

CAMBODIA LAW AND POLICY JOURNAL

ISSUE 3, DECEMBER 2014

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—*Tiphaine Ferry*

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THE CAMBODIA LAW AND POLICY JOURNAL

Eternal (2013). Painting by Asasax

The Documentation Center of Cambodia (DC-Cam) is pleased to announce Cambodia's first bi-annual academic journal published in English and Khmer: *The Cambodia Law and Policy Journal* (CLPJ). DC-Cam strongly believes that empowering Cambodians to make informed demands for change will strengthen the rule of law in Cambodia and other Southeast Asian countries. As empowerment for change requires awareness and dialogue, CLPJ's mission is to promote scholarship and discussion of urgent legal, social, and development issues facing the Southeast Asian region. CLPJ welcomes article submissions on these topics as well as more general discussion and commentary on human rights and transitional justice issues in post-conflict settings.

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THE BOEUNG KAK DEVELOPMENT PROJECT: FOR WHOM AND FOR WHAT?

Poor Land Development Practices As A Challenge For Building Sustainable Peace In Cambodia

SUYHEANG KRY¹

Using the Boeung Kak Lake development project (BKDP) as a case study, this paper explores how poor land development practices in Cambodia impede positive peace building. Viewed within the context of the country's unfinished and prolonged land registration and legal reform efforts, the paper argues that there are three major problems acting as structural and proximate causes of land conflict in Cambodia: the disregard for the law and human rights, the lack of inclusiveness and transparency, and the misuse of the judicial system for coercive ends. These poor practices not only threaten the livelihood and psychological well being of affected communities, but also undermine the building of a more sustainable peace in Cambodia, by reinforcing a cycle of violence and diminishing a culture of trust and social cohesion between the state and the people. Nevertheless, viewed from a conflict transformation perspective,² the BKDP case demonstrates another dynamic in protracted land conflicts: the growing role of internal forces (grassroots and local civil society), interacting with external forces (the international community), in fostering positive change.

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2 Conflict transformation theory views conflict as inevitable and not inherently negative, because it is as "an integral part of society's on-going evolution and development[.]" TransConflict, Principles of Conflict Transformation, at www.transconflict.com/gcct/principles-of-conflict-transformation/. If faced non-violently and creatively, conflict offers an opportunity to build cooperation, foster trust, make change and improve understanding. See generally JOHN PAUL LEDERACH, THE LITTLE BOOK OF CONFLICT TRANSFORMATION (2003).

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I. INTRODUCTION³

For more than a decade, Cambodia has enjoyed a “negative peace”—the absence of the war and violent conflict that had plagued the nation since the 1970s. The incumbent government, which has ruled the country since the mid-1980s, deserves recognition for achieving a relatively peaceful state and rapid economic development, which has improved the lives of a majority of the population compared to the war years. Progress can be seen in the country’s improved infrastructure and growing economy.³ In particular, poverty has been

³ See, e.g., Cambodia Data, World Bank website, http://data.worldbank.org/country/cambodia#cp_wdi (reporting an eight-percent annual GDP growth from 2004 to 2012 and expected seven percent average growth from 2013 to 2016).

greatly reduced.⁴

Notwithstanding these achievements, there remain critical challenges, namely “rising inequality, uneven spatial development, weak institutions, and high levels of corruption.”⁵ Although Cambodia is making progress in meeting its UN Millennium Development Goals (CMDGs),⁶ there is no time for complacency. Hunger is still a serious problem.⁷ Despite Cambodia’s quickly expanding middle class, “those not in poverty but close to it” have also multiplied, and “3 in 4 Cambodians are still either poor or very nearly so.”⁸ Cambodia remains one of the world’s poorest countries, with nearly half of the population living under two dollars per day as of 2009.⁹ The World Bank’s senior country economist, Enrique Aldaz-Caroll, warned in 2013 that “[a] small shock of 1,000 Riel [0.25USD] per person per day would double poverty. We would go back to the high poverty of before; only 1,000 Riel.”¹⁰

In Cambodia, “power, leadership and governance continue to be based on family ties, connections and ‘client’ relationships, without challenge or questioning from the broader population.”¹¹ However, the recent fifth national election in 2013 has been heralded by many as a political turning point, as it was the first time that the country had witnessed massive public manifestations of support for the opposition and the airing of grievances against the status quo, posing great challenges to the ruling Cambodian People’s Party (CPP).¹² Support for the opposition Cambodia National Rescue Party (CNRP) did not merely come from its leaders’ (Sam Rainsy and Kim Sokha) popularity, but also grew out of wide-

4 See, e.g., Zsombor Peter, *World Bank Sees Challenges to Government Income Target*, CAMBODIA DAILY, Oct. 17, 2013 (reporting that “[t]he official poverty rate has dropped from 53 percent of the population in 2004 to 20 percent today”); Cambodia Data, World Bank website, <http://data.worldbank.org/indicator/SI.POV.NAHC/countries/KH?display=graph>.

5 Hal Hill & Jayant Menon, *Cambodia: Rapid Growth with Institutional Constraints*, Asia Development Bank Economics Working Series, No. 331, at v (Jan. 2013), at https://s3-ap-southeast-1.amazonaws.com/asia-first/researches/web_link/ee5ada6b24edd043a0918a7e5adbe0da.pdf.

6 Cambodia reported in 2012 that it ranks “among the fifth best performing countries” in overall MDG progress. See *The Cambodia Government’s Achievements and Future Direction in Sustainable Development*, National Report for Rio+20, United Nations Conference on Sustainable Development (2012), at XIII, at <http://sustainabledevelopment.un.org/content/documents/1022cambodia.pdf>.

7 See, e.g., International Food Policy Research Institute’s Global Hunger Index 2013, at www.ifpri.org/tools/2013-ghi-map (finding the situation in Cambodia “serious” with a ranking of 16.8).

8 Peter, *World Bank Sees Challenges*, *supra* note 4.

9 World Bank, Poverty Headcount Ratio at \$2 a day (PPP) (% of population), at <http://data.worldbank.org/indicator/SI.POV.2DAY> (reporting that 49.5% of Cambodians lived below 2 US dollars a day in 2009).

10 Peter, *World Bank Sees Challenges*, *supra* note 4.

11 Soth Plai Ngarm & Tania Miletic, *Cumulative Impact Case Study: Cambodia’s Post War Struggle for Peace*, Reflecting on Peace Practice Project, Collaborative Learning Project, CDA (Aug. 2009), at 45, at www.cdacollaborative.org/media/53201/Cumulative-Impact-Case-Study-Cambodias-Post-War-Struggle-for-Peace.pdf.

12 See, e.g., Daniel Pye & Meas Sokchea, “An Act of Coup D’Etat,” PHNOM PENH POST, Dec. 24, 2013.

spread social grievances over land grabbing and low wages (among others). This provided the CNRP with the opportunity to garner massive public support ahead of the election, as reflected in its popular election campaign message: “Change or No Change? Change!”¹³

Nevertheless, according to Kheang Un, Cambodia remains “a dominant party authoritarian regime” with rising legitimacy “due mainly to sustained economic growth and political stability, and increased patronage based development.”¹⁴ Moreover, the country’s human rights record is a major concern and may have negative effects on continued economic progress. Human Rights Watch’s World Report 2013 identified a deteriorating human rights situation in Cambodia due to the increase in violent incidents between the state security forces and protesters whose growing grievances center around the development-related issues of land grabbing, working conditions, and environmental depletion.

Although the development approach to peace building in Cambodia has improved many Cambodians’ socio-economic standing during the post-conflict period, the promise of increased quality of life and a sustainably peaceful society is threatened by, among other things, the growing gap between the rich and the poor and the depletion of natural resources at unsustainable rates.¹⁵ Since the 1980s, one percent of Cambodia’s population reportedly owned between 20-30 percent of the country’s land.¹⁶ As of 2009, landlessness affected between 20% and 40% of rural households.¹⁷ An integrative map created in 2012 by the Cambodian League for the Promotion and Defense of Human Rights (LICADHO), a local human rights NGO, shows that over 2.1 million hectares of land have been granted to private companies/investors since 1993.¹⁸ Others report that 2.6 million hectares had been leased, “equivalent to 73% of the country’s arable land.”¹⁹

13 See, e.g., Khy Sovuthy, *Sar Kheng Says “Change” Needs to Go Beyond New Names*, CAMBODIA DAILY, Sept. 28, 2013.

14 Kheang Un, *Cambodia: Moving Away from Democracy?*, 32:5 INT’L POLI. SCI. REV. 546, 546 (2011).

15 For example, according to a study led by researchers from University of Maryland, Cambodia had the fifth fastest rate of deforestation from 2000-2012, losing more than seven percent of its forest cover during this period. See *Global Forest Change 2000-2012*, at www.earthenginepartners.appspot.com/science-2013-global-forest/download.html; Zsombor Peter, *Loss of Forest in Cambodia Among Worst in the World*, CAMBODIA DAILY, Nov. 19, 2013.

16 *Local Development Outlook Cambodia: Trends, Policies, Governance*, United Nations Capital Development Fund (2010), at 34, at http://localdevelopmentacademy.com/sites/default/files/Documents/khm_theme_ld-outlook_0410_en_I_0.pdf.

17 USAID Country Profile: *Cambodia: Property Rights and Resource Governance*, at 5 (May 2011), http://usaidlandtenure.net/sites/default/files/country-profiles/full-reports/USAID_Land_Tenure_Cambodia_Profile.pdf.

18 LICADHO, *The Great Cambodian Giveaway: Visualizing Land Concessions over Time*, www.licadho-cambodia.org/concession_timelapse/.

19 Global Witness, *Rubber Barons: How Vietnamese Companies and International Financiers Are Dividing a Land Grabbing Crisis in Cambodia and Laos*, at 7 (May 2013), at www.globalwitness.org/rubberbarons/pdf/Rubber_Barons_hires.pdf.

Worryingly, many of those who have been granted land have been involved in land conflicts and accused of violence.

Prime Minister Hun Sen has long acknowledged the detrimental effects of land issues in the country, even issuing a public warning in 2013:

Stop grabbing land and forestry[.] ... I declare and announce to all of you who have violated the law and have grabbed forestry areas and encroached on state land for your own property and have affected poor people—especially officials on duty—it is time for you to stop. ... I warn that if [you] continue to grab land there will be a farmers’ revolution, and I hope you will understand my difficulty[.] ... It is time for you to stop before the people lose their patience.²⁰

Land revolts in Cambodia are not unprecedented. In 1967, a farmers’ revolt occurred over land grievances. Known as the Samlaut uprising, it has been seen as “a prelude, in a microcosm, of the conflict that would sweep across the country three years later[.]”²¹ leading to the atrocities of Democratic Kampuchea and decades of civil conflict. Today, conflicts over land are so prevalent throughout Cambodia that the United Nations views it as “a major issue.”²²

The United Nations has recognized the “inextricable” link between land and conflict, noting that “land and natural resources are often among the root causes or as major contributing factors” to intrastate conflict,²³ making the task of addressing land issues a priority for post-conflict countries. In the Cambodian context, land conflict is not a new or isolated phenomenon; it has been a predominant and complicated issue throughout the country’s tumultuous history. Even though Cambodia has adopted many land-related laws and policy goals since the 1989 economic reform, land issues in practice remain a growing critical social

20 Vong Sokheng, *Stop Land Theft, Warns Hun Sen*, PHNOM PENH POST, Dec. 16, 2005 (quoting from Prime Minister Hun Sen’s speech at the National Conference on the Management of Natural Resources to Reduce Poverty). Cf. Vong Sokheng & Kevin Ponniah, *The Buck Stops Elsewhere*, PHNOM PENH POST, Aug. 19, 2014 (quoting the Prime Minister saying, “If I was in an opposition party, I too would oppose [the government on land issues]. The opposition was not just protesting [without reason]. Look at villagers who have been settled for many years on land where [they] are now not allowed to live but investment is allowed[.]”).

21 Ben Kiernan, *The Samlaut Rebellion and Its Aftermath, 1967–70: The Origins of Cambodia’s Liberation Movement*, Working Paper 4, Centre of Southeast Asian Studies, Monash University, part I, preface (1974) (quoting Kirk).

22 *Report of the Special Rapporteur on the Situation of Human Rights in Cambodia*, Surya P. Subedi, ¶ 6, U.N. Doc. A/HRC/24/36 (Aug. 5, 2013).

23 United Nations Interagency Framework Team for Preventive Action, *Toolkit and Guidance for Preventing and Managing Land and Natural Resources Conflict: Land and Conflict*, (2012) at I3, www.un.org/en/events/environmentconflictday/pdf/GN_Land_Consultation.pdf.

grievance, particularly when they are entangled with the many so-called “development projects” now being implemented.

In recent years, popular opposition to Cambodia’s development practices, especially land-related development projects involving the granting of Economic Land Concessions for agro-industry, has grown—as have strong government responses.²⁴ A notorious fatal incident took place on May 16, 2012, during a violent clash between a group of villagers and government forces, resulting in a death of an innocent 14-year-old girl in Kratie province. The authorities accused the villagers of creating a secessionist movement against the government while the villagers asserted that the clash was due to a long standing dispute over a 15,000-hectare Economic Land Concession granted to a private company in 2007. The villagers claimed they were protecting themselves from being forcibly evicted from land they had occupied for seven years.²⁵

Another notorious case is the Boeung Kak Development Project (BKDP). Boeung Kak Lake (BK or Lake) was one of the seven natural lakes located in the center of the capital Phnom Penh city. The Lake’s 133 hectares was leased for 99 years in 2007 as an Economic Land Concession (ELC) to Shukaku Inc., a company owned by a senator from the ruling Cambodian People Party (CPP), for just 79 million—way below the land’s market value at that time.²⁶ The BKDP project is one of the five mega projects or “satellite cities” planned to change the face of Phnom Penh by making space for new commercial and residential areas. The BKDP affected more than 4,200 families living around and on the Lake, some who had lived there since the 1980s. The affected families’ rights to the land were completely rejected, despite the fact that some of the families had claims for legal ownership under the 2001 Land Law. Since 2007, the authorities, developers, and affected communities have been involved in a contentious dispute that has highlighted problems of land ownership, corruption, the lack of government transparency, the right to adequate compensation, the right to protection from human rights violations including forced eviction and violence, and a weak judicial system.

Peace and development are thus interconnected in Cambodia. Viewing peace as the opposite of war and development as merely economic growth is both too

24 See generally Cambodia Center for Human Rights (CCHR), *Cambodia: Land in Conflict, An Overview of the Land Situation* (Dec. 2013), at www.cchrcambodia.org/admin/media/report/report/english/CCHR%20Report%20%20Cambodia%20Land%20in%20Conflict%20An%20Overview%20of%20the%20Land%20Situation%20ENG.pdf.

25 See, e.g., Irwin Loy, *Teen Killed During Cambodia Land Eviction Protest*, VOA, May 16, 2012; May Titthara & David Boyle, *Teenage Girl Gunned Down by Security Forces in Eviction*, PHNOM PENH POST, May 17, 2012.

26 See, e.g., Chan Muyhong, *Questions Raised over Land Sale at Lakeside*, PHNOM PENH POST, June 24, 2014.

narrow and not conducive to sustainable peace, as it indicates the need to accept social injustice and inequality as well as devastating human and environmental costs. Negative peace is a pre-requisite for development to take place; however, without thoughtful implementation, development projects, particularly those which are land-related, can easily undermine important achievements thus far towards building a resilient and sustainable positive peace.²⁷ The grassroots struggle of the Boeung Kak community provides a useful case study for examining the systemic and proximate causes and effects of land conflicts, and the dynamic of community involvement that can possibly contribute to ending the cycle of violence and building trust and cohesion.

2. BRIEF HISTORY OF LAND OWNERSHIP AND ECONOMIC LAND CONCESSIONS (ELC) IN CAMBODIA

2.1. Overview of Land Ownership in Cambodia

Cambodia's modern private property system was influenced greatly by the French legal system during the French colonization era (1863-1953). Prior to that period, all of the land throughout the country theoretically belonged to the King, even though people had long believed that their land was owned and protected by the spiritual "land protector" or "Machas Toek Machas Dei."²⁸ Yet, in practice, private ownership already existed informally through purchase agreements or royal grants for wealthy people, and a use-based land-holding system called "acquisition by the plough" for ordinary people. This type of traditional ownership was practiced without engendering "economic grievances and animosity among people

27 See generally Johan Galtung, *An Editorial*, I:1 J. PEACE RES. I (1964), at <http://jpr.sagepub.com/content/1/1/1.full.pdf+html> (coining the terms "negative" and "positive" peace). "Negative peace" is the absence of visible and direct violence and is "thus a more conservative goal, as it seeks to keep things the way they are (if a war is not actually taking place)." DAVID P. BARASH & CHARLES P. WEBEL, *PEACE AND CONFLICT STUDIES* 9 (2nd ed. 2009). "Positive peace" places crucial significance on social justice and equality as well as structural integration and peace by peaceful means. In other words, positive peace refers to "the elimination of root causes of war, violence and injustice and the conscious effort to build a society which reflects these commitments." SOTH PLAI NGARM & TANIA MILETIC, *INTRODUCTION TO PEACE STUDIES AND RESEARCH METHODS* 33 (Cambodia: Center for Peace and Conflict Studies Mar. 2006). Although the definition of positive peace is contentious, the Institute for Economics and Peace's Positive Peace Index—the first attempt to quantify positive peace by formulating eight pillars of positive peace building—defines it as "the set of attitudes, institutions and structures which, when strengthened, lead to a more peaceful society." *Global Peace Index* (2012), Institute for Economics and Peace (IEP) (June 2012), at 69, at www.visionofhumanity.org/wp-content/uploads/2012/06/2012-Global-Peace-Index-Report.pdf.

28 Hel Charmroeun, *Introduction to the Land Law of Cambodia*, in *INTRODUCTION TO CAMBODIAN LAW* 313-36 (Hor Peng, Kong Phallack & Jörg Menzel eds., 2012), at www.kas.de/wf/doc/kas_31083-1522-I-30.pdf?120720080906.

from different ethnic backgrounds[,]”²⁹ perhaps due to Cambodia’s small population at that time and the abundance of land available for use. Without cadastral (i.e. survey and title) records, “local acceptance was a proof of possession.”³⁰

Formal privatization was first introduced during French colonization under the 1884 Land Act, which was said to serve “as a guarantee for the investment of French settlers” as well as tax collection.³¹ The Department of Cadastral was established in 1896. However, this drastic change of land ownership and the associated taxes were heavily resisted by both the elites and ordinary Cambodians farmers,³² and the system was not able to be fully implemented before 1912.³³ Under the 1920 Cambodian Civil Code, the categories of “landholders” (persons with possession rights based on fixed asset registration through the commune office) and “landowners” (persons with ownership rights based on formal land titles from the district land governance office) ³⁴ were distinguished and recognized; however, “acquisition by the plough” was also maintained if there was “peaceful possession of unregistered land, in public and in good faith, continuously and unequivocally, for five consecutive years.”³⁵

The commune office was created in the early 1900s and tasked with responsibility for registering landholders’ claimed property in the “fixed asset registration,” which was formulated in 1925. Such possession rights could only be converted into ownership rights (definitive title of ownership) if the claims were listed in the District Land Governance Office after a completing series of required procedures. The distinction between “possession” and “ownership,” however, was not well understood by the local people who always assumed that “they have ownership to the land regardless of what document they hold.”³⁶ Such traditional beliefs continue in the present age, often causing conflict with modern legal land claims.

When the Kingdom of Cambodia gained independence in 1953, private property was protected by the Constitution and there was an increase in land transactions; nevertheless, “the success of land codification, privatization, and

29 Sokbunthoeun So, *Political Economy of Land Registration in Cambodia* (2009), at 77. (unpublished Ph.D. dissertation, Northern Illinois University) (on file with NIU, UMI number: 3359039.77, abstract at <http://search.proquest.com/docview/304968261>).

30 *Id.* at 78. (quoting Serge Thion [1993], at 26).

31 Ray Russell, *Land Law in the Kingdom of Cambodia*, 15:2 PROP. MGMT. 101–10 (1997).

32 So, *Political Economy of Land Registration in Cambodia*, *supra* note 29, at 80–81.

33 See Sik Boreak, *Land Ownership, Sales, and Concentration in Cambodia: A Preliminary Review of Secondary Data and Primary Data from Four Recent Surveys*, Cambodia Development Resource Institute (CDRI) Working paper No. 16, at 3 (Sept. 2000), at www.cdri.org.kh/webdata/download/wp/wp16e.pdf.

34 So, *Political Economy of Land Registration in Cambodia*, *supra* note 29, at 85.

35 See Russell, *supra* note 31 (quoting the Cambodian Civil Code of 1920, art. 723).

36 So, *Political Economy of Land Registration in Cambodia*, *supra* note 29, at 89.

commercialization was rather limited.³⁷ Only 10% of the land was registered as private property with officially issued land titles between 1925 and 1975,³⁸ while the rest was held as possession rights under commune office's fixed asset registration, the most prominent mode of land transfer during that period.³⁹ Still, the customary ownership practice of assuming ownership by clearing land remained active during the period, which resulted in land conflict, for instance in the case of the Samlaut Uprising.⁴⁰ The corrupt and abusive land administration led to rising grievances of injustice from the people, which became even worse as the country descended into civil war in the 1970s.⁴¹

Under the Khmer Rouge regime (1975-1978), which sought to destroy capitalism, private property was not allowed; all property became collectivized and owed by "Angkar" or the State. The country's cadastral records were completely destroyed. After the regime was overthrown, the People's Republic of Kampuchea (1979-1989) struggled to fight against the Khmer Rouge guerrillas and build state institutions from the ground up. People began returning to their home villages or moving to new areas to build a new life. Individual families received a small plot of land provided by the State for residential purposes while land owned prior to 1975 was not recognized.⁴² However, land remained state collective property and was not allowed to be sold or rented, in spite of the fact that "occasionally during this period some residential land was unofficially transferred between people by mutual agreement."⁴³ Allocations of agricultural and cultivation land were "based on the population and ability of production of the various so-called solidarity groups

37 So Sovannarith et al., *Social Assessment of Land in Cambodia: A Field Study*, CDRI Working Paper No. 20, at 10 (Nov. 2001), at www.cdri.org.kh/webdata/download/wp/wp20e.pdf.

38 See Kheang Un & Sokbunthoeun So, *Land Rights in Cambodia: How Neopatrimonial Politics Restricts Land Policy Reform*, 84:2 PACIFIC AFFAIRS 289, 291 (June 2011) (citing Voan Lim, director of the Department of Cadastral).

39 So, *Political Economy of Land Registration in Cambodia*, *supra* note 29, at 86.

40 *Id.* at 87.

41 *Id.* at 89-91.

42 See Kheang Un & Sokbunthoeun So, *Land Rights in Cambodia: How Neopatrimonial Politics Restricts Land Policy Reform*, *supra* note 38, at 292.

43 Sik Boreak, *Land Ownership, Sales, and Concentration in Cambodia*, *supra* note 33, at 4 (citing Greve, 1993).

(“Krom Samaki System”).”⁴⁴ In Phnom Penh city, people returning from the countryside and refugee camps occupied houses and land on an “ad hoc basis.”⁴⁵

In 1989, after the withdrawal of Vietnamese troops and an end of aid from the Socialist bloc, which put strong pressure on the already fragile political situation inside the country, the Cambodian Government began to adopt a more self-sufficient free market economy. This also led to a rise in land values. A privatization system and a new Land Law were adopted in 1992, creating ownership rights for residential land no larger than 2,000 square meters, possession rights for agricultural land no larger than five hectares, and concession rights for farm land over five hectares.⁴⁶ Rights of ownership over land dating from prior to 1979 were “null and void,” and the State remained the legal owner of land throughout the country. Any land unused for more than three years reverted to state ownership.

The new land policy convinced people that there was “a fair degree of equity in the distribution of land and that almost all who were eligible, actually received land.”⁴⁷ However, this was not the case, as inequality and corruption became entrenched features of the already ineffective distribution process, which “significantly increased social stratification, enriching those in a position of power, particularly those with power over the privatization of land and resource.”⁴⁸ People in poor rural areas—especially the indigenous populations, who lacked legal understanding and access to information—continued to practice traditional ways of occupying land, including the “use-based” approach, by felling trees, shifting

44 Russell, *supra* note 31, at 105. The creation of “Krom Samaki” and maintenance of moderate collectivization were believed to be necessary to “generate rice production, rescue the economy and resolve the food crisis” because there were, quoting Hun Sen in March 1979, “shortages in seed, farm tools, and work animals.” See EVAN GOTTESMAN, *CAMBODIA AFTER THE KHMER ROUGE: INSIDE THE POLITICS OF NATION BUILDING 91* (2003). Comprising up to 25 families, *Krom Samaki* in practice were categorized into three collective management groups: first, “using group labor for farming some land communally, using pooled livestock and implements and distributing rice harvest from this land”; second, using “mutual labor aid and sharing of implements and plow animals within the group”; third, “individual families farming communally owned land.” *Rice Production in Cambodia* (H.J. Nesbitt ed., 1997), at 7, Cambodia-IRRI-Australia Project, at http://books.irri.org/9712201007_content.pdf. Yet, efforts to expand such collectivization in the mid-1980s failed for three main reasons: first, a lack of incentive for hardworking people; second, a shortage of technical support and human resources; and third, fear of political backlash if a harsh enforcement of collectivization was employed given its political context at that time. See So, *Political Economy of Land Registration in Cambodia*, *supra* note 29, at 97.

45 Natalie Bugalski & David Pred, *Land Titling in Cambodia: Formalizing Inequality: A Year in Review 2009*, Bridge Across Borders Cambodia (BABC) (2009), at 2, at <http://babcambodia.org/articles/docs/BABC%20-%20Land%20Titling%20in%20Cambodia.pdf>.

46 So Sovannarith et al., *supra* note 37, at 11 (citing S. Williams, *Review of Secondary Sources Relating to Land Tenure and Access Issues*, Oxfam (1999). See also So, *Political Economy of Land Registration in Cambodia*, *supra* note 29, at 100.

47 So Sovannarith et al., *supra* note 37, at 11.

48 So, *Political Economy of Land Registration in Cambodia*, *supra* note 29, at 109 (quoting Hughs).

cultivation, and wood gathering in the forests.⁴⁹ In the 1990s, the lack of an effective land registration mechanism was compounded by the fact that local land use, transfer, and ownership were carried out by “informal” means or fixed asset registration recognized or witnessed by local authorities only.⁵⁰

The 1992 Land Law thus did not provide a strong basis for land tenure security and land management, resulting in concerns over “inequality in land holding, increased landlessness and land conflicts, insecure tenancy, and the growth of squatter settlements in the urban areas, particularly in Phnom Penh.”⁵¹ This was likely attributable to the “sporadic” titling process, which by 2001 was inadequate “because of limited institutional capacity and the costs (both legitimate and bribes) associated[,]”⁵² which could “potentially exceed 25% of the value of the land.”⁵³ These problems led to a call for a more modern nation-wide land reform, which led to the adoption of a foreign donor-supported Land Law in 2001.

The 2001 Land Law (the Land Law), which allows both residential and agricultural land ownership, provides a relatively better foundation for land reform programs. The Land Law aims to provide land and housing security to all, as well as to protect existing land from being expropriated, except when it is in the public interest and “after the payment of fair and just compensation in advance.”⁵⁴ The Law allows possessors of land the right to apply for definitive title of ownership, and while they are waiting for the transfer, protects their “right in rem over the immovable property [, which] may be the subject of exchange, transfers of rights and transactions.”⁵⁵

However, not all land possession is recognized by the Land Law. To be a legal landholder, one must have possessed the land before the adoption of the Land Law on August 30, 2001, and the possession must have been “unambiguous, non-violent, notorious to the public, continuous and in good faith.”⁵⁶ Importantly, even if these conditions are met, a possessor can not become a legal owner if he or she resides on state property, private property, or collective property.⁵⁷

49 See So Sovannarith et al., *supra* note 37, at 10.

50 Bugalski & Pred, *supra* note 45, at 2.

51 So Sovannarith et al., *supra* note 37, at 11.

52 World Bank, *Implementation Completion and Results Report for the Land Management and Administration Project* (Dec. 27, 2011) at 1, at www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2012/03/16/000333038_20120316004734/Rendered/PDF/ICRI4910P070870C0disclosed030140120.pdf.

53 CCHR, *Cambodia: Land in Conflict*, *supra* note 24, at 17.

54 Law NS/RM/0801/14 (2001), art. 5 (hereafter 2001 Land Law), at www.opendevdevelopmentcambodia.net/pdf-viewer/?pdf=download/law/Law%20on%20Land_%20August_30_2001_Eng.pdf.

55 *Id.* art. 39.

56 *Id.* art. 38.

57 *Id.* arts. 43, 248.

Significantly, as of 2013, even the mapping of state land property and entry into a publicly accessible database had not yet been conducted, resulting in “no adequate and functioning system of State Land Management in Cambodia.”⁵⁸

The 2001 Land Law classifies land into three main categories: private land, state land and collective land. Any individuals who have possessed unoccupied land peacefully for five year prior to the adoption of the Land Law can apply for private ownership rights. However, traditional ways of land acquisition are no longer to be recognized going forward.⁵⁹ State land is divided into “state public land” and “state private land.” The State can deliver social land concessions to landless families to live on and cultivate. The recipient families can request ownership after five consecutive years of peaceful occupation. Collective land is especially designated for collective uses, such as monasteries and the indigenous groups⁶⁰ that comprise up to 1.5% of the total population and embrace a different culture, way of life, and identity. However, the process of collective land title registration has been very complicated and as of the end of 2013, only five out of the 114 communities that have applied for collective title have been able to complete the process.⁶¹

Despite the establishment of a formal legal regime, land ownership in Cambodia remains tenuous. Because a large number of Cambodians who possess land have not been able to secure land titles, they remain vulnerable to land grabbing and forced eviction as land values continue to soar.⁶² No definitive land ownership title (“hard” title) means no secure right to occupy the land, especially, land that has “unclear status” or is not legally occupied by individual entities, since it is often assumed by local authorities to be “de facto” state land property. People thus are “left defenseless when authorities or companies come to claim their land.”⁶³

In response, in 2001 the Cambodian government initiated the Land Administration, Management and Distribution Program (LAMDP) “(a) to strengthen land tenure security and land markets, and to prevent and resolve land disputes; (b) to manage land and natural resources in an equitable, sustainable and efficient manner; and (c) to promote land distribution with equity.”⁶⁴ The following year, the Land Management and Administration Project (LMAP) was

58 Mark Grimsditch & Nick Henderson, *Untitled: Tenure Insecurity and Inequality in the Cambodian Land Sector* (2009), at 6, at www.babcambodia.org/untitled/untitled.pdf.

59 See 2001 Land Law, *supra* note 54, arts. 29, 34.

60 See *id.* arts. 21, 23, 26.

61 CCHR, *Cambodia: Land in Conflict*, *supra* note 24, at 20.

62 See Grimsditch & Henderson, *supra* note 58, at 66-70 (providing the example of the Dey Krahorm community, whose members were evicted for being illegal settlers in spite of the fact that some of them had possible legal claims for ownership rights under 2001 Land Law).

63 CCHR, *Cambodia: Land in Conflict*, *supra* note 24, at 17.

64 World Bank, *Implementation Completion and Results Report*, *supra* note 52, § F.

founded and funded by multiple foreign donors, and co-sponsored by the World Bank. Buttressing the sporadic land registration program, the LMAP initiated a more systematic program and developed land-related legal frameworks and capacities that resulted in 1.3 million titles issued in 2009. However, limitations on its work, such as the “exclusion of difficult areas [likely to be disputed or have unclear status] and lack of transparency in state land classification” continued to make vulnerable families even more vulnerable.⁶⁵

Cambodia pledged itself to Millennium Development Goals including an increase of land security from 15% in 2000 to 43% (revised down from 65%) in 2015.⁶⁶ Yet, by 2009, only 24% of about seven million land plots had been registered through systemic and sporadic land titling.⁶⁷ According to So, the difficulty in creating cadastral sustainability has been attributable to “endemic corruption in the Cambodian state bureaucracy...[and] the durability of the prevailing system, in which the ruling elites hold interests.”⁶⁸

On June 14, 2012, a student volunteer land-titling program called the “Heroic Samdech Techo Volunteer Youth” was initiated to supplement the LMAP systematic land registration program for measuring and demarcating the land of poor families. Personally financed by Prime Minister Hun Sen, this scheme was reportedly able to measure 660,000 plots and issue 380,000 titles during its first phase, with the second phase scheduled to resume after the 2013 election.⁶⁹ To date, the second phase has not begun and there is no indication if or when it will be undertaken.⁷⁰

Recently it was reported that “[t]he unfinished work left by student volunteers ... is now exacerbating land disputes across the country” due to the fact that some villagers have not received their promised land titles.⁷¹ The human rights NGO LICADHO, which has long criticized the program “for a lack of transparency and

65 Bugalski & Pred, *supra* note 45, at 3.

66 Ministry of Planning, *Achieving Cambodia's Millennium Development Goals* (2011), at 29.

67 UNDP, *Current Status of Cambodia Millennium Development Goals* (Sept. 19, 2010), at 38, at www.un.org.kh/undp/media/files/pages/CMDG_current_status_19092010.pdf.

68 So, Political Economy of Land Registration in Cambodia, *supra* note 29 (quoting abstract).

69 Press Release, Cambodian People's Party, Second Phase of Land Measuring Scheme to Resume (Khmer version) (Nov. 16, 2013), at www.cpp.org.kh/site/detail/901. See also Kuch Naren & Ben Woods, *Hun Sen's Student Volunteers to Resume Land-Titling Program*, CAMBODIA DAILY, Nov. 21, 2013.

70 See, e.g., Ben Sokhean & Holly Robertson, *Hun Sen's Student Volunteer Land-Titling Program Under Fire*, CAMBODIA DAILY, Aug. 1, 2014.

71 See also *id.*

for bypassing government bodies set up to perform land-titling[.]” says Phase I “seems to have avoided many, many, many of the well-known land conflicts[.]”⁷²

Some say the scheme was merely a tactic to garner political support ahead of the July 2013 national elections as the youth were reportedly chosen from “CPP supporters and conducted their work wearing military uniforms, were transported in government military vehicles and were hosted by local CPP authorities.”⁷³ Prime Minister Hun Sen reportedly said in advance of voting:

To those whose lands have not been measured and those who have not been given land titles, I would like to inform you that the youth can return to work only if the CPP wins the election[.] If you want the youths to come back, there is only one choice for you: to vote for the CPP.⁷⁴

Similarly, prior to the first post-Khmer Rouge national election in 1993:

[The CPP] ran on a platform that promised farmers titles to the lands they farmed. ...During 1992 and early 1993 cadastral offices around the country worked furiously to give farmers deeds to their lands to assure CPP votes in the elections. Yet many farmers still have only a piece of paper declaring that they have filed claim to a certain piece of land, not the final documentation verifying that such a claim has been approved.⁷⁵

72 *Id.* Cf. Human Rights Watch (HRW), *Land titling Campaign Open to Abuse* (June 2013), at www.hrw.org/de/node/116350 (arguing that scheme “lacks transparency and accountability and could leave thousands dispossessed from their land” and thus allow more corruption and land grabs). *See also* George Wright & Aun Pheap, *Kratie Case Exposes Flaws in Land-Titling Scheme*, *CAMBODIA DAILY*, Aug. 11, 2014 (reporting that villagers are protesting over an agribusiness firm’s claims to land to which the students promised they would receive titles, and the view of an Adhoc technical advisor that “[t]he entire process was opaque and tainted with irregularities, often biased toward the interests of the wealthy and powerful”).

73 CCHR, *Cambodia: Land in Conflict*, *supra* note 24, at 19. *See also* *Hun Sen’s Student Volunteer Land-Titling Program Under Fire*, *supra* note 70 (quoting Chan Soveth, the deputy head of Adhoc’s land program, saying that the program was used to “collect support for the 2013 election” for the CPP).

74 *Hun Sen Warns of ‘War’ If He Loses Election*, *RADIO FREE ASIA*, Apr. 19, 2013. *See also* Sen David, *Families in Kampong Speu Await Payments*, *PHNOM PENH POST*, May 30, 2014 (reporting that 250 families filed a complaint after losing their land to a company without compensation “even after land measurement volunteers allegedly promised a resolution if villagers voted for the ruling party in last year’s elections”).

75 Judy L. Ledgerwood, *Rural Development in Cambodia: The View from the Village*, in *CAMBODIA AND THE INTERNATIONAL COMMUNITY: THE QUEST FOR PEACE, DEVELOPMENT AND DEMOCRACY* 127, 130 (Fredrick Z. Brown & David G. Timberman eds., 1998), at www.niu.edu/anthro/faculty_staff/faculty/Rural%20Development%20in%20Cambodia%20The%20View%20from%20the%20Village.pdf.

Until today, land reform remains an unfinished task.⁷⁶

2.2. Overview of Economic Land Concessions

Since the 1989 reform toward a free-market economy, numerous land concessions to private companies to develop agro-industry have been granted as part of a non-transparent process. These economic concessions have frequently “created feuding conflicts between the local people and the companies[.] Poor people are vulnerable and are losing out in the conflict over land with the powerful individuals.”⁷⁷ In 2005, Sub-Decree I46 on the Economic Land Concession was promulgated, providing Economic Land Concessions (ELCs) a stronger footing in the legal framework.

The 2001 Land Law classifies state property as either “state public land” or “state private land.” Unlike state private land, which can be leased, transferred, or sold, state public land is comprised of natural areas including rivers, forests, and natural lakes.⁷⁸ Such areas are considered “inalienable...and not subjected to prescription.” They can be authorized for use or occupancy only for temporary periods unless they “lose their public interest use,” and are transferred to state private property.⁷⁹

ELCs can be granted for land classified as state private land for a maximum of 99 years, and can be no larger than 10,000 hectares.⁸⁰ ELCs can be granted only if certain enumerated criteria have been met, including environmental and social impact assessments, assurances that there will be no involuntary resettlement “by lawful land holders,” and prior public consultations with the local people and authorities.⁸¹ Concession title cannot be sold or otherwise transferred.⁸² The main purposes for granting ELCs are:

To develop industrial-agricultural activities requiring a high rate of capital investment; to reach agreements with investors for developing land in an appropriate and long-term manner; to in-

76 See, e.g., generally Sokbunthoeun So, *Land Rights in Cambodia: An Unfinished Reform*, Asia Pacific Issues, Analysis from the East-West Center No. 97 (Aug. 2010), at www.eastwestcenter.org/sites/default/files/private/api097.pdf.

77 So, *Political Economy of Land Registration in Cambodia*, *supra* note 29, at 119-20.

78 See 2001 Land Law, *supra* note 54, art. 15 (providing additional examples).

79 *Id.* art. 16. See also Sub-Decree #129 Rules and Procedures on Reclassification of State Public Properties and Public Entities (Nov. 2006), arts. 16, 18, at www.yumpu.com/en/document/view/24987971/english-open-development-cambodia/7 (allowing state public land to be leased for 15 years if certain conditions are met).

80 2001 Land Law, *supra* note 54, arts. 58, 59, 61.

81 Sub-Decree #146 on Economic Land Concessions (2005), art. 4, at www.cambodiainvestment.gov.kh/sub-decree-146-on-economic-land-concessions_051227.html.

82 *Id.* art. 57.

crease employment in rural areas and stimulate diversification of livelihood opportunities; and to generate state revenues through economic land use fees, taxation and related services charges.⁸³

Despite the stated goals, “no comprehensive evidence-based report has been officially published about the benefits of land concessions. . . . In contrast, the negative impacts have been well documented.”⁸⁴ The systematic classification of private and public land has been “slow” and ELCs have been

granted through dubious processes to the benefit of powerful politico-business individuals” with little contribution to the “public treasury” and “severe social impacts . . . [that] include economic land concessionaries’ encroachment on people’s agricultural land, displacement of local people, limiting people’s access to common property resources, and disturbance to significant cultural and spiritual areas of the local people.”⁸⁵

According to an integrative map recorded in 2012 by LICADHO, over 2.1 million hectares have been granted to private companies since 1993.⁸⁶ Furthermore, approximately 350,000 Ha of protected areas, such as forested or watered areas, known as state public land, have also been allocated to the ELCs,⁸⁷ in apparent violation of the Land Law. During the 1960s, forest coverage exceeded 70% of the total land. According to the World Bank, Cambodia’s forest areas in 2011 covered only 56.5% of the country’s total land.⁸⁸ Reportedly, 20% of the

83 Open Development Cambodia, at www.opendevdevelopmentcambodia.net/briefings/economic-land-concessions/ (last visited Sept. 2, 2014).

84 *Report of the Special Rapporteur on the Situation of Human Rights in Cambodia, Surya P. Subedi, Addendum: A Human Rights Analysis of Economic and Other Land Concessions in Cambodia*, ¶ 128, U.N. Doc. A/HRC/21/63/Add.1 (Sept. 24, 2012).

85 So, Political Economy of Land Registration in Cambodia, *supra* note 29, at 129. The poorly implemented Social Land Concessions (SLCs) have also been a source of increasing land conflicts and vulnerability of poor families. Thirteen out of the total 38 SLCs granted in 2012 are subjected to conflict and ADHOC, a local Human Rights NGO, received 70 cases of land disputes in 2012 with the reported arrest of 232 people, a 144% increase compared to 2011. See ADHOC, *A Turning Point? Land, Housing and Natural Resources Rights in Cambodia in 2012* (Feb. 2013), at 32, at www.adhoc-cambodia.org/wp-content/uploads/2013/02/ADHOC-A-Turning-Point-Land-Housing-and-Natural-Resources-Rights-in-2012.pdf. See also May Titthara, *Scepticism over Social Land Grants*, PHNOM PENH POST, Mar. 13, 2014 (reporting that “through SLCs, the government has . . . caused new disputes, by giving away land that people already live on, and contributed to deforestation, by reclassifying state or protected forest in order for it to be given away”).

86 LICADHO, *The Great Cambodian Giveaway: Visualizing Land Concessions over Time*, www.licadho-cambodia.org/concession_timelapse/.

87 *Current Status of Cambodia Millennium Development Goals*, *supra* note 67, at 34.

88 World Bank, <http://data.worldbank.org/indicator/AG.LND.FRST.ZS/countries/IW-KH?display=graph> (last visited Sept. 2, 2014).

ELCs in Cambodia were granted to five tycoons who have close connections to the ruling CPP.⁸⁹

Neither the land titling program nor the “Heroic Samdech Techo Youth” strategies have been able to address land conflicts in Cambodia equitably. As a result, land-related conflicts persist and protests against land-grabbing not only continue, but are increasing.⁹⁰ In 2012, the Government responded by temporarily halting the granting of new ELCs,⁹¹ excluding an unknown number of ELCs already under consideration.⁹² Not long afterward, three more agro-industrial concessions were approved.⁹³ Since then, approximately 188,749.49 hectares were granted through reclassification “making up over half of the total land granted through land reclassification in 2012.”⁹⁴

Land dispute resolution organs are in place but have failed to resolve effectively the growing number of land dispute complaints. For example, the Government’s National Authority for Land Dispute Resolution (NALDR), established in 2006, managed to resolve only 30% of the total complaints filed throughout 2012.⁹⁵ According to Mr. Chhin, head of NALDR, one reason for this ineffectiveness is the failure of government ministries to communicate prior to the issuance of the ELCs:

[W]henever a dispute arises between a company’s economic concession and the villagers, I have returned them to both ministries, the Ministry of Agriculture and the Ministry of Environment. . . . Why have we not solved them? The [NALDR] doesn’t grant economic land concessions, we have no right to grant them. When an ELC is granted, they don’t ask us if it should be granted[.]⁹⁶

The absence of effective and independent land dispute resolution mechanisms has further fueled the increase in land grievances. The prolongation of land disputes,

89 Global Witness, *Rubber Barons*, *supra* note 19, at 2.

90 See, e.g., May Titthara & Daniel Pyle, *The Calm Before the Storm*, PHNOM PENH POST, Aug. 25, 2014.

91 Order OIBB on the Measures Strengthening and Increasing the Effectiveness of the Management of Economic Land Concessions (ELC) (May 7, 2012), available at www.mlmupc.gov.kh/mlm/imgs/20130213%20Manual%20for%20Implementing%20Govt%20Order%2001_ENG.pdf.

92 CCHR, *Cambodia: Land in Conflict*, *supra* note 24, at 24.

93 David Boyle & May Titthara, *Critics Dismiss Hun Sen’s Pledge As Empty Promises*, PHNOM PENH POST, June 15, 2012.

94 CCHR, *Cambodia: Land in Conflict*, *supra* note 24, at 24.

95 May Titthara, *Most Land Disputes in Cambodia Unsettled*, PHNOM PENH POST, Feb. 21, 2013.

96 Khuon Narim & Zsombor Peter, *Land Dispute Body Blames Concession Troubles on Ministries*, CAMBODIA DAILY, Mar. 1, 2013.

in turn, causes adverse effects on the building of a more peaceful society. This can be seen through the example of the long-running conflict over the Boeung Kak Development Project.

3. THE BOEUNG KAK DEVELOPMENT PROJECT

3.1. Background

Boeung Kak Lake (hereinafter the BK or the Lake) was one of seven natural lakes in Phnom Penh.⁹⁷ During French colonization in 1925, the Lake was closed off from the nearby river and its eastern region was converted into a park. The Lake continued to serve as a natural recreation area in the middle of Phnom Penh city until the 1960s when a number of fishermen worked its western shore. After the fall of the Khmer Rouge regime, the Lake became home to railway staff and refugees, while continuing to function as “a water park and public garden” as well as a natural reservoir during the monsoon season. In 1985, about 70 families were relocated to the BK area when their previous residence behind the Calmette Hospital was turned into an amusement park.⁹⁸

The refugee and tourist populations around the Lake soared after the 1993 national election. However a year later, a number of huts were bulldozed to build a road to the Lake. More “quarters” were scheduled to be destroyed “to make way for a zoo and public garden[,]”⁹⁹ but this plan was never implemented. In 2003, the “PEARL” plan (Preservation, Evolution, Ambition to Regenerate the Lake), aiming to create “a vast green space accessible for all” was chosen in a City Hall-organized-contest to renovate the Lake, but was likewise subsequently abandoned.¹⁰⁰

On February 6, 2007, the Lake and its surrounding area, comprising 133 hectares, was leased as an Economic Land Concession for 79 million US dollars to little known local developer Shukaku Inc., a company owned by CPP senator Lao Meng Khin.¹⁰¹ The 99-year lease was initiated to make way for commercial and residential areas called the “New City of East,” one of five planned satellite cities, and was said to be in line with the City Hall’s plan for the beautification and de-

97 See generally *Timeline Tracking the Development of Phnom Penh’s Boeung Kak’s Lake*, PHNOM PENH POST, Sept. 29, 2008, at www.phnompenhpost.com/national/timeline-tracking-development-phnom-penh-boeung-kak-lake.

98 See Sahnakum Teang Tnaut (STT), *A Home No More: Stories from Boeung Kak Lake*, Facts and Figures No. 18 (Dec. 2010), at www.inclusivedevelopment.net/wp-content/uploads/2012/06/A-Home-No-More-Stories-from-BKL.pdf.

99 PHNOM PENH POST Timeline, *supra* note 97.

100 *Id.*

101 *Id.*

velopment of Phnom Penh city.¹⁰²

By that time, there were approximately 4,200 families living in the Lake area. Many of them had possible claims for legal ownership of their homes under the 2001 Land Law. In March 2006, City Hall had issued a public notification informing the BK community of the adjudication of their land rights under the systematic land registration program co-sponsored by the World Bank's Land Management and Administration Project (LMAP). However, when the families filed their land rights applications, their claims were rejected. Instead, they were threatened with eviction on the grounds that the BK area was categorized as "development zone." In spite of the fact that some of the affected families had possible legal claims to transfer their de facto possession rights into ownership rights, they were accused of being illegal occupants without definitive landownership titles who had settled on state owned property.¹⁰³

Meanwhile, the legitimacy of the 99-year lease agreement was itself questionable, since the Lake is legally regarded as "state public land" which, according to the 2001 Land Law can not be leased as a concession.¹⁰⁴ Over a year after the ELC was agreed to, a sub-decree was issued transferring the Lake's legal status to "state private land," which can be leased legally.

On August 26, 2008, the Shukaku company started pumping sand from the Mekong River into the Lake 18 hours a day, despite repeated calls for a halt from both national and international organizations who argued that the act and the project were "in breach of both Cambodian and international law."¹⁰⁵ On September 1, 2008, hundreds of BK residents thumb printed a petition and marched to the City Hall to demand solutions for their endangered houses, which would be lost to the development without the owners having been consulted or compensated. The deputy governor reportedly said, "We still continue our negotiations with the villagers, but the development can not stop."¹⁰⁶

Shortly after, approximately 500 families agreed to move to a relocation site due to increased flooding, mosquitoes, and "putrid mud." One said, "If we don't go now, we'll go later[.] ... To go now is better. If we go last, we could be sent 20 or 30 kilometers from where we are to be moved to now." Another said, "It is right to say either: we volunteer or were forced, because the company dredged to flood

102 Soeun Say, *Cambodia Cities of the Future — They're Just Around the Corner*, PHNOM PENH POST, Oct. 14, 2010.

103 See Sebastian Strangio & Chhay Channyda, *Who Owns the Lake? Debate Rages*, PHNOM PENH POST, Oct. 3, 2008.

104 2001 Land Law, *supra* note 54, art. 58.

105 Press Release, Amnesty International, Cambodia: Lake Filling Must Not Lead to Forced Evictions (Aug. 27, 2008).

106 *Protesters Meet Official: City Says Lake Filling to Continue*, CAMBODIA DAILY, Sept. 18, 2008.

us[.] ...How can we stay? Speaking frankly they're driving us away."¹⁰⁷

Along the rising water levels, which poured into the residents' houses during the annual monsoon rains, the BK residents were harassed and threatened.¹⁰⁸ Journalists were intimidated when they tried to report the story.¹⁰⁹ Protests were held continuously to call for a halt to the pumping and a discussion of fair and just compensation. "I am not against the government's development plan, but any development in which the poor have to be evicted without proper compensation will only benefit powerful people[.]" said one BK protester outside the Appeal Court.¹¹⁰

On September 4, 2009, the BK community with assistance from the Center on Housing Rights and Evictions (COHRE) filed a "request for inspection" to the World Bank Inspection Panel regarding the violation of residents' land rights under World Bank-financed LMAP. The Panel found the request eligible in November 2009, conducted a full investigation, and concluded in part that:

[R]esidents in the BKL area were denied access to a due process of adjudication of their property claims. It is the Panel's view that residents of the BKL area were justified in expecting that their claims to land were eligible for consideration under systematic land titling, and furthermore that all land claims in the commune were to be adjudicated in accordance with the procedures and processes for adjudication of property claims, agreed between the Government, Bank and Development Partners supporting LMAP. ... [T]he Panel found that design flaws in the Project led to arbitrary exclusion of lands from the titling process and denied residents the opportunity to claim and formalize their pre-existing rights through adjudication under LMAP.¹¹¹

107 *Lake Flooding Forces "Volunteer" Exodus*, VOA KHMER, Oct. 28, 2008.

108 *See, e.g.*, Open Letter from International Federation for Human Rights (FIDH), the Centre on Housing Rights and Evictions (COHRE), Human Rights Watch and Amnesty International to Mr. Kep Chuktema, Governor of the Municipality of Phnom Penh, Regarding the Forced Eviction of Residents of Boeung Kak Lake in Phnom Penh Municipality (Dec. 4, 2008), at www.hrw.org/es/news/2008/12/04/cambodia-open-letter-regarding-forced-eviction-residents-boeung-kak-lake-phnom-penh-.

109 *Id.*

110 Ros Dina, *Lake Residents Protest Over Money*, PHNOM PENH POST, May 19, 2009.

111 World Bank Inspection Panel Investigation Report, *Cambodia: Land Management and Administration Project* (Nov. 23, 2010) at vi-vii, at www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2010/12/01/000334955_20101201025955/Rendered/PDF/580160INVR0INS1seOnlyI910BOX35379I.pdf.

Meanwhile, by 2010, an increasing number of houses around the Lake were inundated and uninhabitable due to continued sand pumping. Some residents had to rent a place to stay or move out, while authorities diverted responsibility to improve the drainage system on to the Shukaku company.¹¹² The community was left with “[r]ising waters, power cut-offs, and the looming threat of disease,” making eventual relocation of the remaining families “inevitable[.]”¹¹³

To make their voices heard, the BK community activists held frequent protests, often resulting in arrests and both minor and serious injuries. Protesters filed complaints at all levels and protested at locations including the Council for the Development of Cambodia, Prime Minister Hun Sen’s house, the Senate, the National Assembly, the courts, City Hall, concerned foreign embassies, and the pumping worksite. During UN Secretary-General Ban Ki-moon’s visit to Cambodia, BK residents gathered in front of the Khmer-Soviet Friendship Hospital, where Ban was scheduled to visit, to demand a meeting with him. Their gathering, however, was dispersed violently and at least one protester was arrested and beaten.¹¹⁴

The Shakaku company tried to convince the BK community to agree to its proposed compensation offer, which was “either an apartment in another area or cash reparations [US\$8500] or the building of a house at the development zone.”¹¹⁵ With the assistance of civil society organizations, some BK residents, most of whom were female vendors as well as housewives, organized a press conference in February 2011 to ask the authorities to adopt a land-sharing plan and to set aside 15 hectares within the 133 hectares for on-site development for the BK community to build homes.¹¹⁶

Despite continuing uncertainty about the fate of remaining BK residents, an official ceremony was held in July 2011 to mark the official start of the construction of the BKDP, in which a Chinese company had a 49% stake. As the situation worsened, in August 2011 the World Bank froze loans to the Cambodian Government until a resolution could be reached. A few days later, the Government signed

112 Khouth Sophak Chakrya, *Lakeside Families Flooded Out*, PHNOM PENH POST, July 8, 2010.

113 R. Schuyler House & Andrew Billo, *Cambodia’s Land Reform and Boeung Kak Lake: Institutions, Politics, and Development*, Lee Kuan Yew School of Public Policy at the National University of Singapore (2011), at http://lkyspp.nus.edu.sg/wp-content/uploads/2013/07/LKYSPPCaseStudy11-01-Cambodia_Land_Reform-Boeung_Kak_Lake.pdf.

114 Press Release, LICADHO, *Violent Crackdown of Peaceful Protesters During the Visit of UN Secretary-General* (Oct. 28, 2010). On another occasion, a forced eviction that took place in the BK community erupted into “a clash between local residents and riot police, [during which] eight homes were demolished without warning and a man was beaten unconscious by police.” CCHR, *Fact Sheet: Case Study Series Vol. 5: Boeung Kak* (Oct. 2011), at [www.cchrcambodia.org/admin/media/factsheet/factsheet/english/CCHR%20Case%20Study%20Fact%20Sheet%20-%20Boeung%20Kak%20\(ENG\).pdf](http://www.cchrcambodia.org/admin/media/factsheet/factsheet/english/CCHR%20Case%20Study%20Fact%20Sheet%20-%20Boeung%20Kak%20(ENG).pdf).

115 Chhay Channyda, *Boeung Kak Protest Erupts*, PHNOM PENH POST, Dec. 21 2010 (quoting the deputy chief of Prime Minister’s cabinet).

116 See, e.g., *Boeung Kak Villagers Claim Delaying Tactics*, PHNOM PENH POST, May 20, 2011.

a sub-decree to grant 12.44 hectares within the BK project to the remaining households (over 3,500 or 83.5% of the BK households had already moved out by then). In October 2011, CCHR reported:

There used to be 4,012 families living around the lake[.] ... Now just under 20% of those families are still living in the BK area. Those who have already left were subjected to a concerted campaign by Shukaku staff, armed police, and communal and district authorities, to intimidate them into accepting compensation widely deemed neither adequate nor equitable, or moving to a resettlement site 20km from their places of work and livelihoods. Those who refused to move suffered continuous intimidation, physical violence, unlawful arrests and detention, and the daily fear and reality of seeing their houses destroyed or flooded by dirty water as sand continued to be pumped into the lake until it disappeared for good.¹¹⁷

About 10% of the remaining households were said to be located outside the land-grant zone and thus excluded from the grant. However, the sub-decree did not mention where and how the granted land should be shared among the people. When a number of the excluded houses were bulldozed, another violent clash took place between the villagers and authorities. Later, a female protester whose house was among those excluded was reported to have committed suicide by jumping into the river.¹¹⁸

Despite the issuance of land titles to villagers with houses within the granted land area, the BK land activists continued to stage protests on an almost daily basis over issues such as drainage system improvement, issuance of the remaining land titles, the demarcation of the granted land, the violence used against BK protesters, the release of arrested BK protesters, and more compensation for those who were previously evicted. The Lake was completely filled with sand on April 19, 2012, while remaining BK residents continued to complain about poor drainage and flooding.

According to Tep Vanny, a well-known BK land right activist and BK representative, as of January 2014, 631 of the remaining households had received land titles, while 63 more households were still waiting, mainly because the claim

117 CCHR, *Fact Sheet*, *supra* note 114.

118 LICADHO, *Pushed to the Edge: the Death of a Beoung Kak Lake Activist* (Nov. 24, 2011), at <http://licadho-cambodia.org/video.php?perm=27>.

that their houses are located outside of the granted 12.44 hectares.¹¹⁹ Despite some progress in the issuance of land titles for the remaining families, as of September 2014, the seven-year-old BK land conflict has not yet been settled completely.¹²⁰ Meanwhile, “[o]ther than filling the lake with sand and clearing residential areas, there has been little development at BK since [Shukaku] took over the site[.]”¹²¹

3.2. Structural and Proximate Causes of the BKDP Land Conflict

3.2.1. Disregard of the Law and the Rights of Residents.

Boeung Kak resident You Ro, 24, said he and other residents had not even been allowed to collect their possessions as their homes were covered in sand and mud. A Shukaku representative wielding an assault rifle threatened him when he attempted to stop his family’s trees from being destroyed by an excavator, he added. “They said they would fire on anyone who tried to stop them[.] . . . [T]he government’s development project is robbing the people and making them cry.”¹²²

Between 1989 and 2006, approximately 20 percent of Cambodia’s total land was reallocated as private property, while the remaining 80 percent remained state property, either as state public land or state private land.¹²³ State land management was not implemented within the existing legal framework, allowing property to be “classified or reclassified according to the authorities’ wishes to sell, lease or grant

119 RFI, Interview with Tep Vanny, Feb. 17, 2014, 7p.m.

120 In March 2014, 17 more families received land titles. See Khouth Sophak Chakrya, *Group of B Kak Villagers Get Long-Awaited Land Titles*, PHNOM PENH POST, Mar. 4, 2014. The issuance of land titles for the remaining families has been gradually moving forward and as of June 2014, reportedly 40 remaining families had not yet received their land titles. See Chan Muyhong, *Questions Raised Over Land Sale at Lakeside*, *supra* note 26. However, the number of remaining families remains contentious. According to a radio interview with Phnom Penh Deputy Governor and Director of Housing Rights Task Force Sia Phearum and Yorm Bopha, after two more families accepted land titles in October, the authorities claimed that only 20 families remained without title, while the community asserted that 38 families had not yet received title. The discrepancy is due to differing interpretation of the Sub-Decree and the inclusion/exclusion of 18 families living along the railway. RFI, Oct. 12, 2014, at 7pm.

121 Chan Muyhong, *Questions Raised Over Land Sale at Lakeside*, *supra* note 26. In June 2014, a 1.3 hectare piece of BK land was reportedly sold to a Singapore-based company and the BK activists protested against the sale. See Mech Dara, *Boeung Kak Evictees Protest at Singapore Embassy*, CAMBODIA DAILY, Aug. 5, 2014.

122 Sun Narin & Chhay Channyda, *Boeung Kak Homes Lost Under Sand*, PHNOM PENH POST, Nov. 8, 2010.

123 See Supreme National Economic Council (SNEC), *The Report of Land and Human Development in Cambodia* (2007), Figure 7, at www.un.org/esa/agenda21/natlinfo/countr/cambodia/land.pdf (citing GTZ, *Overview of Major Legal Categories of Lands and Waters in Cambodia* (2006)).

concessions on the land.”¹²⁴ Without having access to state land maps, communities—especially the marginalized ones—are vulnerable to being exploited or to losing their property. For example, the Boeung Kak communities were denied land titles largely because they were told that they have been living in a “development zone” or on “state land” contrary to the 2006 public announcement in a local pagoda that the BK area would be adjudicated under LMAP’s systematic land registration program.

According to the 2001 Land Law, the BK Lake itself should have been classified as state public property which could not be leased or sold; it could only be leased or sold if the land lost its public interest and was reclassified as state private land,¹²⁵ which did not occur until six months after it was leased.¹²⁶ A 2006 Sub-Decree further provides that state public land can be leased only if the lease does not “change the direction of usage or damage ...those properties[.]” or “effect or change its function in giving public service[.]”¹²⁷ The lease may be for only 15 years, and may be “withdrawn any time in order to protect the state public property and to serve public interest.”¹²⁸ Instead, Shukaku Inc. was granted a 99-year lease and allowed to completely fill in the Lake, wiping it off the map. Compounding these irregularities, in June 2014, it was reported that Shukaku had sold nearly 1.3 hectares of the land to a Singapore company.¹²⁹ However, the rights to an ELC lease are not alienable, making the sale appear to be a breach of both the lease agreement and the law.¹³⁰

Disregard for 2001 Land Law requirements has also undermined the rights of residents. The Law grants legal land possessors the “right in rem over the immovable property [, which] may be the subject of exchange, transfers of rights and transactions” while he or she is waiting for the transfer into definitive right of ownership.¹³¹ According to Bridges Across Borders Cambodia (BABC):

Had the process of land adjudication and registration been conducted according to the law, many households around the lake

124 Grimsditch & Henderson, *supra* note 58, at 58.

125 2001 Land Law, *supra* note 54, art. 16.

126 Grimsditch & Henderson, *supra* note 58, at 60.

127 Sub-Decree #129, *supra* note 79, art. 16. This Sub-Decree has raised concern for having “made the procedure for reclassifying State property much less rigorous and transparent” and for having “potential to undercut the LMAP aim of establishing a regulatory framework for State land management consistent with the 2001 Land Law.” Grimsditch & Henderson, *supra* note 58, at 58–59.

128 Sub-Decree #129, *supra* note 79, art. 18.

129 Mech Dara, *Hun Sen’s Sister Tied to Boeung Kak Land Sale*, CAMBODIA DAILY, June 25, 2015.

130 See Chan Muhyong, *Questions Raised Over Land Sale at Lakeside*, *supra* note 26; 2001 Land Law, *supra* note 54, art. 57.

131 2001 Land Law, *supra* note 54, art. 39.

would have had an opportunity to stake their claim to legal possession rights, and thus to formal title pursuant to the Land Law.¹³²

LMAP's framework on Environmental and Social Guidelines for "proper compensation and resettlement" require that development projects ensure at a minimum that affected communities living standards are maintained, and are "carried out in consultation with the affected people, to ensure minimal disturbance."¹³³ There is little evidence that these guidelines were applied in the BK case. Sixty-year-old Mr. Pich Samol, a former BK resident, describes his experience as follows:

The day that my house was demolished I was in the hospital. I was unconscious when someone came in and dipped my thumb in ink and took my thumbprint which signified agreement with the demolition. The company claimed I had been happy to sign. ...But after they demolished my house, I didn't get anything. When I left the hospital ...I no longer had a home. ...I tried to complain to the Municipality of Phnom Penh, but ...[t]hey said that because I didn't have any documents, I would not get any compensation. They are like robbers. When they dismantled my house they took everything.¹³⁴

3.2.2. *Lack of Transparency and Inclusiveness.*

*I have lived here for 16 years, but. . .[was] not informed about the sand or told about the development until the work started last week.*¹³⁵

Since the early stages of the BK project, it has been carried out without transparency and inclusiveness. Though rumors were spreading for years that the Lake would be targeted for development, there were no public discussions held with the affected community in advance, and no public bidding for the project itself. Only during the public notification of LMAP's systematic land registration for the BK area, did City Hall announce the lease to the unknown Shukaku Inc. company for 65 USD per square meter, when the land's market value at that time was roughly

132 Bugalski & Pred, *supra* note 45, at 1.

133 Grimsditch & Henderson, *supra* note 58, at 63.

134 Sahmakum Teang Tnaut (STT), *A Home No More*, *supra* note 98.

135 Chhay Channyda, *Boeing Kak Lake Protest Held*, PHNOM PENH POST, Sept. 2, 2008 (quoting a BK resident).

3,000 USD per square meter.¹³⁶ The company itself was secretive,¹³⁷ and only later was it revealed to be chaired by Lao Meng Khin, a senator and major donor to the ruling CPP. He is also a director of the Pheapimex company, which is infamous for its alleged complicity “in extensive land grabbing and deforestation in other parts of Cambodia.”¹³⁸ More than a year later, the BK residents did not even know the nationality of Shukaku company’s foreign partner. They gathered to protest in front of the Korean Embassy since “Shukaku” sounded Korean, and were informed that the company was in fact Chinese.¹³⁹

A research project that used the BK project as one of its case studies asserts that “rampant corruption” took place “at every stage of the development process” and that:

These human right violations are not isolated instances. Rather, they are part of a widespread and coordinated effort between the government and private companies [“who have ties to the ruling Cambodia People’s Party”] to capitalize on quickly rising land prices in Phnom Penh by taking advantage of the most marginalized members of society.¹⁴⁰

They found that “not only are residents unaware of their rights, but most have not been told when they will be evicted or of their options for resettlement. Most people are forced to rely on rumors and word of mouth, which only contribute to the spread of misinformation.”¹⁴¹

Sia Phearum, secretariat director of the Housing Rights Task Force (HRTF), said: “It has been difficult for the residents to figure out who they should appeal to[.] . . . The government tells them to go to Shukaku, Shukaku tells them to go to the government. They just throw them back and forth.”¹⁴² According to HRTF, even when the government belatedly allocated 12.44 hectares of the land for on-

136 Bugalski & Pred, *supra* note 45, at 2.

137 See, e.g., Khouth Sophak Chakrya, *Shukaku Spouts Off on Lake*, PHNOM PENH POST, Oct. 12, 2010 (reporting the first time a company representative had ever spoken to the press about the BKDP).

138 See Bugalski & Pred, *supra* note 45, at 1.

139 In early 2011, Shukaku was renamed to Shukaku Erdos Hungjun Property Development Co. Ltd., a joint venture with the Chinese-owned Erdos Hong Jun Investment Col. Ltd. See, e.g., Vanessa Ko, *China Firm in Lake Deal*, PHNOM PENH POST, Dec. 28, 2010. In July 2014, *The Cambodia Daily* reported that the Chinese embassy had confirmed that the Chinese company withdrew from the BKDP in 2012; however, it refused to provide any further information. See Zsombor Peter & Aun Pheap, *Firm’s Split From Boeung Kak Project Confirmed*, CAMBODIA DAILY, July 17, 2014.

140 Chi Mgbako et al., *Forced Eviction and Resettlement in Cambodia: Case Studies from Phnom Penh*, 9 WASH. U. GLOBAL STUD. L. REV. 39, 43-44 (2010), at <http://digitalcommons.law.wustl.edu/cgi/viewcontent.cgi?article=1040&context=globalstudies>.

141 *Id.* at 55-56 (citations omitted).

142 Ko, *China Firm in Lake Deal*, *supra* note 139.

site development to the remaining families, there was a “willful misinterpretation” made by the Phnom Penh authorities to “arbitrarily” exclude over 10% of the remaining BK families “while simultaneously granting nearly two dozen land titles to CPP senator Lao Meng Khin—owner of lake developer Shukaku—within the dedicated ‘resettlement zone.’”¹⁴³

The Environmental and Social Impact Assessment (ESIA) of the project, which by law should have been made public prior to the project’s commencement, was not released until after the company had started filling the Lake. The ESIA report recognized the “serious” impact on the residents’ livelihood but claimed that “the [development] will bring multi-positive benefits for the economy...and city environment. This project will attract investment estimated at...US\$2 billion...and help fill a shortfall in public spaces[.]”¹⁴⁴ Housing rights groups rejected these claims and stated that the report was “false” and neither “independent” nor “transparent.”¹⁴⁵ A Drainage and Flooding Assessment was conducted by a group of concerned professional drainage engineers, who found that “Shukaku Inc.’s approach to ‘dig a canal 20-21m2 in area’ is insufficient...[and] potentially negligent.”¹⁴⁶ The Assessment stated:

The filling of Boeung Kak for urban development is likely to disrupt the equilibrium of the hydrological system...[and] result in runoff from the BKA being routed further downstream, increasing the amount of runoff through neighboring catchment. This additional load has the potential to cause stress on the downstream system, and is likely to worsen flooding. In particular, increased flood frequency and peak flood levels are of concern.¹⁴⁷

These findings were rejected by the Phnom Penh deputy governor, who baldly asserted that “the Boeung Kak development plan will not have any impacts such as flooding[.]”¹⁴⁸

143 Press Statement, Housing Rights Task Force (HRTF), Phnom Penh Municipality Must Abide by the Government’s Order to Grand [sic] Land to the Remaining Boeung Kak Lake Families (Sept. 16, 2011), at <http://licadho-cambodia.org/pressrelease.php?perm=259>.

144 Sebastian Strangio & Vong Sokheng, *Displacement and Development*, PHNOM PENH POST, Sept. 29, 2008.

145 Sebastian Strangio & Khouth Sophak Chakrya, *Lake Development Based on Biased Impact Study*: NGOs, PHNOM PENH POST, Nov. 21, 2008.

146 Sally Benham & Ben Caddis, Boeung Kak Area Drainage and Flooding Assessment (Dec. 2008), at 10, at <http://babcbodia.org/stopevictions/docs/BK%20Drainage%20Assessment.pdf>.

147 *Id.* at 13.

148 Sam Rith & Sebastian Strangio, *New Report Warns of Boeung Kak Flooding*, PHNOM PENH POST, Mar. 12, 2009.

Prime Minister Hun Sen once said, “Inclusive growth is so important to the government, the private sector and Cambodian communities, especially the young, the poor and the vulnerable.”¹⁴⁹ However, this important aim seems to have a long way to go before it is implemented in practice.

3.2.3. *The Misuse of Judiciary and Coercion.*

*We only expressed ourselves, but the court has charged us. How about the company that has pumped sand into our houses and the police who violently abused us? Didn't they commit a crime?*¹⁵⁰

When the BK resident-turned-activists organized protests to demand justice for their land dispute or the protection of their housing rights, they were often violently dispersed and either beaten or arrested. CCHR describes one among the many incidents:

[O]n April 21, 2011, several local residents—including two children—were beaten, electrocuted and detained by Phnom Penh security forces in front of the Phnom Penh municipal cabinet as they attempted to meet local authorities to demand that they stop pumping land into the lake and come to a negotiated settlement with local residents. . . . Nine women were arrested, illegally detained and forced to sign confessions admitting provocation and responsibility for the violence. The women were released the following day.¹⁵¹

Two other incidents that attracted both national and international attention were the arrests of 13 BK women on May 22, 2012, and BK activist Yorm Bopha on September 4, 2012. The two cases were seen to demonstrate blatant misuse of the judiciary system and coercion against peaceful protesters.¹⁵² On May 22, 2012, a group of 13 BK female residents gathered at the BK worksite to sing and give

149 Cambodia Development Resource Institute (CDRI), *Cambodia Outlook Brief: Inclusive growth for Cambodia: Putting Theory into Practice* (2012), at www.cdri.org.kh/webdata/policybrief/ob12/ob2e.pdf.

150 RADIO FREE ASIA KHMER, *Four Charged Following Land Clash*, Nov. 29, 2011 (quoting arrested BK activist).

151 CCHR, *Fact Sheet*, *supra* note 114.

152 *See, e.g.*, Asian Forum for Human Rights and Development, Asia Pacific Forum on Women, Law and Development, Human Rights Watch, the Observatory for the Protection of Human Rights Defenders (a joint program of the International Federation for Human Rights and the World Organization against Torture), WITNESS, Amnesty International and Freedom House, Cambodia: Joint Statement Regarding Detention of Women Land Activists (Sept. 13, 2012), at www.hrw.org/news/2012/09/13/cambodia-joint-statement-regarding-detention-women-land-activists.

speeches, but were soon dispersed. The women were chased and arrested; two days later they were brought to the Phnom Penh Court. Within hours the thirteen were convicted of being “illegal occupants” under article 34 and 259 of the 2001 Land Law and for “obstruction of public officials” under article 504 of the Panel Code and sentenced to over two years in prison. Human rights groups noted that “[t]he main, most active representatives received the full sentence[,] and that [t]he sentences appear directly related to the level of activism engaged in by the women.”¹⁵³ A joint letter published from international human rights groups said that “[t]he trial failed to meet even the most rudimentary fair trial standards” in violation of “not only international fair trial standards, but also Cambodia’s Code of Criminal Procedure.”¹⁵⁴ After constant protests by the detainees’ fellow BK residents, most of whom were women, the elderly, and children, as well as lobbying by both national and international civil society groups (and an intervention by former US Secretary of State Hillary Clinton), the protesters were released; however, the charges against them were upheld.

BK activist Yorm Bopha was arrested on September 4, 2012. In December, she was convicted for “intentional violence with aggravating circumstances” against two motor taxi drivers and sentenced to two years imprisonment. According to Amnesty International, this occurred “despite no evidence against her and inconsistent witness testimonies.”¹⁵⁵ During Yorm Bopha’s incarceration, her fellow BK female residents-turned-land-activists staged repeated protests demanding her release, and many local and international organizations began global campaigns for her release. Amnesty named her a “Prisoner of Conscience,” asserting that she was jailed purely due to her human rights activism.¹⁵⁶ She served 14 months before being released on bail in November 2013. The charges against her were dropped two months later.

Other BK residents who opposed the authorities were also intimidated and threatened with arrest. Kolap, a former BK resident described her situation as

153 Housing Rights Task Force, Sahnakum Teang Tnaut, Equitable Cambodia, Cambodian LICADHO, Community Legal Education Center, Inclusive Development International, and Licadho Canada, Joint Statement Condemning Baseless Convictions and Violence Against Human Right Defenders (May 24, 2012), <http://licadho-cambodia.org/press/files/279JointPRConvictionI3BoeungKakPlusViolenceHRDI2-2.pdf>.

154 Joint Letter to H.E. Hun Sen, Regarding Boeung Kak Lake activists (May 29, 2012), at www.hrw.org/news/2012/05/29/cambodia-joint-letter-regarding-boeung-kak-lake-activists. This pattern was repeated in November 2014 when seven activists, including Tep Vanny, were arrested for protesting flooding at their Boeung Kak Lake homes and sentenced to a year in jail the following day. See, e.g., Mech Dara, *Court Sentences Seven Activists to One Year in Prison*, CAMBODIA DAILY, Nov. 11, 2014.

155 Amnesty International, Cambodia: Global Call to Release Yorm Bopha Ahead of Supreme Court Appeal (Nov. 19, 2013), at www.amnesty.org/en/news/cambodia-global-call-release-yorm-bopha-ahead-supreme-court-appeal-2013-11-19.

156 *Id.*

follows:

Because of my work as a community activist, I have been threatened by the local authority. They accuse me of working for the opposition party. That's not true. The situation was particularly bad in June 2008 before the election. That's when my house was surrounded by commune police armed with handguns. NGOs intervened that time. Without their intervention, I might have been arrested.¹⁵⁷

The mistreatment and arrests have motivated some residents to pursue their rights; however, they have also “intimidate[d] [other community members] into giving up their rights and demands[.]”¹⁵⁸

3.3. Poor Development Practices As Challenges to Positive Peace Building

The evicted population in Phnom Penh since 2000 has reached at least 145,000—equal to 10% of the city's population.¹⁵⁹ The BK case is just one among many cases contributing to that total. Since its inception in February 2007, the BKDP has been denounced by both national and international observers as well as the local community for its anticipated and resulting negative impacts on both residents and the local environment. The question thus arises, what does “development” mean and who does it benefit?

Development was a newly emerged term during the advent of European capitalism, with the ultimate aims of strengthening political legitimacy and military protection. Yet, it became a “worldwide strategy” only in the mid-twentieth century after colonized countries began to gain independence and considered development “an antidote to colonialism,”¹⁶⁰ formulating development projects to boost their economy. The online Longman Dictionary of Contemporary English defines development in economic activity as “the process of increasing business, trade, and industrial activity” while Cambodia's respected Chuon Nath Dictionary defines development simply as “progress” or “advancement.”

The Longman definition defines development with a yardstick, but does not

157 Sahmakum Teang Tnaut (STT), *A Home No More*, *supra* note 98.

158 Mgbako et al., *supra* note 140, at 56.

159 Joint Media Statement by CHRAC, ADHOC & HRTE, Situation of Land/Housing Rights and Activists in 2012 and the Way Forward (Jan. 23, 2013), at www.adhoc-cambodia.org/wp-content/uploads/2013/01/Media-Statement-Situation-of-Land-and-Housing-Rights-and-Activists-23-Jan-2013.pdf.

160 PHILIP McMICHAEL, *DEVELOPMENT AND SOCIAL CHANGE: A GLOBAL PERSPECTIVE* 22 (5th ed. 2012).

take into account variations in the distribution of the quality of life and other non-market values. However, the Chuon Nath Dictionary gives a very general and broad definition. To progress or advance carries the implication of making something better than it was before. In the case of the BK project, the disregard of law and human rights, lack of transparency and inclusiveness, and misuse of the judiciary system have caused both immediate negative impacts on the affected community and a detrimental long-term impact on positive peace building in Cambodia. A former BK resident said, “We ask the Prime Minister to order commune officers to stop using the word ‘develop’ to take villagers’ land.”¹⁶¹ His statement indicates that displaced villagers are associating the term “development” with exploitation instead of advancement or improvement.

3.3.1. *Understanding the Immediate Impact on the BK Community.*

“I can’t live like this any longer, just kill us.”¹⁶² This quote by Tep Vanny reveals the seriousness of losing one’s land, which not only deprives affected individuals of their homes and often their source of livelihood, but also causes trauma and psychological effects.

The government-designated BK relocation site is 20km away from the city center, causing great difficulty for the already poor and marginalized community to live a decent life. A research project showed that the relocated BK community has faced numerous post-eviction challenges, particularly decreased income, inadequate health care, and inadequate educational opportunities for their children, as well as the uncertainty of receiving title for their new land.¹⁶³ Although the BK relocation site has better physical infrastructure compared to other relocation sites, the relocated families have had serious problems including a “lack of a hygienic water system and lack of a systematic method for sanitation.”¹⁶⁴ A survey of threatened and relocated communities in Phnom Penh found that “[t]he unemployment rate...has increased after relocation (35.7%) compared to before relocation rate (18.4%). ...Repetition and dropout rate of children...are very high...compared to the national level[.]”¹⁶⁵

Apart from the immediate and visible impacts on the BK community, there are other possible less visible effects. A research study conducted by Strey Khmer Or-

161 May Titthara, *Disgruntled Villagers March to PM’s House*, PHNOM PENH POST, Apr. 27, 2012.

162 EVEN A BIRD NEEDS A NEST (Directed by Vincent Trintignant & Christine Chansou 2012) (quoting Tep Vanny).

163 Mgbako et al., *supra* note 140, at 57-63.

164 *Id.* at 62.

165 HRTF, Socio Economic Impact of Forced Eviction at the Household Level in Phnom Penh (2011), at 5, at www.adhoc-cambodia.org/wp-content/uploads/2013/01/HRTF-Socio-Economic-Impact-of-Force-Eviction-at-the-Household-Level-2011.pdf.

ganization (SKO) showed that some of the arrested BK women “still experience disturbing flashbacks and recurring dreams about the protests and violent arrests.”¹⁶⁶ Even though the research sample was small, and only five arrested BK women were included among the 40 persons interviewed, this study is significant as the first attempt to examine the psychological impacts of land evictions on women. Cambodia is rated “well above world averages” for levels of anxiety, post-traumatic stress disorder, and depression,¹⁶⁷ making women in “land loss communities” who are frequently exposed to “state violence, economic hardships, and traumatic events...especially vulnerable to mental health problems[.]”¹⁶⁸ A HRFT research study found:

Illegal forced evictions increase poverty and asset vulnerability[.] ...[T]he lack of adequate compensation regularly results in homelessness, social conflict and disproportionately affects the poor and marginalized, such as children, women, and minority groups[.] Many evictees develop distrust in the political system, and suffer from emotional, physical and psychological trauma that are at times so bad that attempted suicides are regular occurrences once eviction orders have been served.¹⁶⁹

In the BK case, there was at least one reported suicide and a few cases of self-injury. On November 22, 2011, Chea Dara, a female BK resident who had been protesting against her forced eviction, committed suicide by jumping off a bridge, “reportedly out of sense of hopelessness.”¹⁷⁰ When the Government granted 12.44 hectares to the hold-out families, her house was still excluded.

During a protest on November 29, 2011, demanding that the authorities issue land titles for their houses, two female BK protesters attempted to injure themselves in front of the authorities: one cut her hand with a razor while the other tried to swallow pills.¹⁷¹ Tep Vanny asserted that “[the villagers] do not fear death or detention in jail. What they are thinking is about their lost land and that their

166 Strey Khmer Organization (SKO), “They Took My Land They Took My Life”: A Report on Psychological Impacts of Land Evictions on Women in Cambodia (Feb. 2013), at 5, at www.hrtfcambodia.org/doc/SKO%20Full%20Report.pdf.

167 *Id.* at 6 (citing RUPP 2012).

168 *Id.*

169 HRFT, Socio Economic Impact of Forced Eviction, *supra* note 165, at 8.

170 Joint statement, Criminal Charges Against Activists Won't Solve Boeung Kak Lake Crisis (Nov. 29, 2011), at <http://licadho-cambodia.org/pressrelease.php?perm=263>. See also Khouth, Sophak Chakrya & David Boyle, *Dark New Chapter in Boeung Kak Story*, PHNOM PENH POST, Nov. 24, 2011.

171 Khouth Sophak Chakrya, *Injuries, Arrests at Boeung Kak Clash*, PHNOM PENH POST, Nov. 29, 2011.

children have no homes in which to live or freedom of living.”¹⁷² A male BK resident said, “I will commit suicide by cutting my neck in front of the Phnom Penh Municipal Hall if the authorities destroy my house.”¹⁷³ Losing their homes is a matter of life and death for the marginalized BK residents.

3.3.2. *Understanding the Long-Term Impact on Positive Peace Building*

A large part of the Cambodian population—including all urban dwellers—were displaced during the Khmer Rouge time. As recent as 1997, Cambodia was estimated to have approximately 445,000 refugees and 210,000 internally displaced persons (IDPs) who were in need of shelter, health care, and other basic services.¹⁷⁴ Given Cambodia’s history of turmoil and the resulting trauma, poor development practices can only compound past grievances of marginalized segments of the population. As a case in point, when her 32-year-old house was demolished, a former BK resident related her current troubles to her past sufferings: “I spent three and a half years living in hell under the Khmer Rouge, . . . [a]nd now I am in hell again.”¹⁷⁵ As Cortright points out in his book *Peace: A History of Movements and Ideas*:

Peace is more than the absence of war it is also “the maintenance of an orderly and just society[.]” . . . [O]rderly in being protected against the violence or extortion of aggressors and just in being defended against exploitation and abuse by the more powerful.¹⁷⁶

According to Lederach, for a post-conflict country to be more peaceful and resilient, it must allow the people to (1) have a sense of place in locating themselves in the world; (2) have a sense of safety to feel at home; and (3) have their voices heard.¹⁷⁷ These opportunities, however, were mostly denied to BK residents, many

172 Heng Reaksmey, *Lake Protesters Released Under Court Watch After Arrests*, VOA KHMER, Nov. 29, 2011.

173 Khouth Sophak Chakrya, *Villagers Defy Ban on Repairs*, PHNOM PENH POST, Dec. 29, 2011.

174 Kroc Institute for International Peace Studies, *Peace Accord Matrix: Cambodia*, Framework for a Comprehensive Political Settlement of the Cambodia Conflict, at <https://peaceaccords.nd.edu/matrix/accord/13>.

175 Jon Gorrivett, *Cambodians Evicted in “Land Grab”: Residents Lose Homes Around Phnom Penh Lake to Make Way for Real Estate Development*, GUARDIAN, Mar. 29, 2011. Cf. Saing Soenthrith, *Ex-Soldier Sprays Market with Bullets in Former KR Town*, CAMBODIA DAILY, Sept. 5, 2014 (reporting that a mentally ill ex-Khmer Rouge soldier shot an AK-47 from a market roof “in an apparent protest against a recent land grab[.]”).

176 DAVID CORTRIGHT, *PEACE: A HISTORY OF MOVEMENTS AND IDEAS* 6 (2008).

177 See John Paul Lederach, *Resilience and Healthy Communities: An Exploration of Image and Metaphor*, in *COMMUNITY RESILIENCE: A CROSS-CULTURAL STUDY ON REVITALIZING COMMUNITY WITHIN AND ACROSS BOUNDARIES* 17-26 (2009), at www.fetzer.org/sites/default/files/images/resources/attachment/2012-07-12/wc1_final_cusp_commprespdf012812_0.pdf.

of them who had settled at the Lake since the 1980s. After two decades of relative peace, a new threat, this time from “development,” upended the foundation on which they had built their fragile post-conflict lives.

Although the business sector is crucial for driving the economy of Cambodia and has “much stake in security and conflict” in the country, this sector has also had a significant impact on the country’s growing inequality. This is because to make a profit and win bidding competitions:

Businesses must develop close connections with political parties or powerful individuals in order to survive. ...Unfortunately there has been no engagement from the business sector in peace building or social issues. The business community has generally been part of the problem, as a driving force behind political interests influencing the allocation of resources available in the country, with little scrutiny from other sectors.¹⁷⁸

Given this context of structural challenges, poor land practices can only further reinforce Cambodia’s cycle of violence.

Attitudes, behaviors, and context together form what is called “ABC Triangle,” a holistic conceptualization of the how cyclical violence is perpetuated.¹⁷⁹ The premise is that violent behavior (“B”) derives from the people’s attitude (“A”) and the political and economical context (“C”), which in turn reinforce each other. From this perspective, the Cambodian context of corruption, patron-client relations, and above all, impunity, combined with people’s growing fear and anger toward being mistreated and exploited, manifested in violent behaviors in the BK land conflict. As the BK land conflict continued unabated, this behavior in turn influenced and reinforced the context and peoples’ attitude toward it. In this way a cycle of violence reinforces and impedes the process of sustainable peace building in the country.

Notably, in 2013 the Institute for Economics and Peace’s Positive Peace Index located Cambodia at 100 out of 126 countries examined. Even though “the strength of the various interactions will depend on the historical, political, economic, and cultural circumstances of particular societies,”¹⁸⁰ being placed

178 *Cumulative Impact Case Study*, *supra* note 11, at 36.

179 See SIMON FISHER ET AL, *WORKING WITH CONFLICT: SKILLS AND STRATEGIES FOR ACTION*, 9-10 (2000).

180 Institute for Economics and Peace, *Global Peace Index: Measuring the State of Global Peace* (June 2012), at 80, 82, at www.visionofhumanity.org/pdf/gpi/2013_Global_Peace_Index_Report.pdf.

among the bottom countries is an alarming reminder that serious action needs to be taken to address the root causes of structural violence¹⁸¹ and create a form of development with conditions conducive to sustainable peace. As shown by the BK land conflict, after more than ten years of civil war, the prerequisites for a well-functioning and peaceful society—social cohesion and trust between the state and the people—remain broken. Instead of reinforcing the cycle of violence, land related development projects should provide a means and process through which Cambodia can continue rebuilding these values within society.

3.4. A Dynamic for Positive Change

As peace is a process “involving the search for positive conditions”¹⁸² to end all types of violence, the following discussion is based on the premise that, if addressed creatively, non-violently, and in a transformative way, conflict can be a source of social change and progress. While the BKDP has had many negative effects, it also demonstrates a dynamic that can foster positive change. The 12,44 hectares eventually granted to residents, the hundreds of land titles eventually issued, and the eventual release of the arrested BK women, were all seen as successes. Though at the time of this writing the case has not yet been completely settled, the process itself has demonstrated the power of a forceful and committed struggle for justice in the face of state violence.

Not only have the BK women been at the forefront of the struggle against their own forced evictions and injustices; they have also challenged the culture and tradition of their gender roles as housewives in Cambodia’s male dominated society. They challenged the powerful authorities with their courage by speaking the truth in the face of power. They were armed with nothing but creativity, flexibility, commitment, compassion, and true courage in their non-violent struggle, and support from concerned NGOs/INGOs and the international community.

This section seeks to explore the dynamic for positive change in the BK case

181 In Peace Studies, violence does not merely mean visible killing, torture, beating, or other physical violence. According to Galtung, violence refers to “avoidable insults to basic human needs and more generally to life, lowering the real level of needs satisfaction below what is potentially possible” and includes:

Direct violence [which] is intended to insult the basic needs of others; structural violence having such insults built into the social fabric as exploitation and repression; and cultural violence occurring when aspects of culture (such as religion and language) legitimize direct and structural violence.

JOHAN GALTUNG, *PEACE BY PEACEFUL MEANS: PEACE AND CONFLICT, DEVELOPMENT AND CIVILIZATION* 40, 197 (1996).

182 ROBERTA LYNN WODENSHECK, *THE HUMAN RIGHTS TO PEACE: WHY SUCH A RIGHT SHOULD BE RECOGNIZED* 9 (2004) (citing Woolman 1985).

by looking at the roles of both internal (grassroots and local civil society engagement) and external (international community) forces in transforming the protracted BK land conflict.

3.4.1. *Understanding the Grassroots Motivation Behind the Struggle.*

The BK community is diverse in its composition. It is comprised of supporters of different political parties, the poor, the middle class, and the relatively affluent who were either owners, renters, or unlawful land possessors.¹⁸³ An unidentified former BK resident stated:

In my community, there are three kinds of people. Firstly, there are those who are afraid because they have been threatened— they have been told they can either accept compensation and move, or get absolutely nothing at all. Secondly, there are those who live in small houses on bad sites. They are poor and don't have a job. They tend to accept the US\$8000 compensation. It's a lot of money for them. But [thirdly] most people say it is their legal right to stay.¹⁸⁴

Residents' motivation to either exit, remain quiet, or air their grievances depended on what each person perceived to be “in their best interest given what they know at the time of choosing.”¹⁸⁵ Their responses to the forced eviction have varied according to each individual's perception of the “higher payoff.” More than 3,000 families of the BK community chose to remain “loyal” by moving away and accepting the compensation options offered by the Shukaku company. For example, a three-decade-old-mosque located in the BK land compound was allowed to be demolished in mid-2011 because the United Arab Emirates offered to donate a new one.¹⁸⁶ Thus, the BK Islamic community chose to “exit” silently. Many poor illegal occupants likewise found it more beneficial to accept payment and move on:

One Damnak Trayoeng resident who previously lived in a floating house on Boeung Kak Lake reported having been afraid that her wooden Boeung Kak house would catch on fire in the

183 See Bugalski & Pred, *supra* note 45.

184 Sahmakum Teang Tnaut (STT), *A Home No More*, *supra* note 98.

185 WILLIAM ROBERTS CLARK, MATT GOLDER & SONA N. GOLDER, *PRINCIPLES OF COMPARATIVE POLITICS* 59 (2009).

186 Khouth Sophak Chakrya, “*Unsafe*” Mosque at Boeung Kak Demolished, PHNOM PENH POST, July 19, 2011.

night. She stated that her living conditions in Damnak Trayoeng [relocation site] are much better, and that she is happy to see the green of the farm and to finally sleep well.¹⁸⁷

Less clear is the payoff for those who chose to continue voicing their concerns by organizing constant protests against the authorities despite ongoing intimidation. According to Goldstone and Tilly, the “usual story” about the relationship between political opportunities and protest movements is that if opportunities increase, the protests mount; if the opportunities decrease, the protests recede (rising opportunity; rising protest).¹⁸⁸ Yet, this fails to account for “the pattern of tactical moves and countermoves between regimes and challengers as both sides engage in a series of choices regarding actions, repression and concessions.”¹⁸⁹ Instead of increased repression reducing action, empirical findings show that “increased repression leads to increased protest mobilization and action.”¹⁹⁰ Why?

The answer may have to do with the role of human needs. In a documentary produced by LICADHO, there is a statement written on the wall of a bulldozed house that says, “No home no life; to die to protect our home.”¹⁹¹ This statement highlights the fact that housing, safety and long-term well-being are major motivations for the BK grassroots struggle. To those who protest, to “exit” or to remain “loyal” would not gain them anything; to voice, however, might give them at least a little chance since “[h]aving a little hope is better than being hopeless” and “[w]e can’t keep quiet until they come to pull down our houses.”¹⁹² In short, in some cases, “the citizen will . . . use her voice even when she knows that it will not be successful” since she will “get a higher payoff from using voice than from choosing either to exit or remain loyal regardless of what the state does.”¹⁹³

3.4.2. *The Significant Roles of Internal and External Forces.*

In the BK struggle, the roles of both supporting civil society organizations (CSOs), and the international community have been indispensable. One common

187 Mgbako et al., *supra* note 140, at 61.

188 Jack A. Goldstone & Charles Tilly, *Threat (and Opportunity): Popular Action and State Response in the Dynamics of Contentious Action*, in *SILENCE AND VOICE IN THE STUDY OF CONTENTIOUS POLITICS* 180 (Ronald Aminzade ed., 2001).

189 *Id.* at 181.

190 *Id.*

191 LICADHO, Video: The Impact of Development and Forced Evictions on Women in Cambodia (Oct. 20, 2011), at <http://licadho-cambodia.org/video.php?perm=26>.

192 Khouth Sophak Chakrya, *Boeing Kak Protesters Seek Chea Sim's Help*, PHNOM PENH POST, Apr. 28, 2010 (quoting a BK representative).

193 CLARK et al., *supra* note 185, at 78.

role played by both these internal and external forces has been to “intensify” the conflict, making a latent conflict become open and visible so that it can no longer be ignored by stakeholders, both national and international.

With regard to CSOs, they have played at least two essential roles. First, they have acted as a resource center to build capacity, knowledge, and skills to empower the grassroots movement. This has been evident in the BK case since the beginning. The BK protesters were initially unable to mobilize their own forces to join the struggle due mainly to their different economic and political groupings and interests, each of which impacted their status with regard to their housing (owners, renters, or illegal possessors),¹⁹⁴ as well as their willingness to fight.

In addition, fear and intimidation made it difficult to mobilize people to join the struggle. Bridges Across Borders Cambodia, partnering with other NGOs, pursued a “deliberate process” by training 15 BK residents to be community organizers. Within five months the community organizers from different villages of the BK community developed the skills and knowledge necessary to take the lead in the struggle. Despite receiving repeated threats and interruptions, the community organizers managed to inspire “collective action,” since those “who had previously been passive began mobilizing to advocate for their rights.” The activists later continued to receive various types of support from different CSOs.

Second, CSOs play a crucial role in keeping the government in check while creating safe spaces and trust between the state and the powerless people. In the BK case, the CSOs contributed to monitoring, lobbying, campaigning, and reporting as well as raising public awareness about the issues on both national and international levels in order to garner more support in pressuring the government to address the issue. This coordination can be seen in the prominent incidents of the BK case, namely campaigns to free the jailed activists such as “Free the 15” and “Free Yorm Bopha,”¹⁹⁵ via what is called the boomerang effect—the pattern when “domestic NGOs may directly seek international allies to try to bring pressure on their states from the outside.”¹⁹⁶

Although supported by civil society, the BK struggle could not have been successful without the BK women activists. With their own creativity, flexibility, commitment, and courage, the BK women activists were able to make their voices heard by wider audiences in both national and international communities, thereby

194 See Bugalski & Pred, *supra* note 45.

195 For more details of the campaigns, see <http://freethe15.wordpress.com/> or http://cchrcambodia.org/index_old.php?url=our_work/our_work.php&p=campaigns/yormbopha/index.php.

196 Margaret E. Keck & Kathryn Sikkink, *Transnational Advocacy Networks in International and Regional Politics*, 51:159 *INT'L Soc. Sci. J.* 89, 93 (1999), at <http://courses.washington.edu/pbaf531/KeckSikkink.pdf>.

managing to win popular support throughout the process of non-violent struggle. For instance, Secretariat Director of HRTE, Sia Phearum, commented during a singing protest by the BK protesters who demanded the release of Yorm Bopha that “the police when they hear the song, they really pity her and understand[.] . . . Their commander ordered them to beat the women, but they reject.”¹⁹⁷

The female grassroots activists have employed what they termed a “drizzling strategy” or constant protests along with a plethora of creative efforts for achieving concessions to draw the attention of the public. In addition to sending petitions, filing complaints, holding meetings, and holding conferences so as to communicate and persuade the authority, the BK women employed more confrontational techniques such as marching to different prominent places to protest. This was not only to demand a resolution to the protracted BK land conflict, but also to address issues beyond housing, such as the need for an end to violence against women, justice for the arbitrary arrests and violence, and above all, basic human rights. Their unique protest tactics for capturing public attention included:

- Women wearing straw nests with plastic eggs as hats during the protest to symbolize “birds need their nests just as people need their home”;
- Women wearing small model houses on their hats to represent their struggle for housing rights;
- Women setting scarecrows representing corrupted officials on fire;
- A woman removing her clothes to reveal her underwear and breasts to express her loss of dignity and hope caused by the loss of home to the development;
- Children of the arrested women kneeling down crying in front the Ministry of Justice and demanding the release of their mothers;
- Jailed women going on a hunger strike;
- Women composing and singing songs related to their case during their protests;
- Women egging photographs of a former city official they hold responsible and the embassy of a foreign company rumored to be buying an interest in the BKDP.¹⁹⁸

According to Tep Vanny and Yorm Bopha, well-known BK representatives-turned-land-activists, the tactics they employed in the protest were grassroots’ initiatives, while some of the logistic and legal support came from CSOs. They

197 Khuon Narim, *From Prison, Yorm Bopha Writes Songs for Freedom*, CAMBODIA DAILY, Jan. 2, 2013.

198 Aun Pheap, *Boeng Kak Protesters Egg Embassy, Ex-Governor’s Photo*, CAMBODIA DAILY, Aug. 28, 2014 (responding “to a Singapore-based company’s pending plan to purchase a 1.35-hectare plot of land from Shukaku Inc.”).

said that having women at the forefront of the protests gives it a higher chance of being effective by making the struggle less confrontational and threatening for the authorities, despite the fact that the women had faced all sorts of state violence ranging from intimidation to physical injury including a few miscarriages and arrests.¹⁹⁹ Working together with the CSOs, the BK land activists created a strong alliance to target the sensitivity and the weaknesses of the government.

International organizations lobbied and raised awareness abroad through campaigning, reporting, and joint statements with outside constituencies on what the activists and civil society believed to be the causes of conflict: injustice, human rights violations, and inequality. For example, during her imprisonment, Yorm Bopha was named an Amnesty International Prisoner of Conscience and an international campaign entitled “International Day to End Impunity 23 November 2013” was initiated and hosted by CCHR’s international partner, IFEX. IFEX shared case studies, interviews, graphics, information, and videos, and initiated a call to action and the signing of a petition to demand justice for Yorm Bopha’s case.²⁰⁰ In addition, BK land activist Tep Vanny received the Vital Voice Global Leadership Award at the Kennedy Center on April 2, 2013.²⁰¹ This further raised awareness among international audiences, while also empowering the ordinary grassroots women in their struggle for justice and human rights. It gave them a safer and larger space to work with the government to build positive conditions favorable for sustainable peace.

External forces also played an important role in applying influence and direct pressure on the government to address the conflict. For example, as Cambodia remains a largely aid dependent country with almost half of its national budget coming from international donors, the BK activists with the help of the CSOs were able to involve the World Bank in their struggle. The notoriety of the issue made the World Bank freeze its loans to the government. Faced with such a de-facto threat to its economy, the government then granted the 12.44 hectares of land to the remaining BK families. In another instance, during a meeting with the Cambodian Foreign Minister in Washington D.C., former US Secretary of State Hillary Clinton urged the Cambodian Government to release the 13 jailed women activists. Two weeks later, the jailed women were released on bail.

Both internal and external forces are indispensable in allowing for an opportunity to confront the challenges of building a more sustainable peace in the coun-

199 Comments during a public screening of the documentary *Even a Bird Needs a Nest* at CCHR (Dec. 5, 2013).

200 See http://daytoendimpunity.org/take_action/index.php?day=04.

201 See, e.g., Ruth Keber, “*This is My Life and Everything is True*”: *B Kak Film Wins Award*, PHNOM PENH POST, Apr. 10, 2013.

try, especially in transforming the conflict into something less destructive. As reported in Polity IV Country Report:

[A]lthough Cambodia functions much like a traditional one-party state, there are emerging institutions that may provide greater constraints on executive power if they are allowed to strengthen their organization and constituency base. International involvement has been crucial in fostering compromises and pressing for greater liberation in Cambodia's contentious political arena.²⁰²

Despite the fact that many of the remaining families have already received land titles, the internal and external actors in the BK struggle have been pulling together to address issues beyond the immediate problem of housing rights to address the systemic structural violence, including arbitrary arrests and charges and official impunity. A number of BK female land activists led by Tep Vanny and Yorm Bopha have moved beyond BK activism to become involved in efforts to fight against any social injustice and human rights violations that occur. The BK activist group has joined marches with NGOs to celebrate International Human Rights Day, International Women's Day, and World Habitat Day. They also joined protests to demand the establishment of an independent investigative committee over alleged July 2013 electoral fraud. They have also joined other land affected communities, and some labor unions, including to ask for the release of the 23 human right defenders and factory workers who were arrested during a violent crackdown on a wage protest on January 3, 2014.

Tep Vanny says that there are three reasons behind her continued activism and protest in spite of the fact that she has already received a land title. First, she and her community would like the authorities to demarcate the granted 12.44 hectares to prevent any future land grabs. Second, since the start of the struggle, she and other protesters have promised to struggle together for their houses and thus she will continue organizing protests to help the excluded families. Third, she would like the BK struggle to become a "model" for other affected communities, empowering them to stand up for their housing rights.²⁰³ By challenging the status quo in a creative and non-violent manner and making the authorities respond to the people's concerns and needs, the BK conflict has become a process for social change.

202 Monty G. Marshall & K. Jagers, Polity IV Country Reports 2010, sponsored by the Political Instability Task Force (PITF) (2010), at www.systemicpeace.org/polity/Cambodia2010.pdf.

203 RFI, Interview with Tep Vanny, *supra* note 119.

4. CONCLUSION

Seen in the context of Cambodia's unfinished and prolonged land registration and legal reform efforts, the BK land dispute is attributable to both structural and proximate causes, namely the general failure of authorities to uphold the law and individual rights and to make decisions transparently and inclusively, and the lack of independence and misuse of judiciary. These institutionalized behaviors not only threaten the livelihood and psychology of the BK community, among others, but also reinforce the cycle of violence and undermine opportunities for building trust and social cohesion—preconditions for a sustainable peace for Cambodia.

Nonetheless, from a conflict transformation perspective, the roles of both internal and external forces in transforming the land conflict in the BKDP case have demonstrated another effective dynamic. These forces have challenged the status quo by intensifying the BK land conflict in a non-violent manner so as to make it visible, prominent and incapable of being ignored by the involved stakeholders. These forces created new opportunities for positive change, empowering those concerned to be actively involved, and ultimately fostering interdependence between the state and its people. Instead of being submissive and passive, the BK grassroots activists chose to voice their concerns through non-violent means until their needs were met, even though it also meant that they had to face state violence. Those who did so were mostly women who became empowered and refused to be victims, instead choosing to be agents for change. While local CSOs took on the role of lobbying, campaigning, supporting, empowering, raising awareness, and being a resource center for the people to strategically and effectively communicate and push the reluctant authorities to deal with the issues, the international community and international non-governmental organizations (INGOs) also played an important role in lobbying and raising awareness internationally and applying influence and pressure on the local government. However, the most important role played by both CSOs and INGOs as well as the international community generally was to bridge the gap and build trust between the state and the people.

Indeed, the Cambodian Government deserves praise for sustaining negative peace and economic development. It should be remembered that Cambodia recently emerged from protracted conflict and has a long way to go to build resilient and positive conditions for lasting peace. As a spokesman for the Government said a few years ago:

We still improve day to day the basic way of the people's life and the government[.] ... Even in the US they do have abuse[.] ...

Human rights is a new culture for everyone on this earth, especially for Cambodia, [which is] in transformation. We need time to grow.²⁰⁴

Nevertheless, maintaining the status quo, with its deteriorating conditions for sustainable peace and development, is now moving the country's peaceful condition backward, reducing its resilience against future violent shocks. Therefore, both development and peace should be home-grown phenomena. Development must afford people the freedom to express their voices and concerns about development projects that affect their lives. Therefore, "development" must be understood to go beyond economic growth to include environmental and social consequences. Development projects must pay serious attention and address unmet human needs by placing people at the heart of the project throughout the entire process. The central point is that the process must be as inclusive, equitable, transparent, and well-structured as possible, and not carried out at the risk of social and environmental damage.

Similarly, peace should not be imported from elsewhere but come from within a system with formal and informal institutions that address the unmet human needs and minimize all types of violence. Building positive peace is thus the building of resilient, sustainable and positive conditions to address the political, social, economic and cultural root causes of violent conflict. In other words, peace is a process that requires continuous effort and commitment in the search for creative conflict transformation characterized inter alia by active non-violence, cooperation, dialogue, integrity, understanding and harmony for mutual and equal benefit. The alternative is that violence will never cease to find ways to express itself. The BKDP illustrates the dynamics of poor land development practices that function as both a challenge to and as a positive transformational opportunity for building a more sustainable peace in Cambodia.

204 Abby Seiff, *Cambodia's Rights Record Under Fire*, PHNOM PENH POST, Sept. 22, 2012 (quoting Spokesman for the Council of Ministers Phay Siphon).

CAMBODIA BETWEEN THE END OF HISTORY AND THE END TIMES OF HUMAN RIGHTS

SEBASTIAN STRANGIO¹

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I. 2013 — A CAMBODIAN SPRING?

On July 28, 2013, Cambodians went to the polls for the fifth time in 20 years and loudly voiced their desire for change. The Cambodian People’s Party (CPP), which has ruled the country in various guises since 1979, reeled as its share of the 123-seat National Assembly was slashed from 90 seats to just 68—its worst electoral performance since 1998. The remaining 55 seats were won by the newly formed Cambodia National Rescue Party (CNRP),² which had deftly capitalized on the simmering discontent with the 29-year rule of Prime Minister Hun Sen.

The surprise outcome was the result of profound social, economic, and demographic changes that have transformed Cambodia in recent years. The 2013 electorate was the youngest in Cambodia’s history: about 3.5 million of the 9.5 million registered voters were between the ages of 18 and 30 years, and 1.5 million

1 Freelance correspondent covering the Asia-Pacific region, former reporter and editor at the *Phnom Penh Post*, and author of *HUN SEN’S CAMBODIA* (Yale Univ. Press & Silkworm Books 2014), available at www.bookdepository.com/Hun-Sens-Cambodia-Sebastian-Strangio/9780300190724, on Amazon.com, and at all Monument Books locations in Cambodia. The author may be contacted at sebastian.strangio@gmail.com.

2 The CNRP was created in 2012 through the merger of two major opposition parties, the Sam Rainsy Party (SRP) and the Human Rights Party (HRP).

of them—more than 15 percent—were voting for the first time.³ These first-time voters have grown up in a very different country than the one their parents and grandparents knew. Between 1998 and 2007, Cambodia’s gross domestic product grew by nearly 10 percent per year—the sixth fastest growth rate in the world.⁴ In two decades Cambodia’s per capita income has almost quadrupled, rocketing from \$240 in 1993 to a projected \$1,000 by the close of 2013, and spawning a small middle class with the disposable income to spend on cars, motorbikes, and consumer electronics such as smartphones. Cambodia is now on the verge of admission into the World Bank’s club of “lower middle-income” countries.⁵

But while the Cambodian economy has exploded, transforming the capital Phnom Penh into a boomtown scored with high-rise towers and apartment blocks, economic development has been highly inequitable. The country’s political, business, and military elites continue to rule through a system of patron-client relations in which political loyalty and preferential access to the country’s resources exist in a tight symbiosis. In the capital, a grab for valuable inner-city land has resulted in the mass eviction of poor urban residents. An estimated 150,000 people have been displaced from Phnom Penh since 1999—around 11 percent of the city’s current population.⁶ A similar form of hurricane capitalism has descended on the rural hinterlands, where land-grabs, deforestation, and the widespread granting of long-term agricultural leases—known as economic land concessions, or ELCs—have consumed huge swathes of arable land and uprooted tens of thousands.⁷

For the past 35 years, the CPP has based its legitimacy on its success in ending the Khmer Rouge threat and bringing peace, stability, and basic economic development to a war-torn land. However, the very social and economic transformations that have resulted directly from CPP rule have also served to weaken the party’s time-proven systems of control. A large majority of Cambodians now have no memory of the Khmer Rouge and, unlike the older generation, are no longer willing to accept Pol Pot’s nightmare as a benchmark. Cambodians also have greater access to information. Urban migration and the

3 Kevin Ponniah, *Political Eyes on Youth Vote*, PHNOM PENH POST, July 9, 2013.

4 Stephane Guimbert, *Cambodia 1998-2008: An Episode of Rapid Growth*, World Bank Policy Research Working Paper No. 5271 (Apr. 1, 2010) at 7, available at <http://documents.worldbank.org/curated/en/2010/04/12093794/cambodia-1998-2008-episode-rapid-growth>.

5 According to the World Bank for 2015, “lower middle-income countries” are those with per capita annual income between \$1,046 and \$4,125. See http://data.worldbank.org/about/country-and-lending-groups#Lower_middle_income.

6 Sahmakum Teang Tnaut, *A Tale of Two Cities: Review of the Development Paradigm in Phnom Penh* (Aug. 2012), 15-16, available at http://teangtnaut.org/wp-content/uploads/2013/01/TaleofTwoCities_STT_August2012_WEB.pdf.

7 See, e.g., Paul Vrieze & Kuch Naren, *Carving Up Cambodia*, CAMBODIA DAILY, Mar. 10-11, 2012.

proliferation of internet access and social media networks such as Facebook have fostered awareness that local concerns (land grabs, deforestation, radiating levels of corruption) are part of a larger system—one that has created massive amounts of wealth, yet largely ignored the needs of ordinary people.

As rural migrants have flooded the cities, joining a growing urban working class of garment and construction workers, they have escaped the smothering influence of CPP village chiefs and commune authorities—the bedrock of the party’s power since the 1980s. As time goes by, fewer people carry portraits of Prime Minister Hun Sen during demonstrations calling for his kingly intercession in local disputes. More people are now criticizing the system. The 2013 election functioned as a flashpoint for the discontent that has been rising slowly over the past decade.

As with every Cambodian election since the United Nations-organized 1993 poll, the July 2013 election gave way to a protracted deadlock. CNRP president Sam Rainsy and his deputy Kem Sokha immediately claimed that they were robbed of victory and demanded a UN-backed investigation into alleged voter fraud. To drive their demands home, they boycotted the newly elected National Assembly and launched a campaign of colorful public demonstrations at Freedom Park, a government-sanctioned “protest zone” in the center of Phnom Penh. Predictably, Hun Sen refused the opposition’s demands, and the CPP-dominated National Election Committee (NEC) rubber-stamped the party’s 68–55 margin of victory.

As the deadlock dragged on, and political negotiations limped along behind closed doors, election complaints coalesced into a broader movement for social change. Garment workers took to the streets, demanding a large hike in the minimum wage. Teachers threatened to strike, and garbage collectors walked off the job. Buddhist monks defied their superiors and attended protests. The wave of opposition crested in late 2013, when more than 100,000 people marched through Phnom Penh, openly calling for Hun Sen’s resignation—the largest sign of opposition to his rule in 15 years. In early January 2014, garment worker protests on the outskirts of the city degenerated into violence as police fired live rounds at demonstrators, killing five. The government responded by banning public gatherings. Freedom Park, now living up to its name as a symbol of free expression and dissenting opinions, was blocked off with barriers and patrolled by thuggish helmeted security guards in the pay of the district authorities.

Nearly a year passed before the deadlock ended. On July 15, 2014, during an opposition protest to “free Freedom Park,” CNRP supporters set upon a squad of district security officials, beating several bloody. In the aftermath, seven CNRP politicians were arrested, slapped with trumped-up charges, and locked up at Prey

Sar prison in Phnom Penh. In typical Cambodian style, the wheel turned quickly; within days, the incident had led to a resumption of talks, and an eventual agreement. On August 5, the CNRP's 55 elected lawmakers were finally sworn into the National Assembly, bringing the post-election deadlock to an end. As opposition lawmakers entered parliament, normality returned to Phnom Penh. The barricades came down and Freedom Park was restored to the public. The tense standoff between Cambodia's two largest parties—one on the rise, the other battling the accretions of age and decades-long incumbency—came to an end, at least for the time being.

What is in store for Cambodian politics between now and the 2018 national election? In purely institutional terms, the political settlement looks promising for the opposition. In exchange for ending its National Assembly boycott, the seven CNRP detainees were released from prison, and the party received the chairmanships of five of the parliament's ten special commissions (including a new Anti-Corruption Commission) and the post of National Assembly vice-president. The agreement also reconfigured the National Election Committee (NEC), previously a CPP fief. The nine members on the newly constituted NEC will now be split between four delegates from each party, with the balance held by one "neutral" delegate. The two parties initially agreed that this position be held by Pung Chhiv Kek, the respected founder and president of the human rights group LICADHO.

At the first joint session of the National Assembly, CNRP president Rainsy hailed a new dawn in Cambodian politics: "To guarantee the implementation of this agreement, both parties must carry it out with optimism, honesty and belief in each other, even though we will be met with obstacles and difficulties." Hun Sen described the occasion in slightly less sunny terms, as "the start of a long process together."⁸ But this new dawn didn't last long. By October, negotiations over the shape of the new-look NEC had run aground on disagreements over the qualifications that members of the body should hold.⁹ The CPP also sought to bar dual citizens from sitting on the committee, a hurdle that would disqualify Pung Chhiv Kek from being appointed the body's ninth member.¹⁰ In mid-November, as the negotiations dragged on, police arrested Meach Sovannara, a CNRP official, in a move that many saw as an attempt to once again strong-arm the opposition into accepting a political arrangement on the CPP's terms.¹¹

8 Khy Sovuthy, *Assembly Rules Amended in First Bipartisan Sitting*, CAMBODIA DAILY, Aug. 9, 2014.

9 Meas Sokchea, *Parties Yet to Agree On Part of NEC Draft Law*, PHNOM PENH POST, Oct. 21, 2014.

10 Kuch Naren, *CPP Says NEC Dual Nationals Ban Not Aimed at Pun Chhiv Kek*, CAMBODIA DAILY, Nov. 18, 2014.

11 Kuch Naren, *Yet Another CNRP Official Arrested Over July Violence*, CAMBODIA DAILY, Nov. 12, 2014.

And so a new political cycle begins, which will set the stage for the crucial 2017 commune election and the national election the year after. Where to now for the country? Were the 2013 election and the deadlock that followed a watershed for Cambodia, or were they business as usual? Did the election represent continuity, or change? John Marston has written that the key to understanding contemporary Cambodia is “the way transnational forces interface with local agendas. Its poverty and history of war, the ineffectiveness of state bureaucratic mechanisms, and the way that Vietnam and the United States played major roles in recent history in the creation of the current state apparatus, all bear on the fact that Cambodia stands particularly exposed to a variety of international pressures.”¹² To get a grasp on where Cambodia may be heading, it is therefore necessary to examine the local and international dynamics that have driven Cambodian politics over the past 20 years, from the country’s democratic rebirth at the end of the Cold War to its emergence into an uncertain and increasingly multipolar world.

2. 1991 — CAMBODIA AT THE END OF HISTORY

Cambodia’s current political system is the product of tensions and collisions between local and international imperatives. Formally, it came into being on October 23, 1991 with the signing of the Paris Peace Agreements, which sought to bring the country’s long civil war to an end. The signatories of the Agreements included 18 nations and representatives of the four Cambodian armed factions that had been fighting one another since the overthrow of the Khmer Rouge in 1979: the Cambodian People’s Party (formerly the Kampuchean People’s Revolutionary Party), which had ruled the country since being installed by Vietnam on the ashes of the Pol Pot regime; the Khmer People’s National Liberation Front, a loose collection of pre-war republicans and nationalists; Funcinpec, a royalist political organization founded by the pre-war leader Prince Norodom Sihanouk in 1981; and the so-called “Party of Democratic Kampuchea,” the rebranded Khmer Rouge, which, thanks to Cold War expediency, continued to occupy Cambodia’s UN seat.

The Paris Agreements created the UN Transitional Authority in Cambodia (UNTAC), which was tasked with taking temporary control of the Cambodian state and guiding its transition towards peace and democratic elections. UNTAC had a daunting mission. It was expected to coordinate a ceasefire and the withdrawal of all foreign (i.e. Vietnamese) forces from Cambodia, followed by the disarmament and demobilization of the four Cambodian armed factions. Refugee

12 John Marston, *Cambodia: Transnational Pressures and Local Agendas*, SE. ASIAN AFF. 95 (2002).

camps along the Thai border were emptied and the UN resettled hundreds of thousands of refugees who had fled there in 1979. In order to create a “neutral political environment” for an election, UNTAC staff were given sweeping vice-regal powers over key ministries. During the transitional period, sovereignty was temporarily vested in a 13-member Supreme National Council consisting of delegates from each of the four factions, with Prince Sihanouk serving as the body’s “neutral” president. The scope and ambition of the UNTAC mission was unprecedented. Retiring UN Secretary-General, Javier Perez de Cuellar, described it as “probably the most important and most complex in the history of the United Nations.”¹³

All this took place at a crucial historical juncture: the fall of the Soviet Union and the wave of liberal optimism that followed in its wake. These were the heady years of US President George H. W. Bush’s “new world order,” and succeeding UN Secretary-General Boutros Boutros-Ghali’s “An Agenda for Peace.” In 1989, Francis Fukuyama had famously proclaimed the “end of history,” arguing that communism’s collapse heralded “the end point of mankind’s ideological evolution and the universalization of Western liberal democracy as the final form of human government.”¹⁴ Post-Cold War optimism was present in Cambodia in an especially concentrated form. With the signing of the Paris Agreements, the country became a symbol and subject of the new world order. A newly united “international community,” working with empowered local NGOs, were expected to usher a victim of Cold War realpolitik along the road towards post-history—an elysian state of human rights, democratic government and free markets. Cambodia was seen in the light of past tragedies and future utopias. Atavistic horror and the hope of human progress came together in a symmetrical moral adventure, with well-intentioned outsiders in starring roles. As one aid worker had memorably told William Shawcross nearly ten years earlier, Cambodia “had everything. Temples, starving brown babies and an Asian Hitler figure—it was like sex on a tiger skin.”¹⁵

After the UN arrived, Phnom Penh, an impoverished socialist capital, became a tropical outpost of what Alex de Waal has termed the “humanitarian international”¹⁶—a postmodern treaty-port city, forced open not by colonial gunboat diplomacy, but by “overseas development assistance.” Foreign money flooded in, along with a legion of NGOs, aid workers, and development consultants. But

13 Alan Riding, *4 Parties in Cambodian War Sign U.N.-Backed Peace Pact*, N.Y TIMES, Oct. 24, 1991.

14 Francis Fukuyama, *The End of History?*, THE NATIONAL INTEREST, Summer 1989.

15 WILLIAM SHAWCROSS, *THE QUALITY OF MERCY: CAMBODIA, HOLOCAUST AND THE MODERN CONSCIENCE* 423 (1984).

16 See Alex de Waal, *An Emancipatory Imperium? Power and Principle in the Humanitarian International*, in *CONTEMPORARY STATES OF EMERGENCY: THE POLITICS OF MILITARY AND HUMANITARIAN INTERVENTIONS* (Didier Fassin & Mariella Pandolfi, eds. 2010).

while the West had experienced what Michael Ignatieff has called a “revolution of moral concern,”¹⁷ no parallel shift had occurred inside of Cambodia. Throughout the 1980s, Cambodia had languished in war and poverty. The regime in Phnom Penh was isolated and embargoed by the West—a punishment for its close association with communist Vietnam—while the men and women who had presided over the horrors of the Khmer Rouge continued to enjoy Chinese and Western support.

For Hun Sen, who came of political age during this decade of Cold War double standards, all this imparted a pointed lesson: when superpowers invoke high-minded principles like democracy or justice or universal rights, they are often a cover for political interests. Powerful states such as China, the US, and the Soviet Union had stoked the Cambodian conflict for decades in pursuit of wider strategic objectives; at Paris, they suddenly decided that peace should prevail. Hun Sen and his government had different ideas. They saw no reason to give up power just because the “international community” demanded it. This was the same “international community,” after all, that had helped keep Pol Pot’s men in the UN since 1979. As a result, the CPP saw the Paris Agreements and the coming of democratic elections not as an end to the civil war and a chance for democratic government, but as a new and more sophisticated way of unseating it from power. The NGOs, newspapers and civil society groups that sprung up under UNTAC’s protective umbrella were not the advance guard of a new global order; they were the fifth column of a hostile West. The end of the Cold War and the political transition it heralded was not a revolutionary change; it was an obstacle to be overcome.

Hun Sen’s particular political genius was to see that by aping the language of the new world order, and by permitting a limited degree of pluralism, his party could navigate the period of pluralism and successfully maintain its grip on power. In the late 1980s, as the prospects for peace improved, he emerged as a key proponent of cosmetic reform—of exchanging of a “red” shirt for a “blue” one.¹⁸ Between 1989 and 1991, his party jettisoned communism, released political prisoners, abolished the death penalty, reinstated private property rights, committed itself to “pluralism,” and redefined itself as a party of Buddhist-inflected populists: the “Cambodian People’s Party.” The old posters of Lenin and Marx came down. The party’s socialist insignia was thrown out in favor of a devada, a Buddhist angel, sprinkling divine blessings. Party leaders soon began patronizing temples and taking part in traditional religious ceremonies, as the old monarchs had once

17 Cited in David Rieff, *A BED FOR THE NIGHT: HUMANITARIANISM IN CRISIS 10* (2002). See also generally MICHAEL IGNATIEFF, *THE RIGHTS REVOLUTION* (2000).

18 See MARGARET SLOCOMB, *THE PEOPLE’S REPUBLIC OF KAMPUCHEA, 1979-1989: THE REVOLUTION AFTER POL POT* 268 (2003).

done.¹⁹ Despite excoriating Prince Sihanouk for years as a “feudal reactionary,” the party positioned itself as the heir and “younger brother” of his royalist regime of the 1950s and 1960s.²⁰ In due course, the party—and Hun Sen himself—had undergone a thorough rebranding.

Of course, Cambodian history didn’t end with the Paris Agreements; it moved into a new phase of political struggle. The keynotes of the immediate post-UNTAC years were not peace and stability, but contingency, fragility, and continuity with earlier forms of governance. To put it another way, the old war simply played out in a new arena. After coming second in the UN-organized 1993 election, the CPP blustered and threatened its way into an equal share of power with Funcinpec, which had won a majority of seats due to the magnetic appeal of the soon-to-be-re-crowned King Sihanouk. When the new government was formed, Funcinpec’s leader (and Sihanouk’s son) Prince Norodom Ranariddh became “First” Prime Minister while Hun Sen became “Second”—a farcical division of titles which can best be appreciated in the French, which anointed Ranariddh “Première Premier Ministre” to Hun Sen’s “Deuxième Premier Ministre.”²¹

The coalition comprised two parties that had been at war for more than a decade. Mounting violence and political dysfunction marked the four years of its existence as two patronage networks struggled for supremacy. The arms race culminated in July 1997, when forces loyal to Hun Sen defeated Ranariddh’s men in bloody street battles—a result that quashed Funcinpec as a source of serious political opposition, eliminated its military wing, and cemented Hun Sen’s supremacy within the CPP.²² Soon afterward, the Khmer Rouge were finally defeated and the Cambodian civil war came to an end—not by treaties and resolutions, but by military force and political deals.

Hun Sen has ruled the country ever since, consolidating his political and economic power and slowly whittling back the democratic gains of the UNTAC years. At the same time, the CPP has elevated its dissimulative strategy of the early 1990s into an entire system of governance. Wanting foreign aid minus foreign scrutiny, Cambodian officials make frequent lofty promises to the international sphere, while continuing to govern in the same fashion: through a decentralized and highly-individualized system of patronage, made up of webs of personal relationships that connect the country’s political, business, and military elites. Steve

19 See, e.g., Judy Ledgerwood, *Ritual in the 1990 Cambodian Political Theatre: New Songs at the Edge of the Forest*, in *AT THE EDGE OF THE FOREST: ESSAYS ON CAMBODIA, HISTORY, AND NARRATIVE IN HONOR OF DAVID CHANDLER* (Judy Ledgerwood & Anne Ruth Hansen, eds. 2008).

20 K. Viviane Frings, *The Cambodian People’s Party and Sihanouk*, 25:3 J. CONTEMP. ASIA 356, 359-60 (1995) (citing a May 24, 1992 editorial in PRACHEACHON).

21 HENRY KAMM, *CAMBODIA: REPORT FROM A STRICKEN LAND* 227 (1998).

22 SEBASTIAN STRANGIO, *HUN SEN’S CAMBODIA* 94 (2014).

Heder has described this system as an “involute façade state,” characterized by political theatre and hollow institutions.²³ In my book *Hun Sen’s Cambodia* I refer to this as a “mirage” of liberalism and reform, which the Cambodian government has fostered—consciously and strategically—in order to placate and manipulate its international “partners.”

In this context, the “humanitarian international” lives on. Twenty-three years after the UN pitched its blue tents, Cambodian civic culture is awash in democratic symbols and human rights narratives. Government officials speak the language of universal values and “good governance.” Artificial UN events such as International Human Rights Day are official public holidays. Colorful NGO insignias can be seen everywhere: on posters, banners, t-shirts, bumper-stickers, calendars, coffee mugs, and the sides of the white 4WDs that roar around the capital Phnom Penh, kicking up dust. The hopes of the early 1990s—for accountable government, human rights, and social justice—are literally emblazoned on Cambodia’s civic life. This collision of local and international prerogatives has produced not democracy, but a façade, an almost perfect abstraction.

3. 2013—CAMBODIA AT THE END TIMES OF HUMAN RIGHTS

Cambodian politics of the past two decades has thus been defined in part by how various political players have situated themselves in relation to the institutions and guiding ideologies of the international sphere. As Marston has written:

[G]overnment institutions and public non-governmental bodies, claiming to be local, must nevertheless negotiate their positions with international bodies, always defensive of their legitimacy; at the same time, not far under this surface of public discourse, there remain the insistent realities of political patronage and ‘strongman’ politics.²⁴

Hun Sen has defined himself squarely in opposition to the “humanitarian international,” happy to accept aid but lashing out at donor countries when they appear to meddle in Cambodian politics. “I am fed up with the world expressing alarming fear over Cambodia’s internal affairs,” he said in a barnstorming speech in late 1995, setting the tone for his relationship with the donor countries that were bankrolling Cambodian reconstruction. “Let me say this to the world: whether or

23 Steve Heder, *Political Theatre in the 2003 Cambodian Elections*, in *STAGING POLITICS: POWER AND PERFORMANCE IN ASIA AND AFRICA 161* (Julia C. Strauss & Donal Cruise O’Brien, ed. 2007).

24 Marston, *supra* note 12, at 96.

not you want to give aid to Cambodia is up to you, but do not discuss Cambodian affairs too much.”²⁵

Sam Rainsy has taken the opposite approach. As Cambodia’s main opposition leader since 1995, Rainsy has made frequent attempts to harness the “end of history” optimism of the age and conscript outside forces into his political struggles with Hun Sen.²⁶ His career has been marked by a remarkable ability to shift dialects, aping the language of World Bank bureaucrats, European human rights activists, and US democracy evangelists as the need arises. Appeals to the “international community” have played a central part in Rainsy’s political strategy, as have references to the Paris Agreements. Unsurprisingly, Rainsy has even described himself in implicitly Fukuyamaite terms:

In a typical family, you have the grandfather, who votes for Funcinpec; you have the father, who votes for the CPP; and you have the children, who when they reach voting age will vote for the SRP [Sam Rainsy Party]. It will take less time than one might imagine now, because of the progress of technology, information, communication and education. History is accelerating.²⁷

This interplay between local and international spheres was on show throughout the 2013 election and its aftermath. The opposition surge began with Hun Sen requesting the royal pardon that allowed Rainsy to return from self-exile²⁸ in time for the poll, a move presumably designed to mollify international concerns about the legitimacy of the election. At post-election protests, opposition supporters wore stickers calling for the intervention of the UN; in speeches Rainsy and Kem Sokha made frequent calls for a UN investigation into the conduct of the election, even though they must have been aware that the UN had no power to do so without a formal invitation from the Cambodian government, which claimed the election was legitimate. On October 23, 2013, the anniversary of the signing of the

25 Foreign Broadcast Information Service, *Daily Report, East Asia*, Dec. 4, 1995.

26 See generally Caroline Hughes, *International Intervention and the People’s Will: The Demoralization of Democracy in Cambodia*, 34:4 *CRITICAL ASIAN STUD.* 539 (2002).

27 Author interview with Sam Rainsy, December 2009.

28 Sam Rainsy had been living in self-exile in Paris since late 2009, shortly after he uprooted a number of wooden border demarcation posts along the Vietnamese frontier, claiming that the government had ceded territory to its eastern neighbor. Rainsy was later tried *in absentia* and sentenced to 12 years prison on a number of dubious charges related to the stunt.

Paris Agreements,²⁹ CNRP leaders marched to Western embassies to call for their governments to somehow force on Hun Sen an independent election investigation.

In between protests, Sam Rainsy and Kem Sokha spent a great deal of time outside the country, raising funds among Khmer diaspora communities in the US and France, and appealing to European bureaucrats, human rights activists, and US Republican congressmen for support in their struggle against Hun Sen. The flavor of these tours and events was of a distinct 1990s vintage. In December 2013, Sokha appeared at a fundraising event in Long Beach at which Ed Royce, a Republican congressman for California, declared, “Hun Sen must go. We want fair elections in Cambodia.” During the event, Sokha claimed: “I have personally been financially supported by the American government to extend democracy for more than five years. Today the results of the assistance from American citizens have helped Cambodians to stand up.”³⁰ The whole post-election period was framed by opposition attempts to enlist international forces and allies through protests and political stunts of various kinds. While the CNRP now has a strong basis of support among the Cambodian people, much of its attention is still directed outwards.

There are several problems with the CNRP’s focus on the international sphere. The first is that it clashes with the party’s undiluted Khmer nationalism, and its focus on the country’s historical enemy: Vietnam. Since the 1990s, opposition leaders such as Sam Rainsy and Kem Sokha have consistently condemned Hun Sen as a puppet of Hanoi, illegitimate by definition and beyond any sort of electoral redemption. This theme dominated the 2013 election campaign, when Vietnam became a key element of Rainsy’s stump speeches in rural areas. “We have been eating sour Vietnamese soup for 30 years,” Rainsy told a cheering crowd in Svay Rieng. “It’s time for that to stop.”³¹ In June 2014, Kem Sokha went so far as to blame the *yuon*, as Vietnamese are often derogatorily termed, for the tragic bridge stampede at Diamond Island during the Water Festival in 2010, which killed 353 people and injured many hundreds more. “They created the scene to kill Khmers at Koh Pich,” he said.³² Taken as a whole, the CNRP presented a contradictory *mélange* of liberal bromides and Khmer nationalist mythology, each working to

29 Interestingly, the 2013 election had the effect of reinvigorating October 23 as a symbol of opposition to the CPP’s consensus, which has enshrined its own date—January 7, the day of Cambodia’s liberation from the Khmer Rouge—as the country’s “second birth.” The government even went so far as to remove October 23 from the roster of national holidays in 2004, only reinstating it as a tribute to Sihanouk following his death in October 2012.

30 Alex Willemyns & Phorn Bopha, *US Congressman Says Hun Sen Must Resign*, *CAMBODIA DAILY*, Dec. 2, 2013.

31 Notes on file with author.

32 Mech Dara, *CNRP Verbally Attacks CPP at Kampuchea Krom Ceremony*, *CAMBODIA DAILY*, June 5, 2014; Meas Sokchea & Kevin Ponniah, *A Bridge Too Far for Sokha?*, *PHNOM PENH POST*, June 6, 2014.

undermine the other.

A second and more critical problem for the CNRP is that the international arena is changing in ways that militate against the re-entanglement of foreign powers in Cambodian politics. The most significant sign of this over the past decade has been the emergence of China, which has risen to become Cambodia's chief foreign patron. Today, Chinese state banks act like a giant cash box for the Cambodian government, bankrolling the construction of bridges, hydropower dams, real estate projects, and tourist resorts. Chinese-built highways have opened up remote corners of the country. Beijing has given Cambodia around \$2.7 billion in loans and grants since 1992, most of them in the last decade.³³

Today, the "China model" of authoritarian capitalism looms as a direct challenge to the liberal democratic model that appeared to be in the ascendant at the end of the Cold War. Whenever donor countries put pressure on Hun Sen to improve governance and enact reforms, China steps in to relieve the pressure with loans and investments. Beijing's sales pitch is simple. It claims a doctrine of mutual non-interference. It makes no demands on how Hun Sen runs the country. "China respects the political decisions of Cambodia," Hun Sen said in September 2009, cutting the ribbon on a \$128 million Chinese-funded bridge over the Tonlé Sap. "They build bridges and roads and there are no complicated conditions."³⁴ In response, the Cambodian government has been willing to toe the Chinese line. It has given Chinese firms open access to Cambodian land and resources. Its leaders have voiced frequent support for the "One China" policy. As it has frequently done for its older patron Vietnam, Cambodia has also deported political activists and other "undesirables" wanted by the Chinese government.³⁵

The rise of China is not only reconfiguring the geopolitical balance in East Asia; it is also part of a broader shift toward global multi-polarity. Arguably this shift has undercut the strengthening of international human rights architecture resulting from the end of the Cold War, a paralysing rivalry that had prevented global institutions like the UN from fulfilling their founding promise. The British political scientist Stephen Hopgood has provocatively argued that with the relative decline of European and American power the world is now entering the "endtimes of human rights." According to Hopgood, human rights norms flourished during

33 Chun Han Wong, *Cambodia's Hun Sen Slams U.S. Threats Over Aid*, WALL ST. J., Aug. 3, 2013. See also Vong Sokheng, *China Doles Out More Loans*, PHNOM PENH POST, Nov. 10, 2014 (reporting that "Hun Sen had secured annual development loans of between \$500 million and \$700 million from its ally and patron, China").

34 Sebastian Strangio, *Adjusting to Life in China's Shadow*, PHNOM PENH POST, Oct. 6, 2009.

35 The most notorious case in recent memory was the Cambodian government's deportation of 20 Uighur asylum in December 2009, two days before the arrival of a high-level Chinese government delegation.

the years of American unipolarity, and with the recent rise of states like China, India, Russia, Indonesia, and Brazil, the Western power necessary to export human rights norms around the world is waning. The result has been termed “Eastphalia Rising”: the resurgence of traditional Westphalian concepts of global order and sovereignty alongside increased challenges to “Western preferences for universal adoption of transnational principles, such as democracy, free market economics and human rights.”³⁶

There is already evidence of this in East Asia. With China’s rise, the United States has systematically downgraded the importance of human rights in its dealings with Asian states. Myanmar’s President Thein Sein has visited the White House, as has Vietnam’s Prime Minister Nguyen Tan Dung (in 2008) and President Truong Tan Sang (in 2013). If the invitation has yet to be extended to Hun Sen, it is largely because Cambodia’s small size and marginal global status makes it low-hanging fruit for international human rights groups and US Congressmen. Even though US President Barack Obama reportedly rebuked Hun Sen for the country’s human rights record in a closed-door meeting during the November 2012 ASEAN summit in Phnom Penh, the US has done little to sanction the Cambodian government. After the 2013 election, Washington was one of the few Western governments to refrain from officially congratulating Hun Sen on his reelection and it called for an independent investigation into allegations of electoral irregularities. Yet it did little to actually make that happen.

Hopgood writes that, as a result of geopolitical realignments, “[T]he prospect of one world under secular human rights law is receding. What seemed like a dawn is in fact a sunset.”³⁷ Whether we accept Hopgood’s view that this is indeed the “endtimes” —or, as one critic put it, merely the beginning of “hard times”³⁸—it’s undeniable that the global balance of powers is changing, that the global liberal consensus of the post-Cold War period is subject to increasing challenge.

At the same time, local struggles for social justice continue to impose serious demands on leaders around the globe. Hopgood draws a useful distinction between “human rights” (in the lower-case) and “Human Rights” (in the upper). In its former sense, human rights is a local language, which “can be used tactically to help prevent torture, disappearances, or extrajudicial executions or to demand economic and social rights to food, water, and health care. It is a flexible and negotiable language. It does not ‘defend human rights,’ it defends the person. It is a means, not an

36 David P Fidler, Sung Won Kim, & Sumit Ganguly, *Eastphalia Rising?: Asian Influence and the Fate of Human Security*, 26:2 WORLD POL’Y J. 53, 53 (Summer 2009).

37 STEPHEN HOPGOOD, *THE ENDTIMES OF HUMAN RIGHTS I* (2013).

38 Daan Bronkhorst, *Hard Times, Not Endtimes: The Case for Human Rights Defenders*, in *DEBATING THE ENDTIMES OF HUMAN RIGHTS: ACTIVISM AND INSTITUTIONS IN A NEO-WESTPHALIAN WORLD* (Doukje Lettinga & Lars van Troost, ed. 2014).

end in itself.” This is the world of local struggles, drawing from a diverse range of languages of fairness, decency, solidarity and religious faith. Then there is the capitalized version of “Human Rights,” the global regime of conventions, treaties, and legal instruments. Unlike local expressions of human rights, these norms are seen as categorical, indivisible, and absolute — a legalistic menu that must be consumed whole, or not at all. Hopgood argues that “the singularity of the Human Rights message resists local adaptation on any basis other than a transient and tactical one.”³⁹

This distinction is germane in the case of Cambodia. Indeed, “tactical and transient” is as good a description as any of the Cambodian government’s adoption of the universalizing discourse of the post-Cold War years. Although human rights discourse has been hailed as “the lingua franca of international morality,”⁴⁰ it is far from clear that this represents a victory in and of itself. In fact, Cambodia’s recent history may show that the spread of human rights and democratic narratives has taken place in nearly inverse proportion to the habituation of these ideals in practice. After all, it’s much easier to universalize a language than it is to universalize a moral and political cast of mind—especially one that poses such a revolutionary challenge to the global status quo. Cambodia today provides a vivid illustration of the global gap between norms and realities.

Nevertheless, as evidenced by the 2013 election, Cambodia is also experiencing a wave of local challenges and demands that its leaders can no longer ignore. This is “human rights” in Hopgood’s lower-case sense: a coalescence of concrete struggles for social justice that seek to address a wide range of grievances. After all, few of the protesters who poured into the streets to welcome Sam Rainsy’s return to Cambodia or joined post-election protests did so in the name of an abstraction. Most people that I spoke to during and after the election had simply grown tired of the widening gap between the CPP’s promises and the realities of daily life. A few months after the election, I met a 67-year-old woman named Yiv Yek Khuan, who lived in a small hamlet along the Mekong River in Kampong Cham province. “I still remember and pay gratitude to January 7, to the Hun Sen government, which liberated me from the killing,” she said. But the promises and ritual invocations of “prampi makara” (January 7) could no longer paper over the fact that people in her village still struggled to survive. As she said, “the paying of gratitude never ends.” This wave of discontent also includes local elements—like anti-Vietnamese animosities and an occasional willingness to use violence—that run counter to the menu of international human rights norms. Change is clearly coming to

39 HOPGOOD, *supra* note 37, at x.

40 ROGER NORMAND & SARAH ZAIDI, HUMAN RIGHTS AT THE UN: THE POLITICAL HISTORY OF UNIVERSAL JUSTICE 8 (2008).

Cambodia, but it's by no means certain that it will happen according to a peaceful or democratic script.

So where does this leave Cambodia for the next few years? Given the history of Cambodia's collision with liberal internationalism, we can foresee a few probable developments. One is that with Western power in relative decline in the Asia-Pacific, the balance between the local and international imperatives in Cambodian politics will continue to shift in the direction of the local. For better or worse, Cambodia's time as the embodiment of a global promise is drawing to a close. With little appetite to become re-entangled in Cambodian politics, Western donor governments will remain aloof. This will not only be signaled by a decline in Western leverage over Hun Sen's government, but also by an increasing reluctance to use what leverage remains.

The second likely outcome is that Cambodia will continue to develop according to its own internal political dynamics, which remain largely divided along the fault-lines of the civil war years. At the symbolic level this comes down to a sharp polarization of views toward January 7, which was either a liberation or an invasion, and October 23, which either put Cambodia on the road to liberal democracy or produced an "indecent peace" that failed to end the civil war.⁴¹ Both perspectives offer nationalist myths that contain their own ambiguities and contradictions. Concomitantly, it's also likely that the tradition of charismatic leadership will continue to provide the template for Cambodia's actual and potential leaders. There's little doubt that the country's politics will remain highly personalized, highly egotistic, and therefore highly unpredictable.⁴²

As a consequence, the current surge of discontent in Cambodia is unlikely to produce anything approaching democracy on the European or American model of a society in which power is vested in independent political institutions rather than in powerful individuals and their galaxies of clients. Michael Vickery's prediction in May 1997, two months before Hun Sen cast off the remaining scraps of the Paris Agreements to seize power from his rivals by force, seems as true now as then: "democracy of the western European type will not be seen in Cambodia soon, if ever."⁴³ But if "democracy" is defined expansively to mean a society that is more just and responsive to ordinary people, then the 2013 election may well prove a watershed. There is every indication the Cambodian population is becoming more informed, more engaged, and more demanding of change. The course of this small

41 Tiziano Terzani, *An Indecent Peace*, 155:25 FAR E. ECON. REV. 21, June 25, 1992.

42 For a perceptive discussion of Cambodian political culture, see Trude Jacobsen & Martin Stuart-Fox, *Power and Political Culture in Cambodia*, Working Paper Series No. 200, Asia Research Institute, National University of Singapore (May 2013).

43 Michael Vickery, *Whither Cambodian Democracy?*, PHNOM PENH POST, May 30-June 12, 1997.

country's future will not be determined by a shape-shifting "international community," though foreign governments and international human rights groups can play a useful supporting role. The Cambodian people themselves will determine it. As one political stalemate ends in a burst of optimism, a more intractable one is almost certainly beginning.

“THIS IS NOW THE MOST IMPORTANT TRIAL IN THE WORLD”: A New Reading of Code #6, the Rule Against Immoral Offenses Under the Khmer Rouge Regime

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This paper provides a gender analysis² of Code #6, the official policy of the Khmer Rouge regime on sexual relations. It argues that Code #6 was not primarily, if at all, an anti-rape policy and therefore does not exonerate senior Khmer Rouge cadre from the sexualized violence committed under their leadership. This paper reviews the mounting body of research on sexual violence during the Khmer Rouge regime, including personal testimonies from survivors and witnesses as part of the Cambodian Women’s Oral History Project.³ A counter narrative emerges: rather than protect victims, Code #6 facilitated the sexual abuse of women; and rather than provide recourse for victims and punishment for perpetrators, the Code was a disincentive for victims to seek justice and thereby promoted impunity for perpetrators. Linking Code #6 to forced marriage and the “enemy policy”—two of the five policies of the regime to accomplish its criminal ends that have been recognized by the ECCC⁴—this paper suggest that sexualized violence may have played a larger role in the atrocities of that era than previously calculated, with Code #6 implicating rather than exculpating senior regime leaders.

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2 See generally Lenore J. Weitzman & Dalia Ofer, *Introduction*, in *WOMEN IN THE HOLOCAUST* (Lenore J. Weitzman & Dalia Ofer eds., 1998) (calling for researchers’ attention to the structural sources of gender difference, social expectations and behaviors, and gendered specificity of experiences of and agency in conflict. The methodology likewise prioritizes women’s personal narratives as a means of better understanding unique aspects of women’s lived ordeal in atrocity).

3 There is a growing body of research and policy exchange on sexual violence under the Khmer Rouge regime, including with the CEDAW Committee and the Office of the Special Representative to the United Nations Secretary-General on Conflict-Related Sexual Violence. For a repository of many of these resources, see *GBV under the Khmer Rouge*, at www.gbvr.org. See also generally Theresa de Langis, *Cambodian Women’s Oral History Project*, at www.cambodianwomensoralhistory.org.

4 See Closing Order, Case 002/19-9-2007-ECCC-OCIJ, ¶ 157 (Sept. 15, 2010). The five policies listed in the Closing Order are: forced movement; collectivization; an “enemy policy”; persecution of targeted groups based on religion, ethnicity and race; and regulation of marriage.

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I. INTRODUCTION

The United Nations-backed hybrid tribunal, the Extraordinary Chambers in the Courts of Cambodia (ECCC), was created in 2006 to bring those most responsible in the Khmer Rouge leadership to justice for crimes committed under the regime between April 17, 1975 and January 7, 1979.⁵ The current trial, Case 002, is considered one of the most complex since the Nuremberg Tribunal’s proceedings, reckoning with the highest death toll from mass atrocity since the Holocaust. Due to the gravity of the charged crimes and the leadership level of the accused, it has been called “the most important trial in the world” by Stephen J. Rapp, United States Ambassador at Large for War Crimes Issues, on behalf of one of the Court’s primary funders. The now commencing second trial segment, Case 002/02, is especially unique for taking up, among other charges, forced marriage and rapes within forced marriage.⁶ However, as to the myriad forms of other sexual violence reported by victims and witnesses from the Khmer Rouge period, the ECCC’s investigation found that, though rapes did occur, the accused senior leaders could not be held responsible because there was an official regime policy, Code #6, intended to prohibit rape and punish perpetrators.

2. “THERE WAS A RULE”

Colloquially speaking, the accepted thesis is that rape did not occur under the Khmer Rouge regime because “there was a rule” prohibiting it. Code #6 is listed as one of the “Twelve Codes of Conduct of the Combatants” circulated by the Khmer Rouge leadership as a series of disciplines expected of all cadre, with these norms imposed even on the general population. Code #6 is virtually universally

5 For background on the formation of the ECCC, see THE KHMER ROUGE TRIBUNAL (John D. Giorciari ed., Documentation Center of Cambodia 2006).

6 For a timeline on charges related to sexual and gender-based violence by the ECCC, see Theresa de Langis, *A Missed Opportunity, A Last Hope? Prosecuting Sexual Crimes Under the Khmer Rouge Regime*, 2 CAMBODIA L. & POL’Y. J. 39 (2014), at <http://cambodialpj.org/article/a-missed-opportunity-a-last-hope-prosecuting-sexual-crimes-under-the-khmer-rouge-regime/>.

known by regime survivors, and is most often paraphrased as the rule against “immoral offenses.” In the Closing Order for Case 002, which serves as the indictment of charges based on investigative findings, Code #6 is referred to as the “Party’s Moral Code” and translated as “do not take liberties with women.”⁷ The Closing Order identifies Code #6 as the basis for excluding liability of the senior level accused for rapes (outside of forced marriage) committed under their leadership:

[While] it is clearly established that under the Democratic Kampuchea^[8] regime crimes against humanity of rape were committed in diverse circumstances, notably in the security centres... [,] the official CPK policy regarding rape was to prevent its occurrence and to punish the perpetrators. Despite the fact that this policy did not manage to prevent rape, it cannot be considered that rape was one of the crimes used by the CPK leaders to implement the common purpose.⁹

Code #6 in this instance is assumed to be an anti-rape policy: “[T]he official CPK policy regarding rape was to prevent its occurrence and punish the perpetrators.”¹⁰ While rapes did occur, demonstrating that the policy was ineffectual as deterrence, according to the Closing Order for Case 002 the existence of the policy absolves the accused of responsibility for these crimes and dissociates rape from the atrocities committed in furtherance of their joint criminal enterprise.

In equating Code #6 with an anti-rape policy, the Closing Order likewise equates “immoral offenses” with rape. Yet, it is highly unlikely that Code #6 was primarily, if at all, intended to prevent rape *per se*. As a result, the policy “did not manage to prevent rape,” especially by state actors of the regime. Upon closer reading, Code #6’s primary injunction was against *any* sexual relations outside of state-sanctioned marriage, regardless of whether the sexual relation was voluntary or forced. The most commonly cited English translation of Code #6 is published in *Searching for the Truth*, the magazine of the Documentation Center of Cambodia (DC-Cam): “Do not abuse women (forcing a woman to have consensual sex or

7 Closing Order, *supra* note 4, ¶ 191.

8 The Khmer Rouge was officially called the Democratic Kampuchea; its political party was the Community Party of Kampuchea (CPK). For the purposes of this paper, the more common parlance of the Khmer Rouge regime is used.

9 Closing Order, *supra* note 4, ¶¶ 1426, 1429 (citations omitted).

10 *Id.* ¶ 1429.

having sex with a woman who is not your wife).”¹¹

Although not noted, this translation is only a small excerpt of the full policy. Additionally, the information in the parenthesis is authorial commentary and not part of the original Code. The first commentary example problematically equates “abuse of women” with rape: “*forcing* a woman to have *consensual* sex. . .” In contrast, the second example (“having sex with a woman who is not your wife”) unquestionably refers to *any* extra-marital sexual activity, without addressing questions of consent or coercion.

Cambodian analysts, in contrast to international scholars, most often interpret “immoral offense” to mean extra-marital sexual activity, primarily via secret, and consensual, love affairs.¹² When Code #6 is read in its entirety, its emphasis on sexual relations outside of marriage is much more distinct, and its concern with rape more tenuous. The full text of Code #6 reads:

6. Never commit any moral misconduct toward women.

In short, never commit any moral misconduct toward women and men. Our honor, revolutionary influence, the clean and dignified culture of our people would be affected if such acts were committed. On the one hand it would affect our people. On the other hand, and most importantly, if we committed such moral misconduct toward women and men, which is an acutely corrupt element believed to be possessed by enemies of all sorts, we would be easily lured by the enemy. This act is therefore dangerous to us and to the revolution movement.

There is no obstacle concerning the present arrangement of marriages, so long as the following principles are adhered to:

11 Youk Chhang, *Letter from the Director*, 15 SEARCHING FOR THE TRUTH 2 (Mar. 2001). DC-Cam serves at the central repository of records of the Khmer Rouge era. See DC-Cam, at www.dccam.org.

12 See, e.g., Youth for Peace, *Neary Padevat: Female Revolutionaries, Stories of the Khmer Rouge from Female Cadre* (2012). Where Code #6, or the policy against “moral offenses,” is referenced, it is within the context of sex outside of marriage. See in particular where a narrator describes how “a couple could not have a love affair before getting married” *Id.* at 29. “Moral offenses” are defined as “secret [I]ove affairs” in Sokhym Em, *Criticism and Self-Criticism*, 31 SEARCHING FOR THE TRUTH 18 (July 2002). Cf. Katrina Anderson, *Turning Reconciliation on Its Head*, 3:2 SEATTLE J. SOC. JUST. 790 (2005) (stating that “[i]n contrast to other regimes, the Khmer Rouge was widely known to have espoused a policy strictly forbidding rape”). Colloquially, the policy on “immoral offenses” is often described as “Do not love one another,” with its expansive reach prohibiting even parental affection for children, as *Angkar* was the “parent” of all. Even smiling, glancing, flirting and laughing were offenses. See generally Kalyanee Mam, Note, *Democratic Kampuchea (1975-1979): Women as Tools for Social Change*, DC-Cam 33-53 (Nov. 2000).

- First. Each to-be-married individual consents to the marriage; and
- Second. It is approved by the collective.

When these principles are followed, there is no reason for anyone to commit moral misconduct toward women and men.¹³

While “moral misconduct” does not exclude rape, or coerced sex, the policy’s central admonishment is to prohibit sex outside of marriages sanctioned—and, in virtually all instances during the period, forced—by the regime (i.e. “approved by the collective,” or *Angkar*¹⁴).

3. CODE #6 AND FORCED MARRIAGE

When read as a prohibition against any sexual activity outside of marriage, and when read as directed toward men in particular, the policy’s meaning stabilizes as a rationalization of forced marriage, especially for the civilian population. In paraphrase, the policy asserts: There is no need to have sexual relations outside of marriage, because *Angkar* will assign spouses to all men and women of reproductive age. Indeed, it is estimated that several hundred thousand individuals, both men and women, were subjected to the policy of forced marriage and coerced into conjugal relationships against their will and under penalty of punishment or death. New research suggests that men were in many instances permitted to “request” wives for final approval by *Angkar*; that sexual relations were compulsory in these arrangements, resulting in cases of rape of wives by husbands, with at least one documented rape aided and abetted by Khmer Rouge actors; and that forced marriage contributed to a state-enforced culture of rape, whereby sexualized violence was normalized within marriage (and, as discussed *infra*, as a form of punishment by Khmer Rouge actors).¹⁵ Perversely, although the state has a duty to

13 This translation was done by an independent professional translation company based on an electronic scan of the original code in Khmer from the DC-CAM archives.

14 Literally, “the Organization,” referring to the highest political body of the Khmer Rouge.

15 Rape did not always result from these marriages, with instances of couples agreeing to have sexual relations for survival or to hide the fact they were not having sex from Khmer Rouge spies. See Theresa de Langis, Judith Strasser, Thida Kim & Taing Sopheap, “*Like Ghost Changes the Body*”: *The Impact of Forced Marriage under the Khmer Rouge Regime*, Transcultural Psychosocial Ass’n (Oct. 2014), at http://tpocambodia.org/fileadmin/user_upload/pdf/pdf-2/Forced_Marriage_Study_Report_TPO_October_2014.pdf. For the conditions of women under forced marriage during the regime, see Cambodian Defenders Project, *List of Critical Issues Submitted to the Committee on the Elimination of Discrimination against Women Regarding Sexual and Gender-Based Violence (SGBV) in Conflict in Cambodia* (Jan. 2013). These resources can be located at www.gbvr.org.

protect and prevent human rights violations, in this scenario the state compelled the violation, and at times state agents were the direct perpetrators.

Sok Samith, whose life-story is included in the Cambodian Women's Oral History Project, recounts how Code #6 operated in (and was commonly understood by) the civilian population, linking it specifically to forced marriage:

We were not allowed to love each other under the Khmer Rouge. There was a rule against “immoral offenses.” If an unmarried man and unmarried woman were caught wasting time together and suspected of loving each other, the Khmer Rouge would kill them or send them to prison. We were not allowed to have girlfriends or boyfriends. It was very strict—there was no flirting allowed, you could not love each other even without touching, we were not allowed to look each other in the face. Women and men could only be assigned by *Angkar* to marry. If you were found to be in love, you were killed. Only those not afraid of dying dared to love each other. For those afraid of dying, they dared not do so.¹⁶

The fact that consensual relationships were punished under Code #6 as “immoral offenses” is consistent with the thesis that Code #6 had as its target the regulation and control, for state purposes, of *all* sexual activity, and that it was rigidly enforced for the civilian population. Stories of rape committed by civilians outside of marriage are non-existent in the research, while the famous story of Bophana is an object lesson for the way in which consensual relations were harshly punished.¹⁷ Sok Samith recounts in her oral history an example of a Khmer Rouge cadre killing himself rather than face punishment for a consensual secret affair, providing some evidence that enforcement of the policy against secret sexual affairs extended to state actors.

Forced marriages and the rapes inside those marriages are charged by the ECCC in Case 002 as a crime against humanity. Those charges are documented through witness and survivor testimonies describing how regime policy reduced sex to its basic utilitarian purpose to meet the reproductive ideological aims of the

16 Theresa de Langis, Personal Interview, Narrator #2, Cambodian Women's Oral History Project (Jan. 26, 2012).

17 See ELIZABETH BECKER, *BOPHANA: LOVE IN THE TIME OF THE KHMER ROUGE* (2010). Bophana underwent five months of torture at the S-21 prison, generating the largest confession file at that execution center, charged with exchanging love letters with her consensual lover, her secret husband.

regime.¹⁸ In prohibiting sexual activity outside of the context of marriage, Code #6 rationalized the system of forced marriage and facilitated the rapes that happened within them, thereby providing the state total control over all sexual activity for revolutionary ends. Code #6 directly implicates rather than exculpates the accused in this crime.

4. CODE #6 AND RAPE

When reviewing Code #6's actual implementation as policy, it can be seen that the Code was concerned only peripherally with rape outside of marriage. Logically, Code #6 was an either/or proposition: the policy could not be implemented both to protect victims from coerced sex outside of marriage and to punish *any* sex outside of marriage, as to be implicated in the first was to be liable (and therefore punished) for the latter. This conclusion is supported by accumulative research. Studies show that Code #6 was implemented in instances of *both* consensual *and* non-consensual relations outside of marriage. In cases of rape, it was enforced against *both* the victim and the perpetrator. The common denominator in all scenarios was a prohibition of sexual activity outside of state-sanctioned—most often forced—marriage, which disrupted the state's control over sexual activity.

In one of the earliest extended treatments of sexual abuse under the regime, Kalyanee Mam found that Code #6 was “applied regardless of whether the act was voluntary or forced,” with punishment wielded against both victim and perpetrator in cases of coercion.¹⁹ Katrina Natale's 2011 study on the full range of sexual violence under the Khmer Rouge (including and beyond rape) both validates Mam's findings and extends them. The findings in Natale's study of two provinces suggests that Code #6 was most often applied to *consensual* relations, and that in non-consensual relations, victims were punished *more often* than perpetrators.²⁰ While all of her respondents were aware of the Khmer Rouge's “policy prohibiting moral offenses,” and many reported having seen individuals punished for such

18 See ELIZABETH BECKER, *WHEN THE WAR WAS OVER: CAMBODIA AND THE KHMER ROUGE* REVOLUTION 184 (1998).

19 Kalyanee Mam, *Evidence of Sexual Abuse during the Rule of Democratic Kampuchea*, I5 SEARCHING FOR THE TRUTH 2 (Mar. 2001).

20 See Katrina Natale, “I Could Feel My Soul Flying Away from My Body,” *A Study on Gender-Based Violence during Democratic Kampuchea in Battambang and Svay Rieng Provinces*, Cambodia Defenders Project (2011). Of those surveyed for the study, 64.5% were aware of rape perpetrated by actors of the Khmer Rouge state, with close to a third directly witnessing such acts, and nearly a quarter reporting knowledge of sexual mutilation. In all but one instance, the perpetrator was identified as an agent of the Khmer Rouge, and in all but two cases the perpetrator was identified as male. *Id.* at 3. The overwhelming majority of victims were women. Only in one case did a respondent report that a perpetrator was punished.

offenses, the overwhelming majority of those punished were in what were considered *consensual* relationships.²¹ In contrast, Natale found that despite “rape being overall the single most reported type of GBV [gender-based violence] by participants” in her study, the vast majority of perpetrators—an overwhelming majority of whom were male agents of the Khmer Rouge regime acting in their official state capacities—were reported to have gone unpunished.²² Moreover, even in the few cases cited where perpetrators were punished for immoral offenses, “it is not entirely clear that [gender-based violence, or rape] was the reason for the punishment.”²³ de Langis and Studzinsky argue further that perpetrators could be pardoned and exempt from punishment under Code #6 if they demonstrated a “good revolutionary” background.²⁴ Collectively, the research strongly suggests two separate regimes of enforcement for Code #6 penalties—one for Khmer Rouge actors, another (more rigid) for the civilian population.

As for rape victims, the research of Mam and others has found that, due to the Code #6 policy, they may have been more likely to be murdered by the perpetrators to conceal the evidence.²⁵ For those rape victims who survived, the Code was a distinct disincentive to seek justice, because “if they accused their rapist, they would only succeed in implicating themselves” under the rule against immoral offenses.²⁶ Rather than being protected by Code #6, they may have been at greatest risk of being punished under the policy, especially when there was a resulting pregnancy—impossible to conceal and difficult to endure under the harsh regime conditions. For example, Sok Samith recounts how her friend was punished under Code #6:

Yes, in that regime, I myself say the exact story as that of sister Ouk, raped until she was pregnant and then sent to prison, tortured and beaten, her legs in chains for everyone to see. She had her baby in that prison.²⁷

Sok Samith goes on to distinguish how women and men received different punishments under Code #6:

21 Natale, *supra* note 20, at 2.

22 *Id.* at 3, 27.

23 *Id.* at 44.

24 See Theresa de Langis & Silke Studzinsky, *Briefing Paper on the ECCC, the Cambodian Women’s Hearing, and Steps for Addressing Sexual Violence under the Khmer Rouge Regime* (May 2012) (unpublished manuscript on file with author).

25 Kayanee Mam, *Evidence of Sexual Abuse*, *supra* note 19, at 4.

26 *Id.*

27 de Langis, “Personal Interview,” *supra* note 16.

The woman was always punished more than the man. . . . Ouk was sent to prison [when she was seven-months pregnant] and then tortured so everyone could see she was seriously punished. They shackled her legs and forced her to dig the dyke[.] . . . She was released in 1977, but she was later killed as part of the regime's targeting of the Vietnamese population. For the man, for Ta So, [a senior district officer for the regime,] I did not see any torture. They sent him away but we didn't know where[;] he disappeared. After the Khmer Rouge collapsed, he was back home as though nothing had ever happened.²⁸

In this case Code #6 was applied in an instance of rape; however, the victim was punished apparently rather than the perpetrator, a Khmer Rouge actor, and was certainly punished more publicly and harshly. The case of Ouk suggests that punishment of women for sexual violations was a spectacle intended for the entire community, further entrenching a normalized rape culture whereby sexual control of women's bodies was monopolized by the state, and women were treated as the primary guilty party in cases of sexual violence. Contextualized within the cumulative research, Sok Samith's account of Ouk's ordeal supports the thesis that Code #6 was enforced inconsistently and infrequently against Khmer Rouge actors for rape of civilian women. Additionally, Vietnamese such as Ouk were at higher risk of sexual abuse due to the Khmer Rouge's "enemy policy," discussed *infra*.

Thus, the relation of Code #6 to prohibiting and punishing rape is tenuous at best: inside forced marriage, rape was compelled (as recognized in the Case 002 indictment, and as rationalized by Code #6 itself); outside of marriage, all sexual activity was punished as divergent from the revolution, regardless of whether consensual or coerced. In either instance, Code #6 served primarily as a means to regulate sexual activity and ensure that it conformed to revolutionary aims. As such, the policy appears to have had two separate enforcement regimes: one for civilians and one for Khmer Rouge actors. For civilians, in light of the paucity of documented rapes of civilians by civilians outside of forced marriage during the period, the Code and its harsh penalties evidently served as a deterrent to rape outside of forced marriage. At the same time, for civilians, the Code at least rationalized compulsory sexual relations within forced marriages, which at times amounted to rape. For Khmer Rouge actors, who are most often reported as the alleged rapist outside of forced marriage, yet rarely reported punished *per se* for the sexual violence under the Code, Code #6 essentially facilitated a *de facto* state

monopoly on sexual violence during the regime.²⁹ That monopoly was exerted both indirectly (by cadre compelling husbands to rape within forced marriage), and directly through rapes and other sexual violence perpetrated nearly exclusively by state actors.

5. CODE #6 AND THE ENEMY POLICY

When contextualized within the Khmer Rouge's enemy policy, the fact that state actors were the most common perpetrators but rarely punished suggests that at least in some instances rape was considered a legitimate tool in advancing the aims of the revolution. The Case 002 Closing Order refers to the enemy policy as one of the five policies used by the Khmer Rouge leadership to implement and defend its socialist revolution through "the reeducation of bad-elements' and the killing of 'enemies', both inside and outside the Party ranks, by whatever means necessary."³⁰ The policy was primarily a means to identify and punish acts of political subversion against the state—which could be as slight an infraction as complaining of hunger or exhaustion, or later in the regime, being suspected of treason and collaboration with the Vietnamese. To implement the policy, nearly 200 security centers and countless execution sites throughout Cambodia were established.³¹ Those suspected of immoral offenses or violations of Code #6 were also considered bad elements or enemies depending on the gravity of the offense. Additionally, detainees were routinely questioned about immoral offenses as part of their interrogation, presumably even when their detention was unrelated to Code #6.³² Significantly, according to the Closing Order the Khmer Rouge state did not draw distinctions between civilians and state actors in eliminating enemies, indicating that "enemies" may have occupied a separate category of "citizenship" bereft of protections or rights.³³

Just as the enemy policy occupied itself with immoral offenses in punishing subversion against the total revolution, Code #6 alluded to the enemy policy in justifying its prohibition against sexual relations outside of marriage. Indeed, the Code distinguishes between the "clean" and "dignified" revolution of the Khmer Rouge and the "acutely corrupt" "enemy," "dangerous" for its seductive "lure[.]" thereby defining any sexual relations outside of revolutionary aims as politically

29 While Khmer Rouge actors were rarely punished for moral offenses *per se*, there are instances where moral offenses were used as an excuse by the regime to purge those state actors deemed "enemies," as discussed *infra*.

30 Closing Order, *supra* note 4, ¶ 1428.

31 *Id.* ¶ 178.

32 *Id.* ¶ 191.

33 *Id.* ¶ 1364.

subversive. In marking the enemy as sexualized, the Code both dehumanized the enemy and rationalized sexualized punishment for political infractions. If Code #6 was intended to extend protections against rape, it appears that such protections did not extend to “bad elements” or “enemies.” Indeed, in equating illicit sexual activity with the political enemy, the Code created a sexual social hierarchy whereby the perceived enemy could be raped by state actors with impunity.³⁴ In this way, Code #6 synergistically re-enforced the enemy policy promulgated by the highest Khmer Rouge leadership.

Under the enemy policy, those targeted for arrest, re-education, imprisonment, torture, or execution were *de facto* dehumanized; to expunge their corruption, they were eliminated, according to the Closing Order, by “whatever means necessary.”³⁵ The Closing Order explicates “by whatever means necessary” of the enemy policy as such:

[B]eatings, applying electric shocks, asphyxiation... , simulated drowning, puncturing and extracting fingernails and toenails and inserting needles in them, inflicting cigarette burns, forcing detainees to pay homage to images of dogs or other objects, force feeding excrement and urine, direct or indirect threats to torture or kill detainees or their family members, the use of humiliating language, plunging detainees in a water jar or suspending them from their hands tied behind their back.³⁶

When glossed with the sexualized language of Code #6, the absence of sexual torture, including rape and sexual mutilation, is conspicuous. Both Code #6 and the enemy policies made permissible the most inhumane treatment against the enemy, with the enemy policy providing impunity for perpetrators acting as agents of the state to meet revolutionary goals. The existence of the enemy policy, alongside the policy on “immoral offenses,” suggests senior political leaders were aware or should have been aware that sexual violence could and would be used to execute the enemy policy by “whatever means necessary” to fulfill the aim of creating a pure revolution, and that Code #6 permitted sexual abuse as a means to exact punishment against a sexualized enemy for cases of perceived political offense.

34 See de Langis & Studzinsky, *supra* note 24. The authors point to the indictment on one charge of rape of Kang Kew Iew (*alias* Duch) showing that sexual violence against the enemy was “neither prohibited nor punished.”

35 Closing Order, *supra* note 4, ¶¶ 175, 1428.

36 *Id.* ¶ 1410.

The use of the “moral code” for political purposes in conjunction with the enemy policy is well documented. As discussed above, the Closing Order for Case 002 states that “detainees were *routinely* questioned about ‘immorality’ during interrogations” and that rapes were found to have taken place *most notably* at security centers.³⁷ Trudy Jacobsen discusses how a fabricated charge of “moral offense” played a role in the political purge of the Chief of Phum Angdong,³⁸ while “The Forced Confession of Hu Nim” recounts how a member of the political elite (the Minister of Information) was purged as a result of a series of political and sexual intrigues that are difficult to disentangle.³⁹

The political purges of the Eastern Zone in 1978 and at Svay Chrum hospital are reported to have included rapes, and Natale found increases in rape and mass rape during Khmer Rouge political purges as they affected Svay Rieng province.⁴⁰ Rape is also documented as a tool of political punishment and torture. In ECCC Case 001, Kaing Guek Eav, alias *Duch*, was convicted of one count of rape as an element of torture in the notorious S-21 prison he oversaw. Van Nath, one of the handful of prisoners to have survived the S-21 death camp, documented through his famous paintings the use of gang rape at the prison against a female prisoner.

In inscribing the ubiquitous “enemy” within a sexual paradigm of social order, Code #6 also rationalized sexual violation, especially against those perceived to be the “enemy,” for political aims. This extended to the spouses and other family members of enemies. Research shows that wives and other family members were targeted for sexual violence when males were accused of enemy activity. Nan Mon recounted for the Cambodian Oral History Project how she was raped by a prison guard at S-21 as punishment after her father was executed for being a political enemy.⁴¹ Another project narrator, Leang Korn, recounted her experience as the sole survivor of a 30-member women’s work crew, taken into the jungle and methodically gang raped before execution as “bad elements” due to their husbands’ alleged CIA affiliations.⁴²

Women deemed enemies were apparently especially targeted for sexual abuse prior to execution at Choeng Ek, the killing fields associated with S-21. As part

37 *Id.*, ¶¶ 191, 1426.

38 TRUDY JACOBSEN, *LOST GODDESSES: THE DENIAL OF FEMALE POWER IN CAMBODIAN HISTORY* 228 (2008) (emphasis added).

39 *POL POT PLANS THE FUTURE: CONFIDENTIAL LEADERSHIP DOCUMENTS FROM DEMOCRATIC KAMPUCHEA, 1976-1977*, at 279-83, 289-99 (David Chandler, Ben Kiernan & Chantou Boua eds. and trans., 1988).

40 JACOBSEN, *supra* note 38, at 229; Natale, *supra* note 20, at 3.

41 Theresa de Langis, Personal Interview with Nan Mon, Narrator #3, Cambodian Women’s Oral History Project (Mar. 5, 2013).

42 Theresa de Langis, Personal Interview with Leang Korn, Narrator #4, Cambodian Women’s Oral History Project (Mar. 15, 2014). *See also* Theresa de Langis, Personal Interview with Prak Yoeun, Narrator #11, Cambodian Women’s Oral History Project (Dec. 10, 2013).

of the audio tour of the numerous mass graves at the memorial Choeung Ek Genocidal Center, one grave is distinguished by an explanatory note on the use of sexual violence before execution, with this mass grave being the only one on the grounds where the remains were found to be naked, containing the bodies of 100 women and children.

This is consistent with global genocide studies showing how women targeted for extermination (that is, deemed the enemy) are at highest risk of rape.⁴³ Additionally, emerging patterns across genocides show that in cases where a specific policy expressly prohibits state actors from engaging in sexual relations with the enemy population, such as during the Holocaust, these policies may serve to accomplish their opposite effect, with enemy “women becom[ing] more desirable prey, but also more invisible as human beings,”⁴⁴ and therefore at higher risk of abuse.

6. CODE #6 AND GENDERED ATROCITY

Sexual violence during genocide, like sexual violence generally, is a specific type of harm that has gendered dimensions, serving as a means of expressing a masculine identity associated with violence and control, whether perpetrated against women or men. The harms and the structures that create the conditions for sexual violence are replicated globally, even as they are “culturally variant, cross cultural, hierarchical and knitted into the fabric of everyday” life as a means of establishing gender roles, expectations and behaviors.⁴⁵

Violence against women is the most pervasive yet under-recognized human rights violation in the world.⁴⁶ Indeed, even when configured as an offense, it is often referred to as a crime against “honor,” not a crime of violence.⁴⁷ Even less frequently is it considered as a crime of gender-based violence, motivated by a

43 Helene J. Sinnreich, *The Rape of Jewish Women during the Holocaust*, in *SEXUAL VIOLENCE AGAINST JEWISH WOMEN DURING THE HOLOCAUST* 118 (Sonja M. Hedgpeh & Rochelle G. Saidel eds., 2010).

44 Niomi Levenkron, *Death and the Maidens: “Prostitution,” Rape, and Sexual Slavery During World War II*, in *SEXUAL VIOLENCE AGAINST JEWISH WOMEN DURING THE HOLOCAUST* 14 (Sonja M. Hedgpeh & Rochelle G. Saidel eds., 2010).

45 Gina Heathcote, *Time to Rethink the Women, Peace and Security Agenda?*, Intlaw Grrls: Gender Voices on International Law, Policy and Practice (July 3, 2013), at <http://ilg2.org/2013/07/03/time-to-rethink-the-women-peace-and-security-agenda/>.

46 Mary Ellsberg & Lori Heise, *Researching Violence Against Women: A Practical Guide For Researchers And Activists*, World Health Organization (2005), at 9, at www.path.org/publications/files/GBV_rvaw_complete.pdf.

47 *CRIMES OF WAR: WHAT THE PUBLIC SHOULD KNOW*, 370-77 (Roy Gutman, David Rieff & Anthony Dworkin eds., 2nd ed. 2007). See also *Analytical and Conceptual Framework of Conflict-Related Sexual Violence*, UN Action Against Sexual Violence in Conflict (2011), at <http://gbvaor.net/wp-content/uploads/sites/3/2012/10/Analytical-and-Conceptual-Framing-of-Conflict-Related-Sexual-Violence-UN-Action-against-Sexual-Violence-in-Conflict-2011.pdf>.

desire to demonstrate male power and control, authoritarian domination and supremacy.⁴⁸ A fundamental form of discrimination against women, rape reinforces rigidly defined social hierarchies and gender identities linking masculinity to force and aggression, serving to establish a culture of violence, obedience and terror, whereby the sexualized female body is “owned” and controlled by men.⁴⁹ With this in mind, we can say that Cambodian men and women experienced the same atrocities under the totalitarian Khmer Rouge regime, but in unique ways. This was due primarily to the difference in their social status and the ever-present threat of sexual violence as a means of enforcing unequal power relations between men and women, as well as between the “masters” of the revolution and the enslaved population.⁵⁰

Researchers have established how deeply embedded cultural markers of identity, especially as they concern gendered power relations, are “wielded via a myriad of violent technologies to reinforce women’s subordination and justify domination.”⁵¹ During the Khmer Rouge period, such violent technologies are reported to have included not only forced marriage and rape, but also sexual slavery, sexual mutilation, sexual torture, sexual exploitation, forced pregnancy and forced prostitution, among other acts.⁵² Not merely isolated or even secret events, sexual violations during the period included gang rapes and mass rapes, and the public display of naked mutilated corpses and sexual body parts at or near security installations.⁵³ In evoking the contrast between “clean” and “dignified” revolution and sexual transgressions, Code #6 targeted the female body for scrutiny,

48 For efforts to examine gendered aspects of sexualized violence crimes, see generally Katharine Derderian, *Common Fate, Different Experience: Gender Specific Aspects of the Armenian Genocide, 1915-1917*, 19:1 HOLOCAUST & GENOCIDE STUD. 1 (Spring 2005); MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZEGOVINA (Alexandra Stiglmeier ed., 1994); Lisa Sharlach, *Gender and Genocide in Rwanda: Women as Agents and Objects of Genocide*, 1:3 J. GENOCIDE RES. 387 (1999); Roger W. Smith, *Women and Genocide: Notes on an Unwritten History*, 8:3 HOLOCAUST & GENOCIDE STUD. 315 (1994).

49 Ellsberg & Heise, *supra* note 46, at 11, 24. See also Amnesty International, *Breaking the Silence: Sexual Violence in Cambodia* (2010), at <http://www.amnesty.org/en/library/asset/ASA23/001/2010/en/17ebf558-95f0-4cf8-98c1-3f052ffb9603/asa230012010en.pdf>.

50 This is not to argue that men did not experience sexual violence under the regime, sometimes by female cadre. See, e.g., Natale, *supra* note 20, at 34. It is also not to suggest that women did not experience sexualized violence before and after the Khmer Rouge regime, especially as related to the protracted civil war. See, e.g., BECKER, *WHEN THE WAR WAS OVER*, *supra* note 18, at 152.

51 Lenore Manderson & Linda Rae Bennett, *Introduction: Gender Inequality and Technologies of Violence*, in *VIOLENCE AGAINST WOMEN IN ASIAN SOCIETIES I* (Lenore Manderson & Linda Rae Bennett eds., 2003).

52 See Nakagawa Kasumi, *Gender-Based Violence under the Khmer Rouge Regime: Stories of Survivors from the Democratic Kampuchea (1975-1979)*, Cambodia Defenders Project (2008), for an early effort to systematically collect oral history narratives of sexual violence under the regime. It includes forced marriage and marital rape; punishment for refusal to marry; women awarded to soldiers; rape before killing; rape in prisons and reeducation centers; rape by Khmer Rouge officials; rape among soldiers; rape against males; sex for survival; sexual assault mutilation; and forced nudity.

53 Natale, *supra* note 20, at 2.

exploitation, and abuse.⁵⁴

Sexual violence including rape during conflict may function as a ritual degradation to instill terror and control over entire populations.⁵⁵ Often aimed at destroying the opponent's culture, rape of the women in a community stands symbolically for the rape of the community itself,⁵⁶ with rape perceived more than any other wartime trauma as the “scene of the violent encounter between the personal trauma and the collective trauma.”⁵⁷ Code #6's identification of sexual activity as a critical marker differentiating the pure revolutionary from a lurid enemy exemplifies a global pattern of sexualized violence during genocide and armed conflict, whereby women's bodies, culturally over-determined as sexualized objects of male exchange and ownership, serve as sign and cipher of the “honor” of the nation state.

Examining the gender ideology as codified in *Chpab Srey*, or the Code of Womanhood, in which women's role is equated with purity and honor of family and ancestors, illuminates this point. This traditional Khmer poem is a normative text that articulates societal expectations for women's appropriate behavior as embedded in religious, cultural, and national identity. Passed down orally from mother to daughter for generations by the time the Khmer Rouge took power, the Code continues to hold powerful sway even today, and it was taught in public schools up until 2007.⁵⁸ In the poem—and in other Cambodian oral traditions, such as the common proverb, “Men are gold, women are white cloth”—sexual purity determines women's social and cultural value, status and identity.⁵⁹ Within this paradigm, the “good Khmer woman” is steward of the reputation and honor of the family, signaled through her chastity, passivity, and submission, which in

54 The emphasis on “revolutionary purity” as a related racial purity discourse is also relevant, though beyond the purview of this paper. See, e.g., BECKER, *WHEN THE WAR WAS OVER*, *supra* note 18, at 155, 163, 242-43, on what she calls “racial pogroms.”

55 For the different functions of sexual violence in genocide, including as a means to appropriate reproduction and spoil and humiliate the “other,” see generally Helen Fine, *Genocide and Gender: The Uses of Women and Group Destiny*, I J. GENOCIDAL RES. 43 (1999).

56 *Id.* at 43.

57 Levenkron, *supra* note 44, at 23.

58 Amnesty International, *supra* note 49, at 45. *Chpab Srey* was highlighted in the 2006 Concluding Observations to the Royal Government of Cambodia from the Committee on the Convention on the Elimination Against All Forms of Violence Against Women (CEDAW) as a restrictive cultural stereotype that legitimizes discrimination against women and impedes women's full enjoyment of their human rights, and is particularly linked to violence against women and women's access to justice. See Concluding Comments of the Committee on the Elimination of Discrimination against Women: Cambodia, ¶¶ 17-18, UN Doc. CEDAW/C/KHM/CO/3 (2006).

59 For further discussion of how this controlling idea has determined women's status in Cambodia throughout history until today, see generally Nakagawa Kasumi, *More Than White Cloth? Women's Rights in Cambodia*, Cambodia Defenders Project (2006). See also Katherine Bricknell, “We Don't Forget the Old Rice Pot When We Get the New One”: Discourses on the Ideal and Practices of Women in Contemporary Cambodia, 36:2 SIGNS 437 (2011).

turn is reflective of the “purity of Cambodian culture” writ large.⁶⁰ In the logic of *Chpbab Srey*, women are the (sexual) property of men, and the sexual activity of women outside of a “legitimate” union is regarded as an outrage against family, community, ancestors⁶¹ and, during the Khmer Rouge period, the revolution. Indeed, as “good” women are by definition sexually “pure,” victims of rape are first and foremost blamed for assumed complicity in the act of sexual violation. The question of sexual consent on the part of women is therefore moot. Even if a victim can prove her non-complicity, she is nevertheless, by definition, irreparably stained by the sexual encounter. The result is a perverse reversal that entrenches impunity for perpetrators and shame and blame for victims.

The logic of *Chpbab Srey* is evident in Code #6, or the policy on “immoral offenses” under the totalitarian patriarch, *Angkar*. This point is especially salient in illuminating the gendered dimensions of the enemy policy. Recalling the intolerability of women’s sexually “soiled” status in *Chpbab Srey*, Code #6’s punishment of rape victims (possibly *more often* than perpetrators) asserted the central injunction around women’s sexual purity and passivity, even as it exerted male (sexual) prerogative and power. In certain instances, punishment of the (impure) victim under Code #6 involved even more sexual violation, again by the state, further dehumanizing sexually impure *women*. Indeed, the first victim—a transgendered woman—to pursue legal action as a civil party in ECCC Case 002 for sexual violence under the Khmer Rouge regime alleged that she was raped as a punishment for moral offenses.⁶²

In this light, it is easy to understand why women’s sexual *agency* was so harshly punished in *consensual* relations (to recall Bophana’s biography once again⁶³), with sadistic sexual tortures reportedly reserved specifically for women in these instances.⁶⁴ Natale and others have shown that even victims of rape were assigned sexual agency and often accused of being “prostitutes” and “new people.”⁶⁵ Prostitution is the embodiment of women’s sexual agency, and the elimination of prostitution is “often referred to as a goal immediately after the communist victory,” with reports of mass deaths of suspected prostitutes by cadres.⁶⁶ In daily

60 JACOBSEN, *supra* note 38, at 192.

61 *Id.* at 96.

62 ASSOC. PRESS, *Victim of Khmer Rouge Sexual Abuse Seeks Justice*, Sept. 3, 2008.

63 BECKER, BOPHANA, *supra* note 17.

64 BECKER, *WHEN THE WAR WAS OVER*, *supra* note 18, at 224 (“[T]heir breasts were slashed; their vaginal areas were burned with hot pokers; poisonous reptiles were allowed to roam their bodies; if they were mothers, they were forced to watch their children slowly tortured. They were regularly called bitch or pig.”). See also JACOBSEN, *supra* note 38, at 228 (regarding sadistic gendered punishment).

65 “New people” describes the urban population forced into the countryside when the Khmer Rouge took power, a group already considered to be “corrupt elements.”

66 Jacobsen, *supra* note 38, at 226.

life, women's bodies were under acute sexual surveillance via the regulatory gaze of the regime, with precisely a view to suppress women's seductive "lure." Indeed, Code #6, regarding *women's* bodies, did not exclusively regulate sexual intercourse, it also prohibited any "sexy style of dressing, which revealed [the] skin," and there is at least one example of a woman being punished for the "immoral offense" of wearing a short sleeve shirt.⁶⁷ Women were also banned from "decorating" with jewelry and "fashionable clothes, wearing long hair" or perfume⁶⁸ under a prohibition that served to silently sexualize capitalist tendencies. Women's bodies were required to be de-sexualized, with all ordered to wear the same uniform haircut. While men and women both wore loose fitting shirts and pants, women's shirts were required to be buttoned to the neck.⁶⁹

The logic of *Chpab Srey* was also exploited in numerous other ways, including the regime's system of forced marriage, a direct implementation of Code #6, which can be viewed as a manifestation of the state's appropriation of women's (sexualized) bodies, circulated as objects of (sexual) exchange by the political elite. The pool of civil parties comprising close to 800 victims of the "regulation of marriage"—the second largest group of victims admitted by the ECCC—will tell the details of that story in Case 002/02. The regime's practice of punishing wives and daughters along with male kin suspected as enemies likewise demonstrates women's status as extension and property of men. Other research suggests that sexual control was used to assert the Khmer Rouge's dominion and power, with elite leaders reportedly retaining "all the feudal privileges of deflowering virgins," with impunity for sexualized violence a direct correlative to the perpetrator's political power to exercise exclusive sexual prerogative as an agent of the state.⁷⁰ The social inscription of women's subordination through the environment of unchecked Khmer Rouge power, the culture of rape instituted through forced marriage, and the use of sexual violence as punishment, put women at constant jeopardy of abuse; her sexualized abuse, in turn, disciplined and terrorized (and "feminized") the entire community into submission while asserting Khmer Rouge control.

With the aid of accumulative research on the Khmer Rouge period and in global genocidal studies more generally, and situated within the specific Cambodian cultural context of entrenched gendered power dynamics and ideologies, sexualized violence takes on a larger role in the Khmer Rouge atrocities

67 Sokhym Em, *Revolutionary Female Medical Staff in Tram Kak District: Part Two*, 35 SEARCHING FOR THE TRUTH 17 (Nov. 2002).

68 *Id.*

69 *Id.*

70 JACOBSEN, *supra* note 38, at 231.

than previously calculated—with Code #6 serving to implicate, rather than dissociate, senior leaders of the regime. Code #6 was not a remedy for sexual violence but rather an instrument to rationalize and justify it, alongside its companion policies on “bad elements” and forced marriage, which the Code synergistically facilitated. These policies did not serve to protect women, but rather put women at greater risk of abuse while insuring impunity for perpetrators and, thereby, total domination over a terrorized civilian population. While it is too late for Code #6 to be made the basis of criminal charges in Case 002—“now the most important trial in the world”—at least an historical correction is called for that reflects the full specificity of women’s experiences of atrocity under the regime so as to strengthen commitments to non-repetition.

AFFIRMING CAMBODIA'S SOVEREIGNTY OVER “STONES” THAT “EXPRESS” “OUR ESSENCE”¹:

ICJ's Interpretation of Its Judgment in the Temple of Preah Vihear Case

RAVINDRA PRATAP²

The eleventh-century Preah Vihear Temple is a key monument of the Khmer Empire. It mainly represents the home of Shiva, a key Hindu god. It gives its name to Cambodia's Preah Vihear province and, as a listed UNESCO World Heritage site, is an important source of tourist income for Cambodia. But the Temple area is also one of several areas where Cambodia and Thailand disagree on the location of their border.

In its Judgment of June 15, 1962, the International Court of Justice (ICJ) ruled that the Temple complex falls within Cambodian territory. Dispute nevertheless continued about possession of the surrounding area, leading to periodic border skirmishes between 2008 and 2011 that resulted in deaths on both sides, displacement of Cambodian villagers, and temple damage.³ At the request of Cambodia, in 2013 the ICJ interpreted its 1962 Judgment. This interpretation helped to maintain international peace and security in the region by clarifying that Cambodia has sovereignty over the whole territory of the promontory of Preah Vihear and that Thailand is under an obligation to withdraw its military or other forces from that territory.⁴ Nevertheless, seen in the context of ICJ

1 See Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Provisional Measures, Order of 18 July 2011) (separate opinion of Judge Cañado Trindade), ¶ 20 [hereinafter Separate opinion of Judge Cañado Trindade on Provisional Measures] (quoting STEFAN ZWEIF, TIEMPO Y MUNDO — IMPRESIONES Y ENSAYOS (1904-1940) 147–48 (Barcelona, Edit. Juventud, 1998)).

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3 See, e.g., Stuart White, *ICJ Ruling Delayed: Thai Gov't*, PHNOM PENH POST, Oct. 14, 2013 (reporting that “intense” fighting in 2011 resulted in 18 deaths and thousands displaced); Vong Sokheng, *Preah Vihear Temple under Repair*, PHNOM PENH POST, Mar. 12, 2014.

4 See Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand), 2013 I.C.J. (Judgment of Nov. 11), ¶ 107 [hereinafter 2013 Temple Judgment].

judgments in comparable disputes, the text of the Judgment is not without a source of potential disagreement that could become a possible excuse for non-compliance with the Judgment and consequently a possible future source of conflict between the two countries.

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I. HISTORICAL AND FACTUAL BACKGROUND

Cambodia derives its name from the Sanskrit word *Kambuja*. After being an Indianized kingdom for over 600 years as the Khmer Empire,⁵ Cambodia became a protectorate of France.⁶ In 1904, France concluded a treaty with Siam (Thailand) for delimitation of the boundary between Cambodia and Thailand by a delimitation commission. The commission prepared and published maps accepted by Thailand and recognized the line on one of the maps as the frontier line, the effect of which was to situate Preah Vihear in Cambodian territory.

Following Cambodia’s independence on November 9, 1953, Thailand occupied the Temple in 1954. On October 6, 1959, Cambodia seized the International Court of Justice with the dispute, relying on a commission map annexed to its pleadings (Annex I map). The 1962 ICJ Judgment decided that the

5 See generally DAVID P. CHANDLER, A HISTORY OF CAMBODIA (2000).

6 2013 Temple Judgment, *supra* note 4, ¶ 15.

Temple of Preah Vihear was situated in Cambodian territory.⁷ The operative part of the 1962 Judgment read as follows:

The Court, [1] by nine votes to three, finds that the Temple of Preah Vihear is situated in territory under the sovereignty of Cambodia; finds in consequence [2] by nine votes to three, that Thailand is under an obligation to withdraw any military or police forces, or other guards or keepers, stationed by her at the Temple, or in its vicinity on Cambodian territory; [3] by seven votes to five, that Thailand is under an obligation to restore to Cambodia any objects of the kind specified in Cambodia's fifth Submission which may, since the date of the occupation of the Temple by Thailand in 1954, have been removed from the Temple or the Temple area by the Thai authorities.⁸

Following the 1962 Judgment, Thailand withdrew from the Temple. On 21 June 1997, the two countries established the "Thai-Cambodian Joint Commission on Demarcation for Land Boundary" for indicating the land boundary between the two countries. Despite holding three meetings, the Commission could not fulfill its task.

In 2007, Cambodia requested the UNESCO World Heritage Committee to inscribe the site of the Temple on the World Heritage List, providing it a map depicting the site. It is unclear whether it was the Annex I map. On May 17, 2007, Thailand contested this map by means of an *aide-memoire*, which it sent to Cambodia.⁹ Thailand claimed that Cambodia "purported to define the area of its listing in a way that included a significant portion of Thai territory."¹⁰ Following the Temple's inscription on the World Heritage List, Thailand

7 Temple of Preah Vihear (Cambodia v. Thailand), 1962 I.C.J. 6 (June 15) at 32 [hereinafter 1962 Temple Judgment]. On the Temple decision, see generally Peter Cuasay, *Borders on the Fantastic: Mimesis, Violence, and Landscape at the Temple of Preah Vihear*, 32:4 MODERN ASIAN STUD. 849 (1998), available at www.academia.edu/235574/Borders_on_the_Fantastic; L.P. Singh, *The Thai-Cambodian Temple Dispute*, 2 ASIAN SURVEY 23 (1962).

8 1962 Temple Judgment, *supra* note 7, at 36-37 (emphasis added).

9 See Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand), 2011 I.C.J. (Cambodia's Application of Apr. 28, 2011, Instituting Proceedings), ¶ 13 [hereinafter Cambodia's Application].

10 Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand), 2013 I.C.J. (Written Observations of the Kingdom of Thailand of 21 Nov. 2011), ¶ 1.21 [hereinafter Thailand's Written Observations]. See also CR 2013/1 (Oral Proceedings of Apr. 15, 2013), ¶ 7 (Hor Namhong).

withdrew from the World Heritage Convention¹¹ and a number of armed incidents took place in the border area close to the Temple. On February 14, 2011, the United Nations Security Council called for a permanent ceasefire,¹² and on April 28, 2011, Cambodia filed a request with the ICJ for interpretation of the 1962 Judgment.¹³

2. PROVISIONAL MEASURES

The same day that Cambodia filed its application, it also filed a request for the indication of provisional measures. By its Order of July 18, 2011, the Court preliminarily indicated in part that “both Parties shall immediately withdraw their military personnel currently present in the provisional demilitarized zone”; “Thailand shall not obstruct Cambodia’s free access to the Temple of Preah Vihear or Cambodia’s provision of fresh supplies to its non-military personnel in the Temple”; and “[b]oth Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve[.]”¹⁴ The Court took these measures to prevent irreparable damage to persons or property in the Temple area pending the delivery of its judgment on the request for interpretation by ensuring that the parties respect the fundamental principles of international law, particularly the U.N. Charter principles of non-use of force and peaceful settlement of disputes.¹⁵

3. PRINCIPAL ARGUMENTS OF THE PARTIES

The principal arguments of the parties concerned their varying characteriza-

11 See, e.g., Ron Corben, *Thailand Withdraws from World Heritage Convention over Temple Dispute*, VOA, June 25, 2011.

12 On July 19, 2008, Cambodia brought the matter to the Security Council. On August 20, 2010, U.N. Secretary-General Mr Ban Ki-moon offered his help in resolving the dispute. See Cambodia’s Application, *supra* note 9, Annex 8 at 151 (U.N. Press Release of August 20, 2010). On February 17, 2011, the European Parliament adopted a resolution on the border clashes. See EUR. PARL. RES. P7_TA-PROV (2011) 0072 (Feb. 17, 2011) (calling “on both countries to respect the 1962 judgment of the International Court of Justice and to reach a peaceful settlement of the dispute regarding the border area close to the Preah Vihear temple”).

13 Cambodia’s Application, *supra* note 9, Annex 2 at 42-43.

14 Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) 2011 I.C.J. 537 (Provisional Measures, Order of 18 July 2011), at 555 [hereinafter Provisional Measures Order].

15 *But see* Provisional Measures Order (dissenting opinion of Judge Owada), ¶ 11; *id.* (dissenting opinion of Judge Donoghue), ¶ 7 *et seq.*; *id.* (dissenting opinion of Judge Xue), at 75. See also Kate Shulman, *The Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand): The ICJ Orders Sweeping Provisional Measures to Prevent Armed Conflict at the Expense of Sovereignty*, 20 TULANE J. INT’L & COMP. L. 555 (2012).

tion of the disputes between them, namely issues of implementation, boundaries and interpretation.

3.1. “Implementation” Versus “Interpretation” Dispute

Thailand denied the existence of a dispute between the Parties within the meaning of the ICJ Statute by arguing that the language of the 1962 Judgment is clear and in need of no interpretation.¹⁶ It argued that Cambodia could not identify a single document in which the Parties held opposing views on the characterization of Thailand’s obligation of withdrawal.¹⁷ Consequently, in Thailand’s view, there was a dispute concerning the “execution—not the interpretation—of the Judgment.”¹⁸

Cambodia countered by pointing out a memorandum to the Thai Prime Minister, dated July 6, 1962, which recorded a Thai expert group’s view that the determination of the “vicinity” of the Temple could be made in two different ways.¹⁹ Cambodia therefore submitted that Thailand itself was unsure how the Judgment should be interpreted but had decided to limit its recognition of the “vicinity” of the Temple to as close to the Temple as possible. Cambodia repeatedly objected to Thailand’s position and insisted that the vicinity of the Temple should extend to the Annex I map line.²⁰ As indicated above, Cambodia had annexed this map to its pleadings in the 1962 case.

A related dispute concerned the scope of Thailand’s obligation to withdraw. While to Thailand, the second paragraph of the *dispositif* of the Judgment imposed an instantaneous obligation to withdrawal of its forces from the area around the Temple,²¹ for Cambodia, the obligation was a continuing one.²²

16 Thailand’s Written Observations, *supra* note 10, ¶ 7.5. See ICJ Statute, art. 60 (“The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.”).

17 Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand), 2012 I.C.J. (Further Written Explanations of the Kingdom of Thailand of June 21, 2012), ¶ 3.82.

18 CR 2013/6 (Oral Proceedings of Apr. 19, 2013), ¶ 9 (Pellet).

19 CR 2013/1 (Oral Proceedings of Apr. 15, 2013), ¶ 16 (Bundy). Thailand tried to underplay the importance of this by arguing that “there is nothing extraordinary in the fact that two methods were envisaged for this purpose: since the Court had not addressed the issue under this aspect, it was necessary to define ‘the vicinity of the Temple’, pending a final determination of the frontier, without any obligation to apply a particular method.” CR 2013/3 (Oral Proceedings of Apr. 17, 2013), ¶ 10 (Pellet).

20 *See, e.g.*, CR 2013/1 (Oral Proceedings of Apr. 15, 2013), ¶ 37 (Bundy).

21 CR 2011/14 (Oral Proceedings of May 30, 2011), ¶ 7 (Pellet).

22 CR 2011/15 (Oral Proceedings of May 31, 2011), ¶ 4 (Berman). In the Order indicating provisional measures, one judge expressed the view that when the principle of prohibition of the use or threat of force is at stake, the obligation of withdrawal of Thai forces is a continuing or permanent one. Separate opinion of Judge Cançado Trindade on Provisional Measures, *supra* note 1, ¶¶ 42, 80.

3.2. “Boundary” Versus “Interpretation” Dispute

Thailand argued that Cambodia’s request for interpretation was inadmissible since its real purpose was not to obtain the Court’s interpretation of the 1962 Judgment, but to obtain the Court’s ruling on the parties’ delimitation dispute in the area of the Temple by having the Court recognize that the Annex I map line constitutes their boundary in that area,²³ which the Court refused to do in 1962.²⁴ Thailand believed that in 1962 the Court had considered the map only with regard to what the map said about Temple, not about the frontier.²⁵

Thailand submitted that the territory that Cambodia claimed as its own since 2007 could not be considered in “the vicinity of the Temple,” because in Cambodia’s original ICJ Application, it claimed neither an area of that size nor a specific frontier, and the Court was unable to rule *ultra petita* (beyond those matters that it had been requested to address).²⁶ Thailand further argued that the 4.6 square km that Cambodia claimed in 2007 was only necessary for the management of the Temple as a World Heritage Site in the absence of co-operation on the part of Thailand.²⁷ In other words, Thailand submitted that there was a new delimitation/boundary dispute between the parties and not a dispute over the interpretation of the second paragraph of the 1962 *dispositif*.²⁸

Cambodia insisted that it was not requesting the Court to delimit the boundary between the Parties on the basis of the Annex I map. Instead, Cambodia submitted that in 1962 it had pleaded the Annex I map line and the Court had recognized it.²⁹ In Cambodia’s view, the meaning and scope of the Court’s 1962 Judgment must be analysed in the light of what the Court said about the Annex I map, which it claimed was recognized as showing a pre-existing delimited frontier in the region of the Temple that Thailand had previously accepted,³⁰ and clearly indicated in the grounds of the Judgment that determine the proper interpretation of the operative clause.³¹ Cambodia considered these reasons to be inseparable from the operative part of the 1962 Judgment,³² of which it was seeking an authentic and definitive interpretation.³³

23 Thailand’s Written Observations, *supra* note 10, ¶ 4.104 *et seq.*

24 CR 2013/4 (Oral Proceedings of Apr. 17, 2013), ¶ 2 (McRae).

25 CR 2013/3 (Oral Proceedings of Apr. 17, 2013), ¶ 27–28 (Crawford).

26 *Id.* ¶ 15 (Plasai).

27 *Id.* ¶ 28 (Pellet).

28 *Id.* (¶¶ 15, 19 (McRae)).

29 CR 2013/5 (Oral Proceedings of Apr. 18, 2013), ¶ 13 (Bundy).

30 CR 2013/1 (Oral Proceedings of Apr. 15, 2013), ¶ 44 (Bundy); Cambodia’s Application, *supra* note 9, ¶ 39.

31 CR 2013/1 (Oral Proceedings of Apr. 15, 2013), ¶ 5 (Sorel).

32 Cambodia’s Application, *supra* note 9, ¶ 41.

33 CR 2013/1 (Oral Proceedings of Apr. 15, 2013), ¶ 16 (Hor Namhong).

It appears from the 1962 Judgment that the Court had used the Annex I map³⁴ as part of its reasoning and as a piece of evidence testifying to its acceptance by Thailand.³⁵ While the Court did infer that Thailand did not object to Preah Vihear lying on the Cambodian side because it accepted the frontier at Preah Vihear as shown on the map, Cambodia did not make a claim that the map-shown frontier line was the boundary in the disputed region. Cambodia did, however, make submissions for the Court's pronouncement on the legal status of the map and on the frontier line in the disputed region, which the Court entertained as grounds for deciding the claim of sovereignty over the Temple, but not as separate claims. As a consequence, in 1962 the Court did not decide whether or not the line on the Annex I map was the boundary line between the two countries and, consequently, it could not be a matter of interpretation in 2013. While the Court is free to select the grounds of its judgments,³⁶ their meaning or scope may not be determined in isolation from a ground that is inseparable from the judgment.³⁷

4. JURISDICTION OF THE COURT

The ICJ exercises its jurisdiction to interpret its judgments under Article 60 of its Statute.³⁸ The Court's jurisdiction to interpret its judgment "is a special jurisdiction."³⁹ Article 60 requires the existence of a dispute as to the

34 See 1962 Temple Judgment, *supra* note 7, at 17.

35 See *id.* at 26, 32-33.

36 See, e.g., Application of the Convention of 1902 governing the Guardianship of Infants (Netherlands v. Sweden), 1958 I.C.J. 55 (Judgment of November 28), at 62.

37 Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections (Nigeria v. Cameroon), 1999 I.C.J. 31 (Judgment of March 25), at 35, ¶ 10 [hereinafter Nigeria v. Cameroon Interpretation Judgment].

38 Article 60 states: "The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party." Article 98(1) of the Rules of Court provide that "[i]n the event of dispute as to the meaning or scope of a judgment any party may make a request for its interpretation . . ." Article 98(2) requires a party to indicate in its request for interpretation "the precise point or points in dispute as to the meaning or scope of the judgment." See also generally THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: COMMENTARY 1469 *et seq.* (Zimmermann et al. eds., 2012); V MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 482 (Wolftrum ed., 2012); SHABTAI ROSENNE, INTERPRETATION, REVISION, AND OTHER RECOURS FROM INTERNATIONAL JUDGMENTS AND AWARDS (2007); Velásquez Rodríguez Case, Judgment of August 17, 1990 (Interpretation of Compensatory Damages (art. 67 American Convention on Human Rights)), Inter-Am. Ct. H.R. (Ser. C) No. 9 (1990), ¶ 26; REISMAN, NULLITY AND REVISION: THE REVIEW AND ENFORCEMENT OF INTERNATIONAL JUDGMENTS AND AWARDS 212 (1971); Kazimierz Grzybowski, *Interpretation of Decisions of International Tribunals*, 35 AM. J. INT'L L. 482 (1941).

39 Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Tunisia v. Libyan Arab Jamahiriya) 1985 I.C.J. 192 (Judgment of December 10), at 216, ¶ 43 [hereinafter Tunisia v. Libya Interpretation Judgment].

meaning or scope of the judgment to be interpreted.⁴⁰ There is no time limit on interpretation requests.⁴¹

4.1. The Dispute Relating to the Operative Clause of the Judgment

The existence of an interpretation dispute under Article 60 of the Statute does not require the same criteria to be fulfilled as in the case of a new dispute under Article 36(2) of the ICJ Statute.⁴² A dispute within the meaning of Article 60 must relate to the operative clause of the judgment and cannot concern the reasons for the judgment, except for those reasons that are inseparable from the operative clause.⁴³ When reasons are found to be inseparable from the operative part of the judgment, a request for interpretation will be found to meet the conditions stated in Article 60 of the Statute.⁴⁴ Reasons for a judgment are inseparable from its operative part when the operative part “is not self-standing and contains an express or implicit reference to these reasons.”⁴⁵ Reasons and the operative part “cannot simply be dissociated from each other; they go together, the former setting the grounds on which the latter was established[.]”⁴⁶ Reasons “serve as aids in the interpretation of what is contained in the operative part.”⁴⁷ Cambodia submitted that if the grounds serve no purpose, a State can do whatever it wants solely on the basis of its own understanding of the operative part.⁴⁸

The existence of a dispute is required for the Court to find it has jurisdiction

40 Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case (Colombia v. Peru), 1950 I.C.J. Reports 395 (Judgment of November 27), at 402 [hereinafter Colombia v. Peru Interpretation Judgment]; Tunisia v. Libya Interpretation Judgment, *supra* note 39, 216-17, ¶ 44; Nigeria v. Cameroon Interpretation Judgment, at 36, ¶ 12; Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America), 2009 I.C.J. 3 (Judgment of January 19), at 10, ¶ 21 [hereinafter Mexico v. US Interpretation Judgment].

41 Provisional Measures Order, *supra* note 14, ¶ 37.

42 *Id.* ¶ 22.

43 *Id.* ¶ 34.

44 Nigeria v. Cameroon Interpretation Judgment, *supra* note 37, at 36, ¶ 11.

45 Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand), 2013 I.C.J. (Judgment of Nov. 11) (Joint Declaration of Judges Owada, Bennouna and Gaja), ¶ 1. In the declaration, the judges distinguish between inseparable and essential reasons: “Essential” reasons are those on which the *dispositif* is based. They may sustain the operative part of the judgment even if this is self-standing.” *Id.* ¶ 2.

46 Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand), 2013 I.C.J. (Judgment of Nov. 11) (separate Opinion of Judge Cañado Trindade), ¶ 46.

47 MANLEY O. HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE 420 (1934).

48 CR 2013/2 (Oral Proceedings of Apr. 15, 2013), ¶ 5 (Sorel).

under Article 60 of the Statute.⁴⁹ However, there is no requirement that the dispute manifest itself in a specific manner or in a formal way.⁵⁰ It is sufficient to establish the existence of a dispute if the parties are holding opposite views on the meaning or scope of a judgment.⁵¹ Obviously, a dispute over interpretation can only arise following the delivery of a judgment.⁵² In this case, Cambodia and Thailand's dispute was apparently recognized in the Court's Order on Provisional Measures, where the Court stated that "a difference of opinion or view appears to exist between them [the Parties] as to the meaning or scope of the 1962 Judgment."⁵³

4.2. The Dispute As to the Meaning or Scope of the Judgment

The requisite dispute between the parties must be about the meaning or scope of the judgment. Arguing that acquiescence regarding the map resulted in acquiescence regarding the Temple,⁵⁴ Cambodia asked the Court to interpret the *dispositive* of the Judgment in the light of the map because the Court's treatment of the map in the 1962 Judgment was essential reasoning, and thus falls within the Court's jurisdiction under Article 60.⁵⁵ Thailand submitted that the Annex I map and boundary line are not mentioned in the *dispositive*.⁵⁶

The Court found that the dispute between the parties comprised three specific aspects: (a) dispute over whether the 1962 Judgment did or did not decide with binding force that the line depicted on the Annex I map constitutes the frontier between them in the area of the Temple; (b) dispute concerning the meaning and scope of the phrase "in the vicinity on Cambodian territory" in the

49 Further, *see generally* *Mavrommatis Palestine Concessions* (Greece v. Great Britain) 1924 P.C.I.J. (ser. A) No. 2 (Judgment of 30 August 1924), at II; *Interpretation of Judgments Nos. 7 and 8 (Chorzów Factory)*, 1927 P.C.I.J. 3 (ser. A) No. 13, (Judgment No. 11 of Dec. 16), at 10-11 [hereinafter *Chorzów Factory Interpretation of Judgments*]; *Columbia v. Peru Interpretation Judgment*, *supra* note 40, at 402; *Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania*, 1950 I.C.J. 65 (Advisory Opinion of 30 March), at 74; *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, 1962 I.C.J. 319 (Preliminary Objections Judgment of 21 December), at 328; Gerhard Hafner, *Some Legal Aspects of International Disputes*, 104 J. INT'L L. & DIPLOMACY 65 (2005); Robert Jennings, *Reflections on the Term "Dispute,"* in *ESSAYS IN HONOUR OF WANG TIEYA* 401 (Ronald St. John MacDonal ed., 1993).

50 Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning *Avena and Other Mexican Nationals (Mexico v. United States of America)*, 2008 I.C.J. 311 (Provisional Measures, Order of July 16), at 325-26, ¶ 54.

51 *Chorzów Factory Interpretation of Judgments*, *supra* note 49, at II.

52 Provisional Measures Order, *supra* note 14, ¶ 37.

53 *Id.* ¶ 31.

54 CR 2013/5 (Oral Proceedings of Apr. 18, 2013), ¶ 19 (Sorel). Thailand acquiesced to the map by its conduct of not objecting to it despite several opportunities it had for doing so. Thailand acquiesced to the map before the 1962 Judgment and regarding the sovereignty, as clarified by the 2013 Judgment, over the whole territory of the promontory of Preah Vihear.

55 *Id.* ¶ 13 (Berman).

56 CR 2013/6 (Oral Proceedings of Apr. 19, 2013), ¶ 2 (McRae).

Judgment's second operative paragraph; and (c) dispute regarding the nature of Thailand's obligation to withdraw imposed by the second operative paragraph.⁵⁷ The Court clarified that while the existence of a dispute between the parties regarding the original judgment is a prerequisite for interpretation under Article 60 of the Statute, the way in which that dispute is formulated by one or both of the parties is not binding on the Court.⁵⁸

4.3. Principal Dispute Between Cambodia and Thailand

The principal dispute was about the nature and extent of the Thailand's obligation to withdraw from the area of the Temple. While the second operative paragraph of the 1962 Judgment expressly required the withdrawal of Thai forces "stationed by her at the Temple, or in its vicinity on Cambodian territory," it did not indicate expressly the Cambodian territory from which Thailand was required to withdraw its personnel nor did it state to where those personnel had to be withdrawn.⁵⁹

Cambodia accepted Thailand's estimate that the disputed area measured approximately 4.6 square kilometres.⁶⁰ Cambodia submitted that the concept of "Cambodian territory" must have the same meaning in both the first and second operative paragraphs.⁶¹ Thailand submitted that the meaning of "vicinity" in the second operative paragraph could not be ascertained by looking at the meaning of "territory" in the first operative paragraph.⁶² To Cambodia, "withdrawal" necessarily meant not just withdrawal *from* somewhere but withdrawal *to* somewhere else.⁶³ To Thailand, the Court did not need to stipulate withdrawal *to* somewhere given the "one question" it had to decide.⁶⁴ Clearly, it was this dispute the resolution of which was critical for the maintenance of international peace and security in the region.

5. PROCESS OF INTERPRETATION

The ICJ is not duty bound to interpret a judgment where it does not consider that it has jurisdiction to do so.⁶⁵ Interpretation of a judgment is not alteration

57 See 2013 Temple Judgment, *supra* note 4, ¶ 52.

58 See *id.* ¶ 67.

59 See *id.* ¶ 81.

60 See *id.* ¶ 83.

61 CR 2013/1 (Oral Proceedings of Apr. 15, 2013), ¶ 19 (Berman).

62 CR 2013/4 (Oral Proceedings of Apr. 17, 2013), ¶ 39 (Mc Rae).

63 CR 2013/1 (Oral Proceedings of Apr. 15, 2013), ¶ 27 (Berman).

64 CR 2013/6 (Oral Proceedings of Apr. 19, 2013), ¶ 21 (Crawford).

65 See *Nigeria v. Cameroon Interpretation Judgment*, *supra* note 37, at 31.

of the judgment. In the process of its interpretation in this case, the Court deliberated the relevance of the following legal considerations: *res judicata*, pleadings, headnotes, and subsequent practice.

5.1. *Res Judicata*

Literally meaning “a thing adjudicated,” *res judicata* is an affirmative defence that bars the same parties from re-litigating the same claim.⁶⁶ Cambodia argued that the relevant grounds employed by the Court for its 1962 Judgment constituted *res judicata*.⁶⁷ Thailand contended:

Allowing the reasons of the 1962 Judgment to be the autonomous object of a Request for interpretation, when no ambiguity exists in the *dispositif* of that Judgment and when this Request has a larger scope than the one of that *dispositif*, would be to fly in the face of the principle of *res judicata*.⁶⁸

The Court recalled that the process of interpreting a judgment is premised on the “primacy of the principle of *res judicata*.”⁶⁹ Interpretation may properly add nothing to the decision, which has acquired the force of *res judicata*.⁷⁰ According to international practice, the authority of *res judicata* attaches in principle only to a judgment’s operative part, i.e., the part in which the Court rules on the dispute and states the rights and obligations of the parties and not

66 See B. A. GARNER, BLACK’S LAW DICTIONARY 1425 (2009).

67 Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) 2013 I.C.J. (March 8 Response of the Kingdom of Cambodia), ¶¶ I.18, 4.2 [hereinafter Response of the Kingdom of Cambodia]. Cambodia elaborated that if what the Judgment said about the frontier and about the map is not *res judicata*, then Thailand is free to deny that it had ever accepted the Annex I map. CR 2013/1 (Oral Proceedings of Apr. 15, 2013), ¶ 47 (Berman). Moreover, while the *res judicata* is the *final decision*, it is not the *only decision*. CR 2013/2 (Oral Proceedings of Apr. 15, 2013), ¶ 16 (Sorel).

68 Thailand’s Written Observations, *supra* note 10, ¶ 4.93. Thailand also argued that “[t]he exceptional possibility for a State unilaterally to seize the Court under Article 60 of the Statute must not be diverted into an attempt to impair the *res judicata* of the main judgment.” *Id.* ¶ 4.73.

69 2013 Temple Judgment, *supra* note 4, ¶ 55. See also ROSENNE, III LAW AND PRACTICE OF THE INTERNATIONAL COURT OF JUSTICE: 1920-1996, 1669 (1997); Nigeria v. Cameroon Interpretation Judgment, *supra* note 37, ¶ 12; Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections (Nigeria v. Cameroon), 1999 I.C.J. 31 (Judgment of March 25) (Dissenting Opinion of Judge Koroma), at 52.

70 Chorzów Factory Interpretation of Judgments, *supra* note 49, at 21.

to its reasoning.⁷¹ The Court therefore disagreed with Cambodia that its 1962 reasoning was also *res judicata*.

5.2. Pleadings

Pleadings are the authentic written positions of the disputants to the Court.

Thailand claimed that Cambodia asserted that the map was annexed to the Judgment of the Court; however, it was merely annexed to Cambodia's pleadings before the Court.⁷² Moreover, Cambodia may not now deviate from what it had stated in its 1961 pleadings, which were concerned only with the issue of which state had sovereignty over the Temple.⁷³ Thailand argued that Cambodia was attempting to give the notion of "vicinity" a role and life it never had in the pleadings in 1962.⁷⁴

Cambodia submitted that Thailand had used various maps, contained in Annex 85 (d) of Thailand's pleadings in the 1962 case, to limit the vicinity of the Temple from which it had an obligation to withdraw.⁷⁵ Cambodia also submitted that the maps and technical studies that Thailand had introduced in its written pleadings subsequent to the 1962 proceedings were irrelevant.⁷⁶

The Court found that the pleadings and the record of the oral proceedings in 1962 were relevant to the interpretation of the Judgment, as they show what evidence was or was not before the Court and how the issues before it were formulated by each party.⁷⁷ The Court therefore accepted Cambodia's view on the relevance of pleadings to an interpretation dispute.

5.3. Headnote

Headnotes have been variedly used by municipal courts and tribunals in interpreting statutes. They are usually prefixed to sections and operate as preambles to them. They have served to explain doubtful expressions, but not to override clear words. At best, headings have been regarded as key to the interpretation of

71 Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic, Decision of 14 March 1978, *RIAA*, Vol. XVIII, at 365, ¶ 28; Dispute concerning the Frontier Line between Boundary Post 62 and Mount Fitzroy (Argentina v. Chile), Arbitral Award of 21 October 1994, RGDIP, 1996, at 551, ¶ 70.

72 Thailand's Written Observations, *supra* note 10, ¶ I.II.

73 *Id.* ¶¶ 2.15, 5.27.

74 CR 2013/6 (Oral Proceedings of Apr. 19, 2013), ¶ 3 (McRae).

75 CR 2013/5 (Oral Proceedings of Apr. 18, 2013), ¶¶ 30, 31 (Bundy).

76 CR 2013/1 (Oral Proceedings of Apr. 15, 2013), ¶ 59 (Bundy).

77 2013 Temple Judgment, *supra* note 4, ¶ 69.

the statutory clauses unless the wording is inconsistent with such interpretations.⁷⁸

Cambodia suggested that the headnote to the 1962 Judgment demonstrated that the Judgment determined the course of the frontier in the relevant area.⁷⁹ The headnote said:

*Territorial sovereignty.—Title deriving from treaty.—Treaty clauses establishing frontier along watershed line as delimited by Mixed Commission of Parties.—Uncertain character of resulting delimitation in disputed area.—Eventual production by experts of one Party, at the request of the other, of a map.—Non-binding character of map at moment of its production—Subsequent acceptance by conduct of map and frontier line by other Party.—Legal effect of silence as implying consent.—Alleged non-correspondence of map line with true watershed line.—Acceptance of risk of errors.—Subsequent conduct confirming original acceptance and precluding a denial of it.—Effect of subsequent treaties confirming existing frontiers and as evidence of Parties' desire for frontier stability and finality.—Interpretation of treaty settlement considered as a whole, including map.*⁸⁰

The Court clarified that the headnote is only indicative of the points examined in a judgment and is neither one of the elements of the judgment nor constitutive of an authoritative summary of the matter of its decision.⁸¹ The Court therefore did not consider that the headnote to the 1962 Judgment could assist it in resolving the contested matter of interpretation before it.

5.4. Subsequent Practice

The relevance of subsequent practice in treaty interpretation is well known.⁸² In its arguments, Thailand relied extensively on the conduct of the parties subsequent to the date of the 1962 Judgment and until 2008. Thailand submitted that the conduct of the parties indicated that the Annex I map had not been adopted in 1962 as the basis for locating their boundary, and that es-

78 See generally GERALD DWORKIN, *ODGERS' CONSTRUCTION OF DEEDS AND STATUTES* 311 *et seq.* (1967); RAVINDRA PRATAAP, *INTERPRETATION OF STATUTES: A READER* (2010), ch. 2.

79 CR 2013/2 (Oral Proceedings of Apr. 15, 2013), ¶ 25 (Sorel).

80 1962 Temple Judgment, at 6 (italics in the original).

81 2013 Temple Judgment, *supra* note 4, ¶ 73.

82 See generally Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, entered into force Jan. 27, 1980, art. 31(c); Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Vol. I, 1971 I.C.J. at 16-345; RICHARD GARDINER, *TREATY INTERPRETATION* (2010); Draft conclusions I-5 provisionally adopted by the Drafting Committee at the sixty-fifth session of the International Law Commission, 24 May 2013.

tablishing the boundary was an outstanding subject in 2000 when the parties signed a Memorandum of Understanding (MoU) for it.⁸³ According to Thailand, “what Cambodia seeks, in truth, is not an interpretation of the 1962 Judgment but an interpretation of the MoU.”⁸⁴ In Thailand’s view, the parties’ conduct subsequent to the pronouncement of the Judgment demonstrated their common understanding of its meaning and scope.⁸⁵

Cambodia, on the other hand, argued that subsequent practices may be taken into account to the extent that they demonstrate the existence of a dispute, but they may not serve as a basis for the Court’s interpretation.⁸⁶ Cambodia submitted that no basis can be found in Article 60, or in the past judgments of the Court, for the notion that a party to contentious proceedings can by subsequent conduct modify or “sacrifice” the proper meaning of what the Court has decided in its judgment.⁸⁷

The Court clarified that a judgment of the ICJ cannot be equated with a treaty, which results from the consent of the contracting States and the interpretation of which may be affected by their subsequent conduct.⁸⁸ The Court added that no abstraction of subsequent facts can be made when interpreting a judgment.⁸⁹ Thus, the Court agreed with Cambodia that subsequent facts may serve to determine whether a dispute exists between the parties over interpretation of the operative part of a judgment, but have no relevance in determining the meaning or scope of the judgment.

6. INTERPRETATION

The Court interpreted the first operative paragraph of its 1962 Judgment to mean that Cambodia had sovereignty over the whole territory of the promontory of Preah Vihear and that, in consequence, the second operative paragraph required Thailand to withdraw from that territory the Thai military or police forces, or other guards or keepers, who were stationed there.⁹⁰ The Court thus interpreted the jural relations of Cambodia and Thailand arising out of the

83 Thailand’s Written Observations, *supra* note 10, ¶ 5.41 *et seq.*

84 *Id.* ¶ 5.45.

85 CR 2013/3 (Oral Proceedings of Apr. 17, 2013), ¶ I (Pellet).

86 Response of the Kingdom of Cambodia, *supra* note 67, ¶ 4.56.

87 CR 2013/1 (Oral Proceedings of Apr. 15, 2013), ¶ 17 (Berman).

88 2013 Temple Judgment, *supra* note 4, ¶ 75.

89 Separate opinion of Judge Cançado Trindade on Provisional Measures, *supra* note 1, ¶ 38.

90 2013 Temple Judgment, *supra* note 4, ¶ 107. In his Separate Opinion, Judge Cançado Trindade observed that the term “vicinity” be understood also to describe the scope of the obligation to withdraw troops or police force in pursuance of the fundamental principle of the prohibition of the threat or use of force in the Temple itself or in its “vicinity.” Separate opinion of Judge Cançado Trindade on Provisional Measures, *supra* note 1, ¶ 16.

1962 Judgment.

In making this determination, the Court considered that the territorial scope of the second operative paragraph must not be confined to the part of the promontory chosen by the Thai Council of Ministers in 1962.⁹¹ The Court was also unable to accept Cambodia's interpretation of "vicinity," which included not only the promontory of Preah Vihear but also the hill of Phnom Trap.⁹² Nevertheless, the Court did not say that the 1962 Judgment treated Phnom Trap as part of Thailand.⁹³ While considering that Cambodia's territory extended in the north as far as, but no farther than, the Annex I map line,⁹⁴ the Court noted Thailand's argument about the difficulty of ascertaining the precise location on the ground of the Annex I map line in the area.⁹⁵

The Court did not consider it necessary to address the question whether the 1962 Judgment determined with binding force the boundary line between Cambodia and Thailand.⁹⁶ The Court also did not address the question whether the obligation imposed on Thailand by the second operative paragraph was a continuing obligation.⁹⁷ Thus, seen in the context of ICJ judgments in comparable disputes, the text of the Judgment is not without a source of potential disagreement that could become a possible excuse for non-compliance with the Judgment and consequently a possible future source of conflict between the two countries.⁹⁸

7. CONCLUSION

Potential for interpretation is inherent in any text, including the text of this Judgment. Although Thailand variedly denied the existence of an interpretation dispute in these proceedings, potential conflict between the Parties over interpretation of the 1962 Judgment first appeared less than a month after its

91 2013 Temple Judgment, *supra* note 4, ¶ 91.

92 *See id.* ¶ 92.

93 *See id.* ¶ 97.

94 *See id.* ¶ 90.

95 *See id.* ¶ 99.

96 *See id.* ¶ 104.

97 *See id.* ¶ 105.

98 On compliance with ICJ judgments *see generally* CONSTANZE SCHULTE, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE (2004) (noting that most ICJ decisions result in compliance); Heather L. Jones, *Why Comply? An Analysis of Trends in Compliance with Judgments of the International Court of Justice since Nicaragua*, 12 CHI-KENT J. INT'L & COMP. L. 58 (2012) (concluding that judgments entailing compromise or allowing for cooperative efforts are more easily implemented); Aloysius P. Llamzon, *Jurisdiction and Compliance in Recent Decisions of the International Court of Justice*, 18 EURO. J. INT'L L. 815 (2008) (concluding that the ICJ has largely been successful at finding a workable equilibrium); Colter Paulson, *Compliance with Final Judgments of the International Court of Justice Since 1987*, 98 AM. J. INT'L L. 434 (2004).

delivery when Thailand stated to the United Nations its legal rights to recover the Temple.⁹⁹ The Court's interpretation has not resolved important issues, mainly the boundary dispute,¹⁰⁰ the settlement of which is most important for an enduring normalization of relations between Cambodia and Thailand. Nevertheless, thus far the Court's interpretation has contributed to the mainte-

99 See Cambodia's Application, *supra* note 9, Annex I: Letter of 6 July 1962 Sent by Thailand's Minister for Foreign Affairs to the Secretary-General of the United Nations (stating, "I wish to inform you that, in deciding to comply with the decision . . . His Majesty's Government desires to make an express reservation regarding whatever rights Thailand has, or may have in the future, to recover the Temple . . . by having recourse to any existing or subsequently applicable legal process[.]").

100 See, e.g., Staff, *Partial Victory at the ICJ*, PHNOM PENH POST, Nov. 11, 2013 (noting that the ICJ "took pains to specify that the 1962 decision dealt with only a "small area" surrounding the temple" and that "[t]he decision leaves unanswered the question of sovereignty over the remainder of the 4.6-square-kilometre area forming the heart of the long-running dispute between Cambodia and Thailand").

nance of international peace and security, with the border situation remaining calm since the Judgment was delivered.¹⁰¹

The Court's exercise of its interpretation jurisdiction in this case was consistent with its well-developed jurisprudence that requires the existence of a dispute about the meaning or scope of a judgment arising out of its operative part and inseparable reasoning. The Court found that the authority of *res judicata* of a judgment attaches to its operative part and not to its reasoning. It found the relevance of pleadings as they show evidence on record of the Court and formulation of the issues by each party to the dispute. But the Court found no relevance of both the headnote to the 1962 Judgment and the subsequent practice of the parties in

101 See, e.g., Vong Sokheng, *Preah Vihear Temple Under Repair*, PHNOM PENH POST, Mar. 12, 2014. Cambodia submitted to the Court that without “an interpretation of the Judgment of 15 June 1962, the resultant maintenance of the status quo would be very likely to have unfortunate consequences...” CR 2013/I (Oral Proceedings of Apr. 15, 2013), ¶ 20 (Hor Namhong). Following the pronouncement of the Judgment, Cambodia stated that “the verdict will bring peace to the border area” and Thailand “instructed its military officers to maintain peace along the border.” <http://myoceanic.wordpress.com/2013/11/12/preah-vihear-temple-reaction-of-cambodia-and-thailand-after-11-november-icj-ruling/> (last accessed on Aug. 19, 2014). Regarding the effectiveness of ICJ judgments in resolving territorial disputes, see generally Joseph Sinde Warioba, *Monitoring Compliance with and Enforcement of Binding Decisions of International Courts*, in 5 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 41 (Armin von Bogdandy & Rüdiger Wolfrum eds., 2001) (concluding that I.C.J. judgments are the basis for the maintenance of peace and security); John A. Vasquez, *Mapping the Probability of War and Analyzing the Possibility of Peace: The Role of Territorial Disputes*, 18 CONFLICT MGMT & PEACE SCI. 145 (2001); Krista E. Wiegand & Emilia Justyna Powell, *Past Experience, Quest for the Best Forum, and Peaceful Attempts to Resolve Territorial Disputes*, 55 J. CONFLICT RESOL. (2011). But see, e.g., Saksith Saiyasombut & Siam Voices, *Thailand's Senate Amnesty Debate, and the Preah Vihear Ruling*, ASIAN CORRESPONDENT, Nov. 11, 2013, at <http://asiancorrespondent.com/115639/live-blog-icj-preah-vihear-ruling-and-senate-debate-on-amnesty-bill/> (last accessed on 16 July 2014), reporting that:

The ICJ's ruling confused most people at first—so much so that initial reactions were sparse—but it became clear that we're back where we started at the original 1962 ruling, since the ICJ only ruled on a little piece of land next to the Preah Vihear temple in favor of Cambodia. That means the rest of the disputed 4.6 sqkm area is still up for debate and both countries are told to work it out. In a way, it is a ruling that many could live with (except for the Thai ultra-nationalists who have rejected anything from the ICJ before already) and it is up to Phnom Penh and Bangkok to calmly dissect the ruling and come up with a solution together—the failure to do so was why both countries ended up at the ICJ in the first place.

See also Kenneth T. So, *Preah Vihear: A Khmer Heritage*, at www.cambodia.org/Preah_Vihear/?history=A+Khmer+Heritage (last accessed on Aug 19, 2014) (arguing: “Thailand never protested against the [1962] verdict; [h]owever, over the years Thailand has unilaterally redrawn the map that contradicts the ICJ judgment.”); Puangthong Pwakanpan, *Can the ICJ Ruling End the Dispute Between Thailand and Cambodia?*, Institute of Southeast Asian Studies (Sept 26, 2013), available at www.iseas.edu.sg/documents/publication/iseas_perspective2013_53_can_the_icj_ruling_end_the_dispute.pdf (arguing that compliance with the ruling is likely to be subject to domestic Thai political pressures); Stuart White, *Temple Ruling Eyed Warily*, PHNOM PENH POST, Oct. 1, 2013.

determining the meaning or scope of the Judgment. This was the sixth occasion for the ICJ to interpret its judgments.¹⁰²

In the Court's view, once a dispute regarding territorial sovereignty has been resolved, each party must fulfill in good faith the obligation to respect the territorial integrity of other States.¹⁰³ The Court underscored the importance of international cooperation between Cambodia and Thailand, and with the international community, in the protection of the Preah Vihear site as world heritage and work to preserve the temple.¹⁰⁴ Above all, the Court underscored that the disputants must abide by the fundamental principles of non-use of force and peaceful settlement of international disputes.¹⁰⁵ It is these principles that formed the basis of the Court's reasoning in its decision to indicate provisional measures¹⁰⁶—even in the midst of arguments that the Court was not empowered to take those measures. These principles remain critical for less powerful countries as they look to international judicial bodies for the resolution of disputes of this nature.

102 The other cases were: Interpretation of the Judgment No. 3 (Treaty of Neuilly, Article 179, Annex, ¶ 4) (Bulgaria v. Greece) 1925 P.C.I.J. 3 (ser. A) No. 4; Nigeria v. Cameroon Interpretation Judgment, *supra* note 37, Chorzów Factory Interpretation of Judgments, *supra* note 49; Columbia v. Peru Interpretation Judgment, *supra* note 40; Tunisia v. Libya Interpretation Judgment, *supra* note 39; Mexico v. US Interpretation Judgment, *supra* note 40.

103 2013 Temple Judgment, *supra* note 4, ¶ 105. On good faith obligation, *see* U.N. Charter, art. 2.2. *See also* The Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., U.N. Doc. A/RES/25/2625 (1970) (providing in part: "Every State has the duty to fulfil in good faith its obligations under the generally recognized principles and rules of international law."); Rights of Nationals of the United States of America in Morocco (France v. United States of America), 1952 I.C.J. 176 (Judgment of August 27), at 212; Nuclear Tests (New Zealand v. France), 1974 I.C.J. 457 (Judgment of December 20), at 473, ¶ 49; Border and Transborder Armed Actions (Nicaragua v. Honduras) 1988 I.C.J. 69 (Judgment on Jurisdiction and Admissibility), at 105, ¶ 94; Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996 ICJ 226 (July 8), ¶ F of *dispositif* 2; BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 105 (1953); SIR GERALD FITZMAURICE, *The Law and Procedure of the International Court of Justice, 1951–54: General Principles and Sources of Law*, 30 BRIT. Y.B. INT'L L. 53 (1953); GEORG SCHWARZENBERGER, *The Fundamental Principles of International Law*, 87 HAGUE RECUEIL 290 (1955); M. LACHS, *Some Thoughts on the Role of Good Faith in International Law*, in DECLARATION ON PRINCIPLES: A QUEST FOR UNIVERSAL PEACE 47 (Rober J. Akkerman et al. eds., 1977); SHABTAI ROSENNE, DEVELOPMENTS IN THE LAW OF TREATIES 1945–1988, 135 (1989); JOHN F. O'CONNOR, GOOD FAITH IN INTERNATIONAL LAW (1991).

104 2013 Temple Judgment, *supra* note 4, ¶ 106.

105 The Court emphasized the principle of peaceful settlement of disputes in its decisions in Pulp Mills on the River Uruguay (Argentina v. Uruguay) 2010 I.C.J. 14 (Judgment of April 20), ¶ 281; Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of Congo), 2010 I.C.J. 639 (Judgment of November 30), ¶¶ 163–64; Application of the Interim Accord of 13 September 1995 (the Former Yugoslav Republic of Macedonia v. Greece) 2011 I.C.J. 644 (Judgment of December 5), ¶ 166. *See also* the Provisional Measures Order, *supra* note 14, ¶¶ 63, 66. *See also generally* C.G. Weeramantry, *The Function of the International Court of Justice in the Development of International Law*, 10 LEIDEN J. INT'L L. 309 (1997).

106 Provisional Measures Order, *supra* note 14, ¶ 66.

ON THE PATH TO SUSTAINABLE DEVELOPMENT: An Assessment of Cambodia’s Draft Environmental Impact Assessment Law[†]

WILLIAM J. SCHULTE & ASHLEE STETSER¹

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I. INTRODUCTION

The Kingdom of Cambodia is currently undertaking a process to overhaul its Environmental Impact Assessment (EIA) laws and regulations. In the two decades since Cambodia emerged from years of conflict and civil war after the establishment of the United Nations Transitional Authority (UNTAC), it has achieved phenomenal economic growth, raised living standards, reduced poverty, and successfully attracted significant foreign investment. However, Cambodia’s leaders recognize that its success is exerting “ever increasing pressure” on its rich natural resources, “causing high potential risks and hazards to the public health and the environment, and . . . jeopardizing the long-term development of the country.”² In 2009, the Royal Government of Cambodia promulgated a National Sustainable Development Strategy that outlines its long-term vision for sustainable development to 2030, including a “shift of the development paradigm favoring a holistic approach that integrates all dimensions of development, including the environment and natural resources.”³ One of the “major strategic measures” proposed to achieve that vision is a strengthened EIA system.⁴

An EIA process is a “universally recognized strategy for sustainable development.”⁵ The purpose of an EIA is “to identify any potentially adverse environmental consequences of a development action, so that they may be avoided, reduced, or otherwise taken into account during planning and design.”⁶ The United States pioneered the EIA concept in 1970 with the adoption of the National Environmental Policy Act (NEPA).⁷ Since that time, the EIA process has become widely accepted and recognized around the world in both international and domestic environmental law. For example, the 1992 United Nations Rio Declaration on Environment and Development emphasized EIA as a central

2 ROYAL GOV’T OF CAMBODIA, NATIONAL SUSTAINABLE DEVELOPMENT STRATEGY FOR CAMBODIA I, 4 (2009), available at www.rtcap.ait.asia/nsds/uploadedfiles/file/Publication%202-NSDS%20Cambodia.pdf.

3 *Id.* at 5.

4 *Id.* at 22.

5 Jesse Moorman & Zhang Ge, *Promoting and Strengthening Public Participation in China’s Environmental Impact Assessment Process: Comparing China’s EIA Law and U.S. NEPA*, 8 VT. J. ENVTL. L. 281, 284 (2007).

6 Environmental Assessment in Developing and Transitional Countries I (Norman Lee & Clive George eds., 2000).

7 National Environmental Policy Act, 42 U.S.C. § 4321 (1970); see also *National Environmental Policy Act (NEPA): Basic Information*, EPA.gov, www.epa.gov/compliance/basics/nepa.html (explaining the origins of NEPA as well as its implementation and process).

component of sustainable development strategies,⁸ and the Convention on Biological Diversity, to which Cambodia is party, requires member states to conduct EIAs for proposed projects that may have significant adverse impacts on biodiversity.⁹ As of 2005, over 100 countries had adopted some form of domestic EIA legislation or regulation.¹⁰

EIA is an especially important tool in developing countries undergoing rapid development, such as Cambodia and the other Greater Mekong Sub-region countries. A 1997 study on EIA in Asian developing countries by the Asian Development Bank (ADB) noted that while “[e]conomic growth may alleviate poverty and lead to a higher quality of life,” it also may lead to increased rates of environmental degradation and may compromise “the sustainability of ecological and economic systems.”¹¹ Indeed, although Cambodia has achieved an impressive average annual GDP growth rate of 7% since the early 1990s,¹² such growth has often come at the expense of Cambodia’s people, environment, and rich natural resources.¹³ A robust EIA process would help address these issues “through its ability to contribute to environmentally sound and sustainable development.”¹⁴

Even though Cambodia’s 1996 Law on Environmental Protection and Natural Resource Management (LEP) and 1999 Sub-Decree on Environmental Impact Assessment Process (EIA Sub-Decree) contain EIA requirements, they have proven inadequate as a tool to promote sustainable development.¹⁵ A major factor is non-compliance with the current requirements. At a 2012 workshop on

8 United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.I (Vol. I) (Aug. 12, 1992) (stating that “[e]nvironmental impact assessment, as a national instrument, shall be taken for proposed activities that are likely to have a significant impact on the environment”), available at www.unep.org/Documents/Multilingual/Default.asp?DocumentID=78&ArticleID=1163.

9 Convention on Biological Diversity, art. 14, June 5-14, 1992, 1760 U.N.T.S. 79 (entered into force Dec. 29, 1993), available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-8&chapter=27&lang=en.

10 Jennifer C. Li, *Environmental Impact Assessments in Developing Countries: An Opportunity for Greater Environmental Security?* 4-5 FOUND. FOR ENVTL. SEC. & SUSTAINABILITY (USAID, Working Paper No. 4, 2008), available at www.fess-global.org/workingpapers/eia.pdf.

11 Bindu N. Lohani et al., *Environmental Impact Assessment for Developing Countries in Asia*, ASIAN DEV. BANK I (1997), available at www.adb.org/sites/default/files/publication/29779/eia-developing-countries-asia.pdf.

12 Hal Hill & Jayant Menon, *Trade Policy Challenges in a Small, Open, Fragile, Post-Conflict Economy: Cambodia 2* (Asian Dev. Bank, Working Paper Series on Regional Economic Integration No. 141, 2014), available at http://aric.adb.org/pdf/workingpaper/WP141_Hill_Menon_Trade_Policy_Challenges.pdf.

13 See generally European Union Delegation to Cambodia, *Country Environment Profile: Royal Kingdom of Cambodia* (Apr. 2012), available at http://eeas.europa.eu/delegations/cambodia/documents/publications/country_env_profile_cam_april_2012_en.pdf.

14 Lohani, *supra* note II, at 4.

15 Simon Lewis & Khuon Narim, *Few Companies Conduct Environmental Studies*, CAMBODIA DAILY, Nov. 5, 2012, available at www.cambodiadaily.com/archives/few-companies-conduct-environmental-studies-6288/.

the draft EIA law discussed in this article, the deputy director of the Ministry of Environment (MOE)'s EIA department stated that from 1999 to 2003 essentially no projects conducted required EIAs, and from 2004 to 2011 only 110 out of nearly 2,000 projects conducted an EIA.¹⁶ Even after the MOE issued the EIA Sub-Decree,¹⁷ the MOE found that compliance remained weak.¹⁸

A number of other factors also contribute to the inadequacy of Cambodia's current EIA regime, including: implementation of EIA too late in the project development process (thereby negating its value as a planning tool); underestimation of adverse social and environmental impacts; lack of coordination among government agencies and clarity with respect to their responsibilities and authority; resource and capacity limitations; insufficient public participation; and a simple lack of political will.¹⁹ Additionally, the early spread of EIA laws into less-developed countries such as Cambodia was often due to "external pressure by international conventions, international environmental organizations, [and] the international donor community," rather than "domestic drivers for the adoption of better environmental protection."²⁰ As a result, EIAs were "adopted more as a standardized, bureaucratized, procedural formality than as a real solution for intertwined environmental and socio-economic problems."²¹ Cambodia is currently undergoing a domestically driven process to draft a new EIA law and address some of these issues. If adopted, the draft EIA law would arguably be the most robust EIA law in the Greater Mekong Sub-region and could raise the bar for other countries.

The origins of the draft EIA law began with a 2011 study tour to China organized for the MOE's EIA Department personnel, representatives from some of Cambodia's civil society organizations, and legal staff from Vishnu Law Group (Vishnu), Cambodia's leading public interest law firm.²² Participants in the tour realized that Cambodia needed a new EIA law, and the MOE and Vishnu agreed to work together to draft the new law.²³ A "key priority" for Vishnu was that the draft EIA law be developed "in the most transparent and participatory manner possible," a priority the MOE fully supported.²⁴ To that end, Vishnu and the MOE

16 *Id.*

17 Sub-Decree on Environmental Impact Assessment Process (No. 72 ANRK.BK Aug. 11, 1999) (Cambodia), available at www.opendevdevelopmentcambodia.net/pdf-viewer/?pdf=download/law/Sub-Decree%20No.72%20on%20the%20Environmental%20Impact%20Assessment%20Process_August_11_1999_Eng.pdf [hereinafter EIA Sub-Decree].

18 See Lewis & Narim, *supra* note 15.

19 Li, *supra* note 10, at 6-7.

20 *Id.*

21 *Id.* at 6.

22 *Project to Create a New EIA Law*, VISHNU LAW GRP., www.vishnulawgroup.com/index.php/what-we-do/project-to-create-a-new-eia-law.html# [hereinafter Vishnu Law Group].

23 *Id.*

24 *Id.*

have worked together to widely distribute the draft EIA law to a variety of stakeholders and have held five separate public consultation meetings on it from 2012 to the most recent held in Battambang in October 2014.²⁵ Numerous stakeholders, including “representatives from the business and investment community, civil society, community networks and different government ministries,”²⁶ have provided comments that are incorporated into the current fifth draft, which is reviewed below.

This article will first provide a brief background on Cambodia’s recent history and development situation. Next, it will describe some of the challenges Cambodia faces in the agriculture, hydropower, and mining sectors in order to establish a context within which to appreciate the integral importance of a robust EIA regime to Cambodia’s ability to pursue a sustainable development path. The article will then describe and assess four prominent beneficial features of the draft EIA law: (1) clarity with regard to institutional authorities and responsibilities; (2) public participation and information disclosure; (3) requirements of impacts to be considered; and (4) monitoring and enforcement. While there are additional elements of the draft EIA law that would offer vast improvements over Cambodia’s current EIA regime, they are beyond the scope of this Article.

While this Article assesses the most current fifth draft of the EIA law (Draft EIA Law),²⁷ more public consultations are planned before the law is presented to the National Assembly next year. Therefore, the content of the law could change. However, this draft appears to have widespread support. If Cambodia truly wants to begin pursuing a sustainable development path, the most prominent features of the Draft EIA Law discussed in this Article should remain intact.

2. BACKGROUND ON CAMBODIA’S DEVELOPMENT, PEOPLE, AND NATURAL RESOURCES

2.1. Cambodia’s Recent History and Development

In order to fully appreciate modern-day Cambodia and the challenges it faces in its pursuit of a sustainable development path, it is essential to understand Cambodia’s recent history, which has been influenced by colonialism, the destructive Khmer Rouge era, Vietnamese intervention, and civil war. Even after over two decades of relative stability and impressive economic growth, Cambodia’s

25 *Environmental Law and Environmental Impact Assessments*, OPEN DEV. CAMBODIA, www.opendevelopmentcambodia.net/briefing/eia/ [hereinafter *Environmental Law and EIAs*].

26 VISHNU LAW GROUP, *supra* note 22.

27 Draft Law on Environmental Impact Assessment, 5th revision (Cambodia), available at www.opendevelopmentcambodia.net/pdf-viewer/?pdf=download/law/5th_Revision_EIA_%20Draft_Law_Eng.pdf [hereinafter Draft EIA Law].

government institutions and legal system are still relatively very young.²⁸ This makes it all the more necessary for the country to craft and adopt an EIA that is suitable to its current conditions and capacities.

In the wake of the Vietnam War, the Khmer Rouge overthrew the Lon Nol regime in April 1975 and proceeded to inflict untold destruction on Cambodia's economy, infrastructure, and people.²⁹ Among other acts, the Khmer Rouge "banished money, blew up the central bank and many court houses, destroyed government documents, dismantled the education system, and massacred millions."³⁰ It is estimated that up to two million Cambodians died under the Khmer Rouge's rule within the span of a few of years.³¹ No legal system existed during the Khmer Rouge's reign, and the majority of people in the country with any legal education or training fled or were murdered.³²

The Khmer Rouge's reign of terror ended when the Vietnamese entered the country in late 1978. However, the decade of Vietnam's control of Cambodia was largely characterized by "intermittent civil war, international isolation, and sanctions."³³ By the time of the signing of the Paris Agreements in 1991 marking the official end of war, and the establishment of the UNTAC in 1992, Cambodia had "become one of the poorest countries in the world."³⁴

Out of these ashes Cambodia rose, experiencing remarkable stability and economic growth over the last two decades. Subject to some brief periods of volatility, from 1992 to the present Cambodia's Gross Domestic Product (GDP) has grown at an average of 7% per year, "faster than almost any other postconflict society."³⁵ Cambodia's per capita GDP has risen ten-fold in that time, increasing from \$216 per capita in 1992³⁶ to an estimated \$2600 in 2013.³⁷ Cambodia has also achieved impressive reductions in poverty rates from 47% in 1992 to a predicted 19% in 2015.³⁸

28 THE KHMER ROUGE TRIBUNAL 36 (John D. Ciorciari ed., 2006).

29 *Id.* at 11-16.

30 Rebecca Povarchuk, *Cambodia's WTO Accession: A Strenuous but Necessary Step for a Poor Nation Seeking Economic Prosperity*, 13 PAC. RIM L. & POL'Y J. 645, 647 (2004).

31 Stephen P. Marks, *The New Cambodian Constitution: From Civil War to Fragile Democracy* 26 COLUM. HUM. RTS. L. REV. 45, 55 (1994).

32 Hill & Menon, *supra* note 12, at 1.

33 *Id.*

34 *Id.*

35 *Id.* at 2.

36 KINGDOM OF CAMBODIA, THE CAMBODIAN GOVERNMENT'S ACHIEVEMENTS AND FUTURE DIRECTION IN SUSTAINABLE DEVELOPMENT: NATIONAL REPORT FOR RIO+20 UNITED NATIONS CONFERENCE ON SUSTAINABLE DEVELOPMENT 13 (2012), available at <http://sustainabledevelopment.un.org/content/documents/I022cambodia.pdf> [hereinafter Rio+20 Report].

37 *The World Factbook: Cambodia*, CIA.GOV, <https://www.cia.gov/library/publications/the-world-factbook/geos/cb.html> [hereinafter CIA.GOV].

38 Rio+20 Report, *supra* note 36, at 41.

Cambodia's macroeconomic stability during this period also improved investor confidence and led to a steady increase of foreign direct investment (FDI) in the country. FDI's share of GDP rose steadily from 2% in 1993 to 11% in 2011.³⁹ Much of this increase has been do to the attractiveness of Cambodia's natural resources and relatively cheap labor, but has also been facilitated by Cambodia's 1994 Law on Investment, which established a relatively "open and liberal foreign investment regime."⁴⁰

As mentioned earlier, while Cambodia's sustained economic growth has resulted in gradual increases in Cambodia's living standards and reductions of poverty, it has come with great "environmental and social cost[s]."⁴¹ These include increased deforestation; land grabs and land evictions; and relatively little progress on reducing inequality in the country.⁴² Additionally, Cambodia's rapid development has contributed to land degradation, biodiversity loss, and degradation of the country's extremely valuable inland aquatic resources.⁴³

2.2. Geography, People, and Natural Resources

Cambodia is located in Southeast Asia in the Lower Mekong Region. It is nestled between Thailand to the west, Laos to the north, Vietnam to the east, and has 443 kilometers of coastline along the Gulf of Thailand to the south. Cambodia has a total land area of 181 square kilometers.⁴⁴ Its terrain is characterized by low-lying flat plains in the central and coastal areas, and mountains in the north and the southwest.⁴⁵ Some of Cambodia's most dominant geographical features are the Tonle Sap (Great Lake), and the Bassac River and Mekong River, which flow from the northern part of the country to the south.⁴⁶ The Tonle Sap is the largest freshwater lake in Southeast Asia, varying in size from 2600 km² in the dry season to 13,000 km² in the wet season.⁴⁷ It is sometimes referred to as the "beating heart" of the country.⁴⁸

Approximately 80% of Cambodia's 15.5 million people live in the country's rural areas, and around 70% depend on agriculture and forestry for their

39 *Id.* at 15.

40 U.S. DEP'T OF STATE, 2013 INVESTMENT CLIMATE—CAMBODIA, available at www.state.gov/e/eb/rls/othr/ics/2013/204614.htm.

41 Rio+20 Report, *supra* note 36, at 16.

42 *Id.*

43 MINISTRY OF ENV'T, CAMBODIA ENVIRONMENT OUTLOOK 70-73 (2009), available at http://geodata.rrcap.unep.org/all_reports/cambodia_081010.pdf [hereinafter CAMBODIA ENVIRONMENT OUTLOOK].

44 CIA.GOV, *supra* note 37.

45 *Id.*

46 CAMBODIA ENVIRONMENT OUTLOOK, *supra* note 43, at 3.

47 *Id.* at 4.

48 European Union Delegation to Cambodia, *supra* note 13, at 18.

livelihoods.⁴⁹ While Cambodia has an abundance of arable land and natural resources such as timber and minerals, until recently its “history of internal conflict has stunted development” of these resources.⁵⁰ However, as Cambodia’s economy, FDI, and population continue to grow, so will the immense pressure on and exploitation of these natural resources. The decisions it makes today regarding the development and management of its natural resources will have an enormous impact on its success in pursuing a sustainable development path. The following section will briefly highlight some of these issues in the context of the agriculture, hydropower, and mining sectors and, where applicable, include some case studies to demonstrate the value that a robust EIA law could have.

2.2.1. Agriculture.

Simply put, “agriculture is central to the Cambodian economy and a critical source of employment.”⁵¹ As stated earlier, agriculture provides employment for about 70% of Cambodia’s population.⁵² Although agriculture’s overall share of the economy has fallen from about 55% in the early 1990s,⁵³ it has grown about 4-5% annually in recent years and now accounts for about 34% of the economy.⁵⁴ Most of Cambodia’s farmers are engaged in managing “small plots of land to produce rice for subsistence or small-scale commercial purposes.”⁵⁵ Indeed, from 1994 to 2006, “rice contributed up to 50 per cent of total crop growth” and accounted for more than 10% of Cambodia’s total export value in 2007.⁵⁶ The majority of the rice produced in Cambodia is still destined for local consumption.⁵⁷

Until relatively recently, large-scale agricultural production of more export-oriented crops such as cassava, rubber, and forestry products had been “held back due to a lack of investment.”⁵⁸ In 2005, however, the Cambodian government began to actively promote investment in the agricultural sector.⁵⁹ A major component of this strategy is Sub-Decree No. 146 on Economic Land Concessions, “which sets out the criteria, procedures, mechanisms and institutional arrangements for initiating, granting, monitoring and reviewing [Economic

49 Hem Sochet, *Foreign Investment in Agriculture in Cambodia: A Survey of Recent Trends*, INT’L INST. FOR SUSTAINABLE DEV. 2 (2012), available at www.iisd.org/tkn/pdf/foreign_investment_ag_cambodia.pdf.

50 *Id.* at 1.

51 *Id.* at 13.

52 *Id.* at 2.

53 Hill & Menon, *supra* note 12, at 3.

54 Rio+20 Report, *supra* note 36, at 14.

55 Sochet, *supra* note 49, at 4.

56 *Id.*

57 *Id.*

58 *Id.* at 1.

59 *Id.* at 7.

Land Concessions (ELCs)]” under the 2001 Land Law.⁶⁰ An ELC is essentially “a long-term lease that allows the beneficiary to clear land in order to develop industrial agriculture.”⁶¹

According to Article 3 of the Sub-Decree on ELCs, ELCs are intended to, among other things, develop industrial agriculture in Cambodia and provide increased employment opportunities in Cambodia’s rural areas.⁶² In addition to this Sub-Decree, the Cambodian government’s policy of promoting investment in the agricultural sector has included the provision of favorable conditions and tax incentives.⁶³ Taken together, these policies led to a marked increase in foreign investment in the agriculture sector beginning in 2005.⁶⁴ ELCs are essential to foreign investment in agriculture because foreigners cannot own land in Cambodia.⁶⁵ By 2009, foreign investors were granted over a third of all ELCs.⁶⁶ Although there is “a widely acknowledged lack of transparency in the way ELCs are granted, [and] it is difficult to assess exactly how many ELCs have been approved,”⁶⁷ the available data indicates that Chinese companies hold about 20% of ELCs granted to foreign investors, which is by far the most among foreign investors.⁶⁸ The website of Open Development Cambodia keeps some of the most up-to-date information on ELCs in Cambodia, including interactive mapping of ELCs and a database of projects.⁶⁹ Although it is effectively impossible to gather data on all ELCs, the Cambodian League for the Promotion and Defense of Human Rights (LICADHO) has verified and located at least 2.1 million hectares of ELCs, and provides a striking time-lapse map of these ELCs.⁷⁰

Widespread concerns have been expressed both internationally and domestically regarding the adverse environmental and social impacts of ELCs.⁷¹ In 2012, the European Union Delegation to Cambodia reported: “The problem in natural resources management that overshadows all others is the distribution of land, and especially the allocation of nominal state land (mainly forests) to

60 *Id.* at 9.

61 *Economic Land Concessions*, OPEN DEV. CAMBODIA, www.opendevdevelopmentcambodia.net/briefing/economic-land-concessions-elcs/ [hereinafter *Economic Land Concessions*].

62 Sub-Decree on Economic Land Concessions (No. 146 ANK/BK Dec. 27, 2005) (Cambodia), available at www.cambodiainvestment.gov.kh/sub-decree-146-on-economic-land-concessions_051227.html.

63 Sochet, *supra* note 49, at 4.

64 *Id.* at fig.3.

65 *Id.* at 9.

66 *Id.* at 13.

67 *Economic Land Concessions*, *supra* note 61.

68 Sochet, *supra* note 49, at tbl.6.

69 *Economic Land Concessions*, *supra* note 61.

70 *Visualizing Land Concessions over Time*, LICADHO-CAMBODIA.ORG, www.licadho-cambodia.org/concession_timelapse/.

71 *Economic Land Concessions*, *supra* note 61.

concessions for mines or industrial agriculture.”⁷² Forests in concession areas are often cleared wholesale with heavy machinery, which has “glaringly negative environmental consequences for soil erosion and fertility, for surface and groundwater, as well as for biodiversity.”⁷³

Additionally, the clearing of forests is “regularly associated with involuntary or forced resettlement” of local communities, threatening social stability.⁷⁴ The Cambodian Ministry of Environment and the United Nations Development Program reported in 2001 that “land conflict is a persistent feature of rural Cambodia.”⁷⁵ Indigenous minority communities are often adversely affected by ELCs, “losing access to spirit forests and areas they have traditionally used for agriculture, and losing resin trees that they have harvested for many years.”⁷⁶ For example, in October 2014 over 250 ethnic Bunong families from Mondolkiri province petitioned Prime Minister Hun Sen seeking to cancel a 728-hectare rubber plantation concession based on allegations that the company had cleared hundreds of hectares of sacred forests and resin trees outside the designated concession area.⁷⁷ The situation has gotten so precarious that it has been described as “anarchic.”⁷⁸ Indeed, possessing an ELC does not even appear to guarantee an exclusive right to use of the land. In April 2012 the European Union Delegation to Cambodia noted that “land grabbing” for ELCs “has reportedly reach levels where the original holder of an ELC cannot be sure not to be overpowered by ‘bigger fish’ and lose the ELC.”⁷⁹

In another striking example of the problems posed by ELCs, the *Phnom Penh Post* reported in November 2014 that former residents of two villages in Koh Kong province are preparing a complaint to submit to Prime Minister Hun Sen regarding the razing of their homes by security guards for a Chinese company.⁸⁰ The company, Union Development Group, was granted the concession to construct a “sprawling \$3.8 billion beachside tourist development” inside Botum

72 European Union Delegation to Cambodia, *supra* note I3, at 3.

73 *Id.* at 4.

74 *Id.*

75 *Building Resilience: The Future for Rural Livelihoods in the Face of Climate Change: Cambodia Human Development Report*, U.N. DEV. PROGRAMME 40 (2011), available at http://hdr.undp.org/sites/default/files/cambodia_2011_nhdr.pdf [hereinafter *Human Development Report*].

76 *Economic Land Concessions*, *supra* note 61.

77 Aun Pheap, *Mondolkiri Villagers Seek Cancellation of Rubber Concession*, *CAMBODIA DAILY*, Oct. 31, 2014, available at www.cambodiadaily.com/news/mondolkiri-villagers-seek-cancellation-of-rubber-concession-71463/.

78 *Human Development Report*, *supra* note 75, at 40.

79 European Union Delegation to Cambodia, *supra* note I3, at 8.

80 Taing Vida, *Evictees Prepping Complaint*, *PHNOM PENH POST*, Nov. 17, 2014, available at <http://phnompenhpost.com/national/evictees-prepping-complaint>.

Sakor National Park.⁸¹ The security guards allegedly attacked the villagers with stones, axes, and knives,⁸² and were armed with AK-47s.⁸³ The company evicted over 1,000 families that “supported themselves on the land by farming and fishing.”⁸⁴ Although \$10 million out of the \$3.8-billion project was allocated for relocation and compensation,⁸⁵ the villagers were forced to a site 20 km inland with no access to water or electricity.⁸⁶

Examples such as these highlight the problems identified by the International Institute for Sustainable Development of a “lack of communication between companies, local authorities, and local communities.”⁸⁷ In many instances, local residents do not even receive notice that their land will be cleared,⁸⁸ let alone notice that an ELC is under consideration in the first place. When they are forced to resettle or have land taken from them, the compensation is often inadequate. On top of that, the companies often exceed the boundaries of their ELCs and take additional land and resources without providing any compensation. In April 2014 it was estimated that such land disputes have adversely impacted around half a million people around Cambodia.⁸⁹

In an attempt to address some of these widespread issues, the Cambodian government announced in May 2012 that it would suspend granting new ELCs, and one month later Prime Minister Hun Sen initiated a campaign to issue land titles to people living on state land in order afford them a greater level of security in living on and using the land.⁹⁰ Nevertheless, “new disputes have continued to be reported.”⁹¹ In July 2014, the MOE announced a new initiative to “begin assessing existing and proposed [ELCs], cancelling or rejecting those that have negative social or environmental impacts.”⁹² The MOE will form a working group to oversee ELCs that will, among other things, offer advice on developing EIAs for

81 Hul Reaksmey, *UDG Guards Again Accused of Violent Evictions*, CAMBODIA DAILY, Nov. 3, 2014, available at www.cambodiadaily.com/news/udg-guards-again-accused-of-violent-evictions-71628/.

82 Vida, *supra* note 80.

83 Reaksmey, *supra* note 81.

84 *Id.*

85 Vida, *supra* note 80.

86 Reaksmey, *supra* note 81.

87 Socheth, *supra* note 49, at 12.

88 *Id.*

89 May Titthara, *Tougher ELC Oversight Pledged*, PHNOM PENH POST, July 30, 2014, available at www.phnompenhpost.com/national/tougher-etc-oversight-pledged.

90 *Economic Land Concessions*, *supra* note 61.

91 Titthara, *supra* note 89.

92 *Id.* In October 2014, Environment Minister Say Sam Al announced the cancellation of ELCs comprising 62,000 hectares held by II companies “because they ha[d] failed to develop the land or adversely affected villagers living there.” Chhay Channyda, *Another 11 Land Concessions Cancelled*, PHNOM PENH POST, Oct. 18, 2014, available at www.phnompenhpost.com/post-weekend/another-11-land-concessions-cancelled.

proposed projects.⁹³ However, according to a representative from the rights group Adhoc, unless the MOE's review process itself is transparent and involves the affected public, its effectiveness in reducing land disputes may be very limited.⁹⁴

While certainly not a panacea, if enforced, a robust EIA law could go a long way toward ameliorating some of these problems. By conducting a transparent review process, disclosing information about the proposed concessions early and often, and involving affected communities, a strong EIA law would reduce the risk of social instability and could even lead to cooperation among communities and project developers. Moreover, strong EIA reviews would anticipate potentially adverse impacts of forest clearing, soil degradation and loss, and other potential impacts early in the process and identify measures to mitigate and manage these impacts.

2.2.2. *Hydropower.*

Since 2007, Cambodia's overall energy consumption has outpaced domestic production.⁹⁵ As a result, Cambodia imports up to 60% of the energy it consumes and has some of the highest electricity prices in the region.⁹⁶ Moreover, almost 90% of Cambodia's domestic power plants use imported light diesel and heavy fuel oil to produce energy.⁹⁷ Since these fuels are expensive and unreliable, Cambodia is "increasingly turning to hydropower as the key to break free from its developmental constraints."⁹⁸ As of 2009, only 4% of Cambodia's electricity was produced by hydropower.⁹⁹ However, "aggressive development of hydroelectric potential in the Great Mekong Sub-region"¹⁰⁰ aims to increase hydroelectric power "to account for 77% of Cambodia's total electric generating capacity by 2030."¹⁰¹ To reach this goal, Cambodia plans to construct 10 dams between 2010

93 Titthara, *supra* note 89.

94 *Id.*

95 Catherine Beck, *The Push and Pull for Hydropower in Vietnam and Cambodia*, WILSON CTR. 4 (Jan. 15, 2014), available at www.wilsoncenter.org/publication/the-push-and-pull-for-hydropower-vietnam-and-cambodia.

96 Sim Vireak, *Cambodia's Hydroelectric Question: China Power and the Environment*, THE DIPLOMAT, July 30, 2014, <http://thediplomat.com/2014/07/cambodias-hydroelectric-question-china-power-and-the-environment/>.

97 Beck, *supra* note 95, at 4.

98 *Id.*; see also Neou Vannarin, *Hun Sen Says Hydropower Is the Key to Stable Electricity Prices*, CAMBODIA DAILY, Feb. 25, 2013, available at <http://sahrika.files.wordpress.com/2013/02/english13.jpg>.

99 Beck, *supra* note 95, at 4.

100 THE INSTITUTE OF ENERGY ECONOMICS, THE 3RD ASEAN ENERGY OUTLOOK 22 (Feb. 2011), available at <http://aseanenergy.org/media/filemanager/2012/06/14/t/3/t3aeo-complete-outlook.pdf>.

101 *Chinese Investments Play Large Role in Southeast Asia Hydroelectric Growth*, U.S. ENERGY INFO. ADMIN. (Aug. 16, 2013), www.eia.gov/todayinenergy/detail.cfm?id=12571 [hereinafter U.S. ENERGY INFORMATION ADMINISTRATION].

and 2019, which will “add[] 2,045 [megawatts] of capacity.”¹⁰²

A 2003 National Sector Review for Hydropower found 60 potential sites for hydropower development.¹⁰³ Out of the total potential of 10 gigawatts from these sites, “50% is located on the mainstream Mekong, 40% on its tributaries, and 10% in the southwestern part of the country.”¹⁰⁴ Investors and donors such as the World Bank, the ADB, and Western donors have been hesitant to provide funding for Cambodia’s planned dams largely due to concerns over environmental and social impacts and economic feasibility.¹⁰⁵ Instead, such donors and investors have chosen “to handle less sensitive projects such as electricity transmission and distribution systems.”¹⁰⁶ In the mid-2000s, however, China began providing financing for hydropower projects.¹⁰⁷ To date, “Chinese companies have invested over 1.6 billion US dollars to construct six hydroelectric dams with a total capacity of 928 megawatts in Cambodia.”¹⁰⁸ Four of these dams have been completed and the remaining two are expected to be completed in 2015.¹⁰⁹

The potentially enormous adverse environmental and social impacts of large-scale hydropower generating stations are well known.¹¹⁰ They can “destroy livelihoods and food security, exacerbate poverty and lead to human rights violations.”¹¹¹ In addition to the obvious impacts of submerging large tracts of land underwater, large-scale hydropower dams can severely reduce soil fertility by impeding sediment flows, disrupt the seasonal flow fluctuations of the Mekong basin that so many farmers and fishermen have come to depend on, and adversely impact fish migration patterns.¹¹² Indeed, in April 2014 Vietnam’s Prime Minister made a plea for a halt to dam construction on the Mekong mainstream due to the increased salinity of the Delta resulting from reduced water and sediment flows.¹¹³

In 2005, Cambodia issued an approval for its first major hydropower dam, the Kamchay Dam, to China’s Sinahydro Corporation, and construction was

102 *Id.*

103 Mark Grimdsitch, *China’s Investments in Hydropower in the Mekong Region: The Kamchay Hydropower Dam, Kampot*, 4 BANK INFO. CTR. (Jan. 2012), available at www.bicusa.org/en/Document.I02893.pdf.

104 *Id.*

105 *Id.* at 6.

106 Vireak, *supra* note 96.

107 U.S. ENERGY INFORMATION ADMINISTRATION, *supra* note 101.

108 Vireak, *supra* note 96.

109 *Id.*

110 See generally Dam Problems – Environmental Impacts, WWF GLOBAL, available at wwf.panda.org/what_we_do/footprint/water/dams_initiative/problems/environmental/.

111 Simon Marks, *Chinese Dam Project in Cambodia Raises Environmental Concerns*, N.Y. TIMES, Jan. 16, 2012, available at www.nytimes.com/2012/01/17/business/global/17iht-rbog-cam17.html?pagewanted=all&_r=0.

112 See, e.g., Beck, *supra* note 95, at 2-3.

113 Kraisaak Choonhavan, *Vietnam Screams for Halt to Mekong Dams as Delta Salts Up*, THE NATION, Apr. 30, 2014, available at www.nationmultimedia.com/opinion/Vietnam-screams-for-halt-to-Mekong-dams-as-delta-s-30232520.html.

completed in 2011.¹¹⁴ The Kamchay Dam submerged over 2,000 hectares of the Bokor National Park, “home to a number of endangered species and an important resource to local communities.”¹¹⁵ The international non-government organization (NGO) International Rivers reported that the EIA for the dam was completed in 2011 “only months before the dam became fully operational,” seriously calling into question the EIA’s utility as a planning tool for sustainable development and management of natural resources.¹¹⁶ Field research on the Kamchay Dam conducted by World Resources Institute found that “community awareness of the project was quite low” even four years into construction.¹¹⁷

More recently, conflict arose over the construction of the Lower Sesan II Dam. Cambodia approved the 400-megawatt, \$781-million-dollar project in 2012¹¹⁸ after an EIA was completed in 2010.¹¹⁹ The government “acknowledge[s] that the dam would impact the environment, but assure[s] lawmakers that studies would be done ahead of its construction.”¹²⁰ Estimates show that 5,000 ethnic minorities will be displaced to clear the dam’s 130-acre reservoir.¹²¹ The number of people affected by the dam increases to hundreds of thousands when considering “those whose livelihoods rely on fishing, farming in floodplains and other activities linked to the Mekong River.”¹²² Other studies show that fish stocks in the Mekong Basin could drop almost 10% as a result of the dam’s construction.¹²³ The 2010 EIA has been widely criticized for failing to meet Cambodian and international standards,¹²⁴ including for vastly underestimating the impacts on local culture and livelihoods and for a wholly inadequate public consultation process.¹²⁵ More recently, International Rivers has reported that Hydrolancang, the Chinese company constructing the dam, has “redesigned the Lower Sesan 2 Dam with

114 Cambodia, INT’L RIVERS, available at www.internationalrivers.org/campaigns/cambodia.

115 *Id.*

116 *Id.*

117 Grimsditch, *supra* note 103, at 27.

118 *Fact Sheet: Lower Sesan 2 Hydropower Project, Northeastern Cambodia*, INT’L RIVERS (Aug. 5, 2013), www.internationalrivers.org/files/attached-files/lower_sesan_2_factsheet_english.pdf; but see *Lower Sesan 2 Dam*, INT’L RIVERS, available at www.internationalrivers.org/campaigns/lower-sesan-2-dam [hereinafter *Lower Sesan 2 Dam*] (noting that the project cost is upward of \$816 million).

119 Joshua Lipes, *Cambodia’s Parliament OKs Dam Compensation Plan*, RADIO FREE ASIA, June 19, 2014, www.rfa.org/english/news/cambodia/dam-06192014195419.html.

120 *Id.*

121 Coco Liu, *China-led Hydropower Project Faces Resistance in Cambodia*, E & E PUBL’G, June 10, 2014, www.eenews.net/climatewire/stories/1060000986/print.

122 *Id.*

123 Lipes, *supra* note 119.

124 River Coalition of Cambodia, *Proposed Lower Sesan 2 Dam, Cambodia Fails to Uphold Best Practice*, INT’L RIVERS (Aug. 19, 2009), available at www.internationalrivers.org/resources/proposed-lower-sesan-2-dam-cambodia-fails-to-uphold-best-practice-3787 [hereinafter *River Coalition of Cambodia*].

125 *Id.*

significant changes towards structure and the height of the dam.”¹²⁶ As a result, a number of NGOs have called on the Cambodian government to “halt the dam’s construction, put the new design into the public domain, while also carrying out a new [EIA], which also considers transboundary impacts, before a decision is made over whether construction should proceed.”¹²⁷

If ultimately adopted by the National Assembly, Cambodia’s Draft EIA Law will represent a major step toward solving some of these problems. In addition to the common issues related to underestimation of impacts and public participation processes, the Draft EIA Law’s clear mandate to prohibit any construction activities until *after* an EIA has been approved will help to ensure that EIAs actually begin to serve their purpose as tools to anticipate impacts and promote sustainable development, rather than mere justifications for predetermined outcomes.¹²⁸ Moreover, due to the interconnectedness of the Mekong region countries and their dependence on the Mekong River and its invaluable resources, the Draft EIA Law’s transboundary EIA requirements,¹²⁹ if adopted, will help ensure that development of hydropower in the region does not threaten the continued viability of these resources.

2.2.3. Mining

Although Cambodia is rich in mineral resources such as gold, iron, bauxite, manganese, silica sand, limestone, rubies, coal, and construction materials,¹³⁰ the development of Cambodia’s mining sector “lags far behind its neighbors” due to “[y]ears of civil war, the presence of land mines and unexploded ordnance, inadequate infrastructure and other issues.”¹³¹ There are some active “small-scale quarries” that are producing construction materials, but “[t]o date there has been no industrial scale extraction of precious minerals” in Cambodia.¹³² This situation is beginning to change, however, and the Cambodian government seems optimistic that investments in mineral resource extraction will become a significant source of

126 See *Lower Sesan 2 Dam*, *supra* note 118.

127 *Id.*

128 See *infra* note 161.

129 See *infra* notes 224-32.

130 MINISTRY OF INDUSTRY, MINES AND ENERGY, CURRENT SITUATION OF MINING INDUSTRY IN CAMBODIA, I (Mar. 6, 2013), available at http://mric.jogmec.go.jp/public/kouenkai/2013-03/briefing_I30315_02b.pdf [hereinafter *MINING INDUSTRY*].

131 *Cambodian Mining Sector*, OPEN DEV. CAMBODIA (Aug. 2014), www.opendevdevelopmentcambodia.net/briefing/mining-licenses/ [hereinafter *Cambodian Mining Sector*]; see also Kate M. Lazarus, *In Search of Aluminum: China’s Role in the Mekong Region*, INT’L INST. FOR SUSTAINABLE DEV. 2 (2009), available at www.iisd.org/sites/default/files/pdf/in_search_of_aluminum.pdf.

132 *Cambodian Mining Sector*, *supra* note 131.

revenue for the country in the next few years.¹³³ Indeed, in March 2013 the Ministry of Industry Mines and Energy reported that as of that date it had licensed “around 91 companies” to conduct 139 mineral exploration projects, and that 17 of those were confirmed positive for the presence of exploitable minerals.¹³⁴ Additionally, 13 of those 91 companies (five from China, five from Thailand, and three domestic companies) had been licensed to begin conducting mining projects for gold, iron, coal, limestone, and phosphate.¹³⁵

Large-scale, industrial development of Cambodia’s mineral resources, while certainly a potential source of revenue for the country, is also “an inherently disruptive enterprise which poses potential threats to the integrity of the environment and to the well-being of local communities.”¹³⁶ A large portion of Cambodia’s mineral resources reportedly lies within the northeastern provinces of Monduliri, Ratanakiri, and Kratie, which are “home to diverse ecosystems and extremely sensitive biodiversity.”¹³⁷ Reportedly, as of 2008, 22% of protected wildlife sanctuaries and forests in Monduliri province were in fact covered by mining concessions.¹³⁸ There are also reports that the biologically diverse and sensitive Cardamom Mountains in the southwest of Cambodia hold valuable deposits of titanium,¹³⁹ but the 2011 cancellation of a planned titanium mine due to “concerns of the impact on the environment, biodiversity, and local livelihoods” offered an encouraging sign that economic development may not always take precedence over social and environmental protection.¹⁴⁰

There is widespread concern among communities and civil society in Cambodia with regard to the “secretive manner” in which mining deals are made.¹⁴¹ This is due in large part to the fact that Cambodia’s legal framework for mining is “still largely undeveloped” and “in need of modernizing if it is to cope with expansion of the industrial mining sector.”¹⁴² Indeed, secrecy and lack of transparen-

133 *After Long Wait, Cambodia Opens to Mining*, VOICE OF AMERICA: KHMER, Mar. 18, 2010, www.voacambodia.com/content/a-40-2010-03-18-voa7-90235907/1358202.html.

134 MINING INDUSTRY, *supra* note 130, at 2.

135 *Id.*

136 *The Expansion of Mining Activities and Indigenous Peoples’ Rights in Monduliri Province*, COOPERATION COMM. FOR CAMBODIA 7 (Oct. 2010), http://www.ccc-cambodia.org/downloads/research-report/Round20_Mining_Study_Final_Report_Oct2010_Revised_En.pdf.

137 *Cambodian Mining Sector*, *supra* note 131.

138 *Id.* (quoting *Forests, Plantations, and Concessions*, in NGO Position Papers on Cambodia Development in 2007-08: Monitoring the Implementation of 2007 CDCF Joint Monitoring Indicators and the National Strategic Development Plan 2006-10, Phnom Penh, Nov. 2008).

139 European Union Delegation to Cambodia, *supra* note 13, at 17.

140 *Cambodia Mining Sector*, *supra* note 131 (quoting Jeremy Hance, *Cambodian Prime Minister Cancels Titanium Mine Project Citing Impact on Biodiversity and Local People*, MONGABAY.COM, Apr. 11, 2011, http://news.mongabay.com/2011/0410-hance_titanium_cambodia.html#sthash.kHfqV6cy.dpbs).

141 *Cambodian Mining Sector*, *supra* at 131.

142 *Id.*

cy are actually built into Cambodia's Law on Mineral Resource Management and Exploration (Mining Law), which explicitly guarantees the confidentiality of all "application forms, reports, plans and notices."¹⁴³ Although the law nominally requires all mining license holders to conduct an environmental impact study, it also states that it is up to the discretion of the Minister of Industry Mines and Energy whether to release, after notification to the license holder, "information related to environmental and social issues."¹⁴⁴ The EIA Sub-Decree, on the other hand, ostensibly requires the release of such information. It thus appears that there are some contradictions with regard to the legal framework for public participation and information disclosure in the mining sector. Cambodia's Draft EIA Law, as detailed below, would go a long way toward clearing up some of these contradictions and putting the development of its mining sector on a more sustainable path.

3. CAMBODIA'S DRAFT ENVIRONMENTAL IMPACT ASSESSMENT LAW

Until the draft EIA law is finalized and enacted, the requirements and procedures for EIA as laid out in the 1996 Law on Environmental Protection and Natural Resource Management (LEP),¹⁴⁵ the 1999 Anukret on Environmental Impact Assessment Process (EIA Sub-Decree),¹⁴⁶ and the 2009 Prakas on General Guidelines for Initial and Final Environmental Impact Assessment Reports¹⁴⁷ still apply. Generally speaking, the current EIA process requires project proponents to submit an Initial Environmental Impact Assessment (IEIA) to the MOE for review, after which the MOE may determine that a full EIA report is required if it concludes that the project may "have serious impact to the natural resources, ecosystem, health or public welfare."¹⁴⁸ The current EIA law also provides for public participation and gives some monitoring authority to the MOE. However, as detailed below, Cambodia's current EIA process is simply not a sufficient tool to steer Cambodia toward a sustainable development path.

This section of the article will describe some features of the fifth draft of the

143 Kingdom of Cambodia, Law on Mineral Resource Management and Exploitation, Preah Reach Kram NS/RKM/0701/09, art. 19 (July 13, 2001), available at http://www.opendevdevelopmentcambodia.net/download/law/Law%20on%20Mineral%20Resource%20Management%20and%20Exploitation_May_30_2001_Eng.pdf.

144 *Id.*, art. 20.

145 Law on Environmental Protection and Natural Resource Management (Preah Reach Kram NS/RKM/I296/06 Dec. 24, 1996) (Cambodia), available at www.opendevdevelopmentcambodia.net/laws_and_regulations/environment-land-and-nrm-laws/?post_type=law [hereinafter Law on Environmental Protection].

146 EIA Sub-Decree, *supra* note 17.

147 *Environmental Law and EIAs*, *supra* note 25.

148 EIA Sub-Decree, *supra* note 17, art. 8.

new EIA law and assess how they offer improvements over the current regime on the following issues: clarity with regard to institutional authorities and responsibilities; public participation and information disclosure; requirements regarding impacts to be considered; and monitoring and enforcement.

3.I. Clarity with Regard to Institutional Authority and EIA Process

Cambodia's Draft EIA Law remedies some of the ambiguities and deficiencies of the current EIA regime with respect to the MOE's authority and the overall review process. This is a crucial element of the Draft EIA Law because the effective implementation of EIA in Cambodia has been hampered by, among other things, "a lack of awareness (or concern) from a number of important ministries about the importance of the EIA process."¹⁴⁹ According to Sam Chamroeun, then Director of the Department of Environmental Planning and Legal Affairs at the MOE, "The significance of EIAs is not fully recognized by . . . many of the government ministries responsible for infrastructure or industrial and agricultural development."¹⁵⁰ Moreover, in general the MOE "is a relatively powerless agency in natural resource matters, especially when compared with the Ministry of Agriculture, Forestry, and Fisheries."¹⁵¹ As explained below, the Draft EIA Law will help to solve this problem by clarifying the overall process and greatly enhancing the MOE's authority with respect to EIA implementation and approval.

The current EIA Sub-Decree requires the project proponent to submit a copy of the IEIA or EIA report to the MOE and the "Project Approval Institution" simultaneously.¹⁵² However, the Sub-Decree does not explicitly give the MOE authority to approve or reject the EIA document. Instead, the MOE is authorized only to review the EIA document and provide its "findings and recommendations" to the project proponent and the project approval institution.¹⁵³ If the MOE fails to do so within thirty days, the project approval institution can assume that the EIA report complies with all of the requirements of the Sub-decree and may move ahead with the project.¹⁵⁴ If the MOE does provide findings and recommendations to the project approval institution, the project approval institution is only required to "consider" them prior to approving the project.¹⁵⁵ Given the inherent resource and capacity limitations that developing countries such as Cambodia face, deeming EIA reports approved *unless* the MOE reviews and comments on them within thir-

149 Grimsditch, *supra* note 103, at 36.

150 *Id.*

151 Li, *supra* note 10, at 12.

152 EIA Sub-Decree, *supra* note 17, art. 14.

153 *Id.*, art. 15.

154 *Id.*

155 *Id.*, art. 4.

ty days presents the risk that project sponsors will take advantage of such capacity limitations and draft inadequate EIAs that fail to account for the potential environmental and social impacts. This, of course, would defeat the purpose of an EIA regime to promote sustainable development.

The EIA Sub-Decree's lack of clarity with respect to both the MOE's authority to approve EIA reports and the project approval institution's obligation to follow the "findings and recommendations" of the MOE, seriously calls the entire EIA process into question. One case is illustrative in this regard. In 2000, the Ministry of Agriculture, Forestry, and Fisheries (MAFF) received an application for a 300,000-hectare land concession from a Cambodian company, Pheapimex Fuchan Cambodia Co., Ltd, that planned to contract with a Chinese investor to cultivate eucalyptus trees and build a paper factory.¹⁵⁶ The Minister of the provincial office of the MAFF concluded that allowing commercial scale agriculture would actually benefit the area in question because of "overexploitation by unauthorized parties and the government's inability to invest the capital and technology required to instill proper management."¹⁵⁷ On the other hand, the reviewing MOE inspectors recommended refusing the project because of its potential adverse impacts on the environment.¹⁵⁸ Thus, it appears that MOE's review of potential environmental impacts and subsequent recommendations did not actually influence the ultimate outcome in this case, rendering the EIA process meaningless.

The Draft EIA Law eliminates this problem by placing authority to review and issue approvals for EIA documents squarely in the hands of the MOE.¹⁵⁹ It also establishes a new "EIA Unit" within the MOE for overall implementation and enforcement of the EIA law, including review and approval of EIA documents.¹⁶⁰ Importantly, the law also states explicitly, for the first time, that project proponents may not engage in any pre-construction or construction activities until they have obtained an EIA Approval Certificate from the MOE.¹⁶¹ This requirement will address the problem exemplified by the Kamchay Dam described above, where the project's EIA was not approved until some four years *after* construction had begun.¹⁶² Moreover, the draft law removes the provision in the EIA Sub-decree stating that if the MOE does not provide comments or otherwise respond to the project

156 Andy Weiner, *The Forest and the Trees: Sustainable Development and Human Rights in the Context of Cambodia*, 151 U. PA. L. REV. 1543, 1546-47 (2003).

157 *Id.* at 1548.

158 *Id.* at 1581.

159 Draft EIA Law, *supra* note 27, arts. 17 & 22.

160 *Id.*, arts. 8-12.

161 *Id.*, art. 23. Additionally, EIA Approval Certificates are made valid for five years, after which they may be renewed. *Id.*

162 Grimsditch, *supra* note 103, at 37.

proponent's EIA documents within thirty days, then the EIA documents are deemed to be in accordance with the EIA law.¹⁶³ Instead, the Draft EIA Law gives the MOE sixty days to review an Initial Environmental Examination (IEE)¹⁶⁴ and ninety days to review full EIA reports.¹⁶⁵ Therefore, the Draft EIA Law makes clear both that projects may not begin construction until EIA documentation (including Environmental Management Plan and/or Environmental Protection Agreement) is approved, and that the MOE is the institution with authority to grant such approval.

Additionally, under the Draft EIA Law, full EIA reports are required to undergo an additional level of review by an Expert Review Committee.¹⁶⁶ The Expert Review Committee must consist of individuals with "appropriate qualifications and experience" from the MOE, other relevant government ministries, and local and/or international independent experts.¹⁶⁷ The Committee would be established on a project-by-project basis with its members reimbursed by the project proponent.¹⁶⁸ This Committee would seem to have considerable power: The MOE may not issue an EIA Approval Certificate until it has received written comments from "all members" of the Committee¹⁶⁹; the Committee may impose conditions on the EIA Approval Certificate, which are then binding on the project proponent¹⁷⁰; and it is an actionable offense for the MOE to grant an EIA Approval Certificate without taking into consideration the recommendation of the Committee or without having the necessary document(s).¹⁷¹

3.2. Public Participation and Information Disclosure

Public participation is "a cornerstone of the EIA process."¹⁷² Among other benefits, strong public involvement in the EIA process "encourages the preparation of robust and defensible EIA studies and reports" and "promotes equitable and informed choice, leading toward better and more acceptable social and environmental outcomes."¹⁷³ Cambodia's Draft EIA Law very prominently promotes pub-

163 EIA Sub-Decree, *supra* note 17, art. 18.

164 The 1999 EIA Sub-Decree referred to the first level of review as an Initial Environmental Impact Assessment (IEIA), whereas the Draft EIA Law refers to it as an Initial Environmental Examination (IEE).

165 Draft EIA Law, *supra* note 27, arts. 17 & 22.

166 *Id.*, art. 21.

167 *Id.*

168 *Id.*

169 *Id.*, art. 23.

170 *Id.*

171 *Id.*, art. 76.

172 UNITED NATIONS ENV'T PROGRAMME, ENVIRONMENTAL IMPACT ASSESSMENT AND STRATEGIC ENVIRONMENTAL ASSESSMENT: TOWARDS AN INTEGRATED APPROACH, at 28 (2004), available at www.unep.ch/etu/publications/textONUbr.pdf [hereinafter United Nations Env't Programme].

173 *Id.*

lic participation and information disclosure as an integral component of the EIA process, and offers a significant improvement over the previous requirements. The 1996 LEP only requires the MOE to “encourage participation of the public in the environmental protection and natural resource management,”¹⁷⁴ which, according to one scholar, “is basically a meaningless statement.”¹⁷⁵ Likewise, the 1999 EIA Sub-Decree states that one of its objectives is to “encourage public participation in the implementation of [the] EIA process and take into account . . . their conceptual input and suggestion[s] for re-consideration prior to the implementation of any project,”¹⁷⁶ but is silent with regard to specific procedures required to make this happen. Both the LEP and the EIA Sub-Decree are similarly deficient with regard to procedures and requirements for information disclosure.

In contrast, the Draft EIA Law explicitly requires both public participation and information disclosure at all stages of the EIA process. One of the main objectives of the law, as stated in Article 2, is to “promote public participation and information disclosure.”¹⁷⁷ Article 7 reinforces the Cambodian peoples’ Constitutional right to “participate actively in the political, economic, social and cultural life of the nation”¹⁷⁸ by emphasizing that “[n]atural persons, legal entities, civil society, and project-affected people have the *right* to receive information and participate in the EIA process.”¹⁷⁹

To operationalize this right, the Draft EIA Law explicitly requires public participation during the project-planning phase prior to the submission of the IEE or EIA report to the MOE for review and during the EIA review stage, and implicitly requires it in post-construction project monitoring.¹⁸⁰ The Draft EIA Law places the obligation on the project proponent to include “public involvement and consultation” at the project planning phase in order to: “identify areas of cultural and social significance; collect opinions of stakeholders and integrate such opinions into the decision making process; review the project proposal and explain social and environmental impacts; [and] consider a wider range of alternatives and mitigation measures.”¹⁸¹ The project proponent is also obligated to ensure that the public receives information about the project “in Khmer” and is “given the opportu-

174 Law on Environmental Protection, *supra* note 145, art. 1.

175 QI GAO, A PROCEDURAL FRAMEWORK FOR TRANSBOUNDARY WATER MANAGEMENT IN THE MEKONG RIVER BASIN 212 (2014).

176 EIA Sub-Decree, *supra* note 17, art. 1.

177 Draft EIA Law, *supra* note 27, art. 2.

178 THE CONSTITUTION OF THE KINGDOM OF CAMBODIA art. 35 (Sept. 21, 1993), available at http://cambodia.ohchr.org/klc_pages/KLC_files/section_001/section_01_01_ENG.pdf [hereinafter CONSTITUTION].

179 Draft EIA Law, *supra* note 27, art. 7 (emphasis added).

180 *Id.*, art. 30.

181 *Id.*

nity to fully participate in public consultation meetings.”¹⁸² Such meetings must be arranged by the project proponent, in consultation “with the MOE and relevant ministries, institutions, local authority, civil society, community representatives and project-affected people in the EIA process.”¹⁸³ Additionally, for projects involving the resettlement of affected populations, such as the Lower Sesan II Dam project described above, it is the project proponent’s responsibility to “ensure that project affected persons are involved in any resettlement planning to minimize the adverse effects of resettlement.”¹⁸⁴ The Draft EIA Law requires the MOE to issue a sub-decree stipulating the “procedure of resettlement and solution of compensation to the affected/impacted community.”¹⁸⁵

A novel and progressive feature of the Draft EIA Law is the requirement that the project proponent proactively “identify measures to improve the livelihood and assist project affected persons” and to gain the “consent of project-affected communities to the proposed mitigation measures [] based on the free, prior, and informed consent principle (FPIC).”¹⁸⁶ What this means is that the project proponent must present its proposed mitigation measures to the project-affected community *before* the IEE or EIA is submitted to the MOE for review, allowing “sufficient time” for consideration.¹⁸⁷ The project-affected community must then be given the opportunity to “approve the proposed mitigation measures without pressure or coercion from any natural person or legal entity.”¹⁸⁸ Although the law is silent with regard to the timeline along which public participation during the project planning phase must occur, this is to be addressed in the “further Guidelines for procedures for public participation and access to information” that the Draft EIA Law requires the MOE to issue.¹⁸⁹

Although the current version of the draft law clearly requires public participation at the project planning phase for both IEEs and EIA reports, it only requires project proponents conducting an EIA report to “record the public participation” and to include in their EIA report “the details of the public impact and whether those concerns are accepted or rejected.”¹⁹⁰ Additionally, if any public concerns are rejected, the project proponent must “provide the clear reasons why those concerns are rejected in the EIA report.”¹⁹¹ The EIA report must also “focus on the issues

182 *Id.*
183 *Id.*
184 *Id.*, art. 32
185 *Id.*
186 *Id.*
187 *Id.* Annexure I.
188 *Id.*
189 *Id.*, art. 33.
190 *Id.*, art. 31.
191 *Id.*

raised by women and those most vulnerable potentially impacted by the proposed project.”¹⁹² While this arrangement is certainly an improvement over Cambodia’s current EIA requirements, it would be optimal for the Draft EIA Law to require the project proponent to record and respond to public concerns and comments in the preparation of an IEE as well as a full EIA report.

During the IEE or EIA report review stage, it is the MOE’s responsibility to “ensure a fair hearing process to enable public involvement.”¹⁹³ The MOE must “invite relevant ministries/institutions, civil society and impacted persons to attend such hearings and provide comments to the proposed project.”¹⁹⁴ Although the Draft Law does not provide any more specificity on public participation during the review stage, this is to be addressed in a subsequent Prakas of the MOE.¹⁹⁵ With regard to information disclosure, the MOE must make an IEE or EIA report publicly available once it is received from the project proponent, including on a website accessible to the public.¹⁹⁶ The MOE must also ensure that “stakeholders and project-affected communities have access to clear and sufficient information.”¹⁹⁷ Decisions of the MOE to accept or reject an IEE or EIA report, including any “conditions or reasons as the case may be,” must be made “available to the public both on its website and by publication in a regional or national newspaper.”¹⁹⁸ Additionally, the MOE must make publically available any EIA Approval Certificates and associated Environmental Management Plans that it issues on its website.¹⁹⁹

Finally, while the Draft EIA Law does not explicitly state that the public has a right to participate in post-construction project monitoring, it implies as much by stating that public participation during the project monitoring stage will be stipulated in a subsequent Prakas.²⁰⁰ The Draft Law does require the project developer to prepare annual environmental reports after construction; the developer must provide the annual reports “to the public on request, without charge.”²⁰¹ The project developer must also provide electronic copies of its annual reports to be placed both on an MOE website and a publicly accessible website made by the developer.²⁰²

192 *Id.*

193 *Id.*, arts. 17 & 22.

194 *Id.*

195 *Id.*, art. 30.

196 *Id.*, art. 33.

197 *Id.*

198 *Id.*, arts. 17 & 22.

199 *Id.*, art. 23.

200 *Id.*, art. 30.

201 *Id.*, art. 39.

202 *Id.*

3.3. Requirements Regarding Impacts and Issues to Be Considered in an EIA

In order for an EIA to be an effective tool for planning and achieving sustainable development, it must include consideration of the full spectrum of potential project-related impacts.²⁰³ Neither the LEP nor the 1999 EIA Sub-Decree provides any guidance or requirements on the specific types of environmental or social impacts that must be considered during the course of an EIA. In 2009, the MOE issued a Prakas on General Guidelines for Initial and Final Environmental Impact Assessment Reports, pursuant to Article IO of the Sub-Decree,²⁰⁴ which attempted to fill this void but is nevertheless insufficient to create a truly robust EIA regime that meets international standards. As explained by Open Development Cambodia, an annex to the Prakas states that the initial EIA is mainly based on already existing and available data on the study area, whereas a full EIA report is “a more detailed study, and is based on primary data gathered in and around the project site.”²⁰⁵ In turn, a full EIA report must contain the following elements: project overview; methodology and scope of study; summary of the relevant framework; full description and action plan; description of existing environmental resources (including physical, ecological and socio-environmental resources); detailed information on the results of public consultation; environmental impact mitigation measures; environmental management plan; economic analysis compared with environmental costs; and conclusions and recommendations.²⁰⁶ However, the current regime’s lack of defined specificity with regard to issues such as alternatives to the proposed action (including the “no action” alternative), indirect and cumulative impact analyses, public health and social impacts, and transboundary impacts has led to a chronic underestimation of proposed projects’ impacts, thereby seriously undermining the entire purpose of an EIA.²⁰⁷

Even though the Draft EIA Law does not provide a general definition of environmental or social impacts,²⁰⁸ it improves on the current regime by explicitly requiring the assessment of specific types of potential impacts and making these requirements applicable to all development projects. To begin with, the Draft Law states that all development projects, business activities, and investment activities “must properly assess the impacts on the environment, economy, society, health, and culture.”²⁰⁹ While other sector-specific laws such as the Law on Mineral Re-

203 See, e.g., UNITED NATIONS ENV’T PROGRAMME, *supra* note 172, at 40.

204 *Environmental Law and EIAs*, *supra* note 25.

205 *Id.*

206 *Id.*

207 See, e.g., River Coalition of Cambodia, *supra* note 124.

208 In contrast, see NEPA’s definition of impacts. 40 C.F.R. § 1508.8.

209 Draft EIA Law, *supra* note 27, art. 6.

source Management and Exploitation²¹⁰ and the Law on Forestry²¹¹ do require social impact assessments, this requirement in the Draft EIA Law would represent the first time that project proponents in all sectors across the board must assess potential impacts on society, health, and culture in addition to the economy and environment.

The Draft EIA Law also specifically requires for the first time the assessment of climate change impacts, cumulative impacts, and health impacts, devoting an entire section to each subject.²¹² Additionally, it requires projects that may have significant transboundary environmental impacts to conduct a transboundary EIA (TbEIA),²¹³ and requires Strategic Environmental Assessments that consider the potential impacts resulting from “policies, programs, and strategic plans of the Royal Government.”²¹⁴ Though the Draft Law states that the “form and content” of IEE reports will be defined in a subsequent Prakas to be issued by the MOE,²¹⁵ it nevertheless obligates IEE projects to consider and assess some of these impacts, as detailed below.

With regard to climate change, all projects for which a full EIA report is being conducted must analyze and assess both the project’s potential contribution to climate change and the project’s vulnerability to the impacts associated with climate change.²¹⁶ The project proponent is responsible for proposing “emergency response planning and technology choices to prepare for climate change impacts” as well as measures to mitigate the project’s contribution to climate change “in order to achieve low-carbon economic development which is a primary target of Green Growth.”²¹⁷ These requirements do not apply to projects undergoing IEE’s. However, both IEE’s and EIA’s must include a calculation of the project’s carbon footprint and must “investigate low GHG energy options and the need to mitigate climate induced changes to water supply.”²¹⁸

210 Law on Mineral Resource Management and Exploitation art. 11(6) (Preah Reach Kram NS/RKM/0701/09 July 13, 2001) (Cambodia), available at www.opendevdevelopmentcambodia.net/download/law/Law%20on%20Mineral%20Resource%20Management%20and%20Exploitation_May_30_2001_Eng.pdf.

211 Law on Forestry, art. 4 (Preah Reach Kram NS/RKM/0802/016 Aug. 31, 2002) (Cambodia), available at www.opendevdevelopmentcambodia.net/download/law/Law%20on%20Forestry_August_31_2002_Eng.pdf.

212 Draft EIA Law, *supra* note 27, arts. 26-29.

213 *Id.*, arts. 42-45.

214 *Id.*, art. 41. The Strategic Environmental Assessment provision in the Draft EIA Law is based on the Protocol on Strategic Environmental Assessment to the Espoo Convention. See Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context, U.N. Doc. ECE/MPEIA/2003/2 (May 21, 2003).

215 Draft EIA Law, *supra* note 27, art. 15.

216 *Id.*, art. 26.

217 *Id.*

218 *Id.*, art. 27.

The terminology used in the current Draft EIA Law does not make it entirely clear whether both IEEs and EIAs require cumulative impact analyses, but it implies that the requirement only applies to full EIA reports.²¹⁹ Under this section, project proponents must “analyze and evaluate the cumulative impact caused by existing and future projects in the surroundings of the Project.”²²⁰ Project proponents must also consider measures to mitigate or offset potential significant cumulative impacts.²²¹

The Draft EIA Law is very clear, however, that both IEEs and EIAs must include health impact assessments (HIA).²²² A project’s HIA must include baseline data on the health of the project-affected population, a description of potential health impacts “due to construction, population influx, and changes to the environment,” proposed mitigation measures to offset or eliminate adverse health impacts, and issues related to health monitoring in both the short and the long term.²²³

Finally, the Draft EIA Law contains a novel provision requiring any project that “has potentially significant trans-boundary environmental impacts” to conduct a TbEIA.²²⁴ In 2010, the International Court of Justice held for the first time that an obligation exists under customary international law to perform a transboundary EIA for any project that may adversely affect the environment of another State.²²⁵ If the Draft EIA Law were adopted, Cambodia would be the first among the Mekong region countries to require a TbEIA under its domestic law. Although Cambodia, Thailand, Laos, and Vietnam are obligated as members of the Mekong River Commission (MRC) to follow the Prior Notification, Prior Consultation, and Agreement (PNPCA) process for projects that may have adverse transboundary impacts on the Mekong,²²⁶ the parties’ refusal to cooperate has thus far rendered the process largely ineffective. For example, despite repeated calls to initiate the PNPCA process with respect to the aforementioned Lower Sesan II Dam, Cambodia’s government has refused.²²⁷ Similarly, the construction of the

219 *Id.*, art. 28.

220 *Id.*

221 *Id.*

222 *Id.*, art. 29.

223 *Id.*

224 *Id.*, art. 42.

225 *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, ¶¶ 204-05 (Apr. 20, 2010), available at www.icj-cij.org/docket/files/135/15877.pdf.

226 *Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin*, art. 5, Cambodia-Lao-Thai-Viet., Apr. 5, 2014, available at www.mrcmekong.org/assets/Publications/policies/agreement-Apr95.pdf.

227 *See, e.g.*, Mekong River Commission, Report: Informal Donor Meeting, ¶ 7 (June 27-28, 2013), available at www.mrcmekong.org/assets/Publications/governance/Report-IDM-2013-Complete-set-final.pdf.

Xayaburi Dam on the mainstream of the Lower Mekong in Laos presented the MRC with its first true test case but the MRC process in this instance was fraught with procedural problems.²²⁸

In its current form, the Draft EIA Law's section on TbeIA contains procedures for notifying neighboring countries when a project may have significant transboundary environmental impacts and for entering into discussions with such countries regarding "procedures and timetables for comments on the proposed project."²²⁹ These procedures are based on the United Nations Economic Commission for Europe's (UNECE) 1991 Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention).²³⁰ The project proponent must propose mitigation measures to reduce transboundary impacts taking into account comments received from "all potentially affected parties," and then must "develop an appropriate EMP to manage the predicted trans-boundary impacts."²³¹ Regarding monitoring, the Draft Law states that involved countries should "mutually determine how best to conduct monitoring...during preparatory groundwork, construction, operation and decommissioning, as relevant to the proposed project and its agreed upon EMP."²³²

3.4. Monitoring and Enforcement

According to the International Association for Impact Assessment's "Principles of Environmental Impact Assessment Best Practice," an effective EIA process must include "follow up" in order to ensure that the conditions in the project's EIA approval are met, monitor the effectiveness of the mitigation measures, and perform environmental audits "to optimize environmental management."²³³ Cambodia's current EIA regime does not adequately address the "follow up" process. The 1999 EIA Sub-Decree places full responsibility with the MOE for monitoring projects and taking "appropriate measures to ensure a Project Sponsor will comply with the Environmental Management Plan (EMP) during

228 See, e.g., Xayaburi Dam, INT'L RIVERS (Apr. 2014), www.internationalrivers.org/campaigns/xayaburi-dam.

229 Draft EIA Law, *supra* note 27, art. 43.

230 United Nations Convention on Environmental Impact Assessment in a Transboundary Context Espoo, Fin., Feb. 25, 1991, 1989 U.N.T.S. 309, https://treaties.un.org/Pages/ShowMTDSGDetails.aspx?src=UNTS&tabid=2&mtsg_no=XXVII-4&chapter=27&lang=en#Participants.

231 Draft EIA Law, *supra* note 27, art. 44.

232 *Id.*, art. 45.

233 *Environmental Impact Assessment Best Practice*, INT'L ASSOC. FOR IMPACT ASSESSMENT (Jan. 1999), available at www.iaia.org/publicdocuments/special-publications/Principles%20of%20IA_web.pdf. Organized in 1980, the International Association for Impact Assessment is "the leading global network on best practice in the use of impact assessment for informed decision making regarding policies, programs, plans, and projects." See www.iaia.org/.

project construction, implementation, and closure.”²³⁴ Additionally, the Sub-Decree empowers the MOE to issue a “stop work order” for projects that have “failed in implementing the [EMP] as approved in the EIA report” and to “report and file a complaint against any Project Sponsor found in violation of provisions of [the Sub-Decree].”²³⁵ The EIA Sub-Decree is otherwise silent with respect to monitoring and enforcement.

The Draft EIA Law builds significantly on the EIA Sub-Decree’s framework, establishing a robust monitoring and reporting system that, if implemented, could greatly strengthen the implementation of EIA in Cambodia. The project proponent would have a clear obligation to ensure effective monitoring and self-reporting.²³⁶ Moreover, to provide clarity on institutional organization and responsibility, the Draft EIA Law stipulates that the EIA Unit to be established within the MOE “has the authority to monitor, check, inspect, investigate, research, advise, and take actions itself or in cooperation with relevant stakeholders on all project and activities.”²³⁷ The EIA Unit may examine environmental management records and documents and require “administrators, employees and agents of development projects and operations to provide all information and/or records related to the environmental management of the Project Proponent.”²³⁸ Additionally, the EIA Unit may enter any premises to exercise its inspection powers and seize documents or other property if necessary to the investigation, including taking samples for environmental examination.²³⁹ It also must meet “Boards of Directors and administrators of the development projects and operations at least once per year in order to assess the implementation of environmental law and other relevant regulations.”²⁴⁰

To enhance the EIA Unit’s ability to perform its functions, all development projects must prepare both quarterly and annual Environmental Monitoring Reports for submission to the EIA Unit, and the annual reports, as mentioned earlier, must be made available to the public on request as well as on the MOE’s website and a website created by the project proponent.²⁴¹ On top of that, all development projects with an EIA Approval Certificate (i.e., those that completed an IEE or EIA)²⁴² must also produce monthly reports.²⁴³ Finally, projects with “significant

234 EIA Sub-Decree, *supra* note 17, art. 4.

235 *Id.*, arts. 28 & 30.

236 *See infra*, notes 241-44.

237 Draft EIA Law, *supra* note 27, art. 8.

238 *Id.*, art. 12.

239 *Id.*

240 *Id.*

241 *Id.*, art. 39.

242 *Id.*, art. 23.

243 *Id.*, art. 40.

environmental or social impacts” must be audited by an external environmental auditor in accordance with a Prakas to be issued by the MOE.²⁴⁴

The Draft EIA Law also establishes a strong enforcement regime that is lacking in the current EIA system. First, the Law devotes two separate chapters to specific EIA offenses and penalty provisions, respectively.²⁴⁵ Second, the Law stipulates the competencies of the EIA Unit, the MOE, and Cambodian courts with respect to the various forms of punishments and penalties they may mete out.²⁴⁶ Third, for the first time an EIA law empowers citizens to be involved in the enforcement process by establishing a complaint procedure for persons affected by EIA offenses.²⁴⁷ Importantly, the Draft EIA Law explicitly provides judicial access to persons who have exhausted the administrative complaint procedure established by the Law but are still not satisfied with the ultimate decision.²⁴⁸ In order to ensure that such complaints are addressed effectively, the Law provides for the accreditation of “EIA Judicial Police Officers” who “have the mission of receiving complaints, examine [sic] offenses, investigating and compiling case file to submit to a competent court.”²⁴⁹ Any attempt by an accredited EIA Judicial Police Officer to “avoid or not fulfill their duties” is an actionable offense.²⁵⁰

4. CONCLUSION

In the early 1990s, Cambodia emerged from years of turmoil and has since achieved remarkable economic growth and development. However, Cambodia’s leaders—and perhaps more importantly its people—recognize that such growth is not sustainable and brings immense environmental and social costs. If the current Draft EIA Law is adopted and implemented, it would represent a major step for Cambodia toward a sustainable development path. As demonstrated, the Draft EIA Law improves on Cambodia’s current EIA regime by firmly establishing the MOE as the institution with authority over EIAs, preventing any construction until a project’s EIA has received approval, greatly enhancing public participation and information disclosure requirements, requiring the consideration of a broad range of environmental and social impacts, and setting up a thorough monitoring, reporting, and enforcement mechanism.

Cambodia’s MOE and the Vishnu Law Group have several more public

244 *Id.*, art. 38.

245 *Id.*, arts. 65-93.

246 *Id.*, art. 54.

247 *Id.*, arts. 50-56.

248 *Id.*, art. 51.

249 *Id.*, art. 59.

250 *Id.*, art. 69.

consultations planned before the law is presented to the National Assembly for adoption sometime in 2015. While it is possible that some aspects of the law may be removed or weakened, it is also possible that they could be further improved. For example, project proponents should be required to more fully analyze alternatives to the proposed action, including the no-action alternative. In order to maximize the transparency of the EIA process, project proponents should also be required to record public participation and respond to public comments received during the preparation of an IEE. However, overall the fifth draft of the EIA law represents a sea change from Cambodia's current EIA regime and, if adopted, would become a major and integral component of Cambodia's strategy for sustainable development.

HOW DISARMAMENT, DEMOBILIZATION AND REINTEGRATION PROGRAMS COULD HAVE FACILITATED THE ESTABLISHMENT OF LONG-TERM CONFLICT PREVENTION IN POST- CONFLICT CAMBODIA

TIPHAINE FERRY¹

Since the mid-1990s, the international community, members of Cambodian civil society, and the Cambodian Ministry of Defense have stressed the importance of reducing the number of soldiers in the Cambodian army.² According to data collected by the London-based International Institute for Security Studies, in 2014 Cambodia had a civil-military balance of 8.2 active military personnel per 1000 capita, a surprisingly high number that can hardly be justified by the geopolitical situation

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2 Counts of Royal Cambodian Armed Forces (RCAF) personnel often conflict. A Cambodian Ministry of Defence White Paper published in 2006 states that there were approximately 165,000 personnel in the RCAF before 1999. However, in 2002, the Co-Minister of Defence said that the total military strength of the army stood around 112,000 persons, which would imply that 53,000 personnel were demobilized from the army between 2000 and 2002, while the official objective (which was not achieved) was to demobilize 43,000 soldiers during that period. An August 2001 World Bank report presenting the Demobilization and Reintegration project describes the problem: "The number of military personnel has been a subject of constant debate. The situation has been made more difficult by the integration of soldiers belonging to different political factions into the army. There have been recurrent reports on the existence of ghost soldiers who contribute to an artificially high military bill." World Bank, Cambodia-Demobilization and Reintegration Project (Aug. 2001) at 2, at www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2001/05/12/000094946_0104270727447/Rendered/PDF/multi0page.pdf.

in the country. In comparison, neighboring countries Thailand and Vietnam respectively have 5.3 and 5.2 active military personnel per 1000 capita, while in the UK and the US the balances are 2.6 and 4.7 per 1000 capita.³ Keeping such a large number of active military personnel not only suggests unjustified expenditures, but also may threaten the implementation of long-term conflict prevention in a country recently plagued by thirty years of civil war. Efforts to implement a proper Disarmament, Demobilization and Reintegration (DDR) program in Cambodia have faced challenges for twenty years, starting with the Paris Agreements in 1991. These attempts are the subject of this study.

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3 Calculated by the author from the numbers provided in International Institute for Security Studies (IISS), *The Military Balance: The Annual Assessment of Global Military Capabilities and Defence Economics* (Feb. 2014) (breaking down the military power of 171 countries worldwide).

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I. INTRODUCTION

Since the first Disarmament, Demobilization and Reintegration (DDR) operation in Central America in 1989, a large number of United Nations (UN) operations have contained DDR programs, including those in El Salvador, Cambodia, Mozambique, Angola, Liberia, Sierra Leone, Guatemala, Tajikistan, and Burundi. DDR is now considered part of the toolbox of multidimensional peacekeeping operations, allowing the international community to disarm and demilitarize the parties of both civil and international conflicts. Demobilization is intended to relieve transitional states from the burden and threat posed by the existence of a large army. Reintegration helps ex-combatants find their place in civilian society after giving up their weapons. Successfully implemented, it lowers the chances of a return to combat.

DDR is not always implemented within multidimensional operations⁴ under the supervision of the UN. In post-conflict Cambodia, for example, DDR programs were successively implemented within a multidimensional peacekeeping operation, and then by a governmental council with the financial support of the international community.

Using Cambodia’s experience as a case study, this paper will attempt to determine whether DDR programs should be an internationally or a nationally driven project. This consideration arises from the fact that DDR programs can have two

4 The United Nations identifies the implementation of three inter-related programs among the tasks necessary for successful peace-building operations: (1) disarmament, demobilisation and reintegration (DDR); (2) security sector reform (SSR); and (3) support for electoral processes. See UN Peacebuilding Support Office, www.un.org/en/peacebuilding/pbso/pbun.shtml.

purposes: the promotion of peace building, and the facilitation of public sector reforms in the context of administrative and financial post-conflict reconstruction. In order to answer this question, this paper will compare Cambodia's UN-led DDR, which was considered a peace-building tool, with its government-led DDR, which was implemented after peace was achieved. It will also examine alternatives to DDR programs.

Finally, this paper will address the larger issue of whether there is a link between DDR and long-term conflict prevention: Does DDR build security (through disarmament, demobilization and the neutralization of armed factions) and promote reconciliation (through reintegration and the reconstruction of social fabric), contributing to a long-term conflict prevention that goes beyond the absence of violence? This paper concludes that DDR can indeed offer a satisfactory prospect of long-lasting peace in a post-conflict setting. However, as exemplified by the Cambodian experience, DDR programs cannot build peace from the ground up.

2. DEFINITIONS AND BEST PRACTICES

2.2. Disarmament

Disarmament is at the center of a demobilization process. It consists of controlling, registering, gathering and destroying the weapons of soon-to-be-demobilized combatants and also any weapons retained by civilians. The overall objective is to reduce the number of small weapons in order to promote the non-violent resolution of conflicts within the society.⁵ This stage is supposed to build confidence and increase stability in post-conflict settings.

2.3. Demobilization

Best practices define demobilization as the act of officially registering, counting, and controlling combatants in advance of preparing them to return to civilian life. Demobilization should thus be understood as a process composed of various steps. Demobilization can include a "cantonment" phase during which soldiers are stationed in a specific military station to allow registration and medical treatment, if needed. In order to protect the soldiers and to allow a proper, unbiased and time-effective registration, the process of demobilization should be realized within a precise legal frame and be answerable to an official timetable. The objective can be either to downsize the army or military group, or to dissolve

5 Yvan Conoir & Gérard Verna, *DDR, Désarmer, Démobiliser et Réintégrer* (Nov. 2006) at 43-44.

it entirely.⁶

2.4. Reintegration

In the context of DDR programs, the reintegration of ex-combatants means the transition from being military personnel to earning a living by other means within the civilian population. It addresses a larger scope of issues than the notion of social reintegration, which often has more to do with the process of national reconciliation, including the perception that civilians have of ex-combatants.

The reintegration of ex-combatants, just like the reintegration of displaced people, is a major challenge in post-conflict societies. It is socio-economical process, limited neither in space nor in time. According to best practices, it should be implemented at two levels: the ex-combatant level, and the civil-society level.⁷

3. UNTAC: DDR IN THE DIRECT AFTERMATH OF THE CONFLICT (1991-1993)

3.1. Context

The infamous Democratic Kampuchea era ended in 1979, when Vietnamese troops invaded Cambodia and overthrew the Khmer Rouge government and installed a new regime: the People's Republic of Kampuchea (PRK). The Khmer Rouge armed forces reconstituted themselves at the Thai border in the north of Cambodia. At the same time, a former prime minister, Son Sann, created an armed faction called the Khmer People's National Liberation Front (KPNLF) to fight against the PRK forces, including the occupying Vietnamese army. In 1980-1981, Prince Norodom Sihanouk, former king and head of state of Cambodia, created his own resistance front against the Vietnamese-backed PRK called FUNCINPEC (the Nationalist United Front for an Independent, Neutral, Peaceful and Cooperative Cambodia). These four factions were the parties to a proxy war between China and Vietnam—the PRK being supported by Vietnam and the other three receiving backing from China.

In 1982, the three PRK resistance groups—the Khmer Rouge, the FUNCINPEC and the KPNLF—created a tripartite movement: the Coalition Government of Democratic Kampuchea. When Vietnamese troops withdrew from Cambodia in 1989, Prime Minister Hun Sen proclaimed the State of Cambodia (SoC), and the war continued. In October 1991, the four factions signed a cease-fire and peace agreement in Paris to end the fighting and pave the way for general

6 *Id.* at 113-14.

7 *Id.* at 253.

elections. UN-supervised elections were held in 1993 without the participation of the Khmer Rouge faction, resulting in a flawed power sharing agreement between Hun Sen, leader of the Cambodian People's Party (CPP) and Prince Sihanouk's son Norodom Ranariddh, leader of the new FUNCINPEC party. The new regime nevertheless fought actively against Khmer Rouge, which maintained a "low-level war."⁸ A political crisis broke out in 1996-1997, and the coalition fell. In 1999, the last pockets of Khmer Rouge finally surrendered.

The United Nations Transitional Authority in Cambodia (UNTAC) was established to implement the Paris Peace Agreements, and became the first body in Cambodia to implement a DDR program. The UNTAC mandate included all the elements of a comprehensive peace settlement, which resulted in a hybrid operation composed of peace-making, peace-building and peacekeeping tools. It included supervising the withdrawal of foreign troops from Cambodia, repatriation of refugees, maintenance of law and order, demilitarization and cantonment of all the military factions, creation of a unique military structure, assistance with mine-clearance, creation of a neutral political environment, organization of elections, and the rehabilitation of infrastructure essential for economic reconstruction—all in a very short timeframe of three years.⁹

In the end, the effort was a failure due to the lack of cooperation from the combatants. Cantonment, disarmament and demobilization efforts were undertaken; however, there was no reintegration phase. In hindsight we know that, at the time of UNTAC intervention, the war was far from over despite the ceasefire and the peace agreement, suggesting that the DDR program was bound to fail.

3.1.1. Political Neutrality: a Goal or a Precondition for DDR?

In 1993, journalist and movie director John Pilger interviewed Lieutenant General John Sanderson, the UN Force Commander for UNTAC. In answer to the question: "How will you create a neutral political environment?" Lieutenant General Sanderson answered: "The principal step was to create a neutral security environment by cantoning and disarming all the factions, and then demobilizing 70% of them[.]"¹⁰ This statement suggests a demobilization program can be used to promote a neutral political environment by bringing security and neutralizing armed factions. However, the premise that disarming factions leads to a neutralization of the political scene is highly debatable.

8 Peter Bartu & Neil Wilford, *Transitional Justice and DDR: The Case of Cambodia*, International Center for Transitional Justice (June 2009), at 6, available at www.ictj.org/sites/default/files/ICTJ-DDR-Cambodia-CaseStudy-2009-English.pdf.

9 TREVOR FINDLAY, *CAMBODIA: THE LEGACY AND LESSONS OF UNTAC 15* (1995). The UN resolution is available at: www.un.org/en/peacekeeping/missions/past/untacmandate.html.

10 *CAMBODIA: RETURN TO YEAR ZERO* (ITV 1993) at 07:00.

Officially, the Khmer Rouge faction refused to cooperate because the Supreme National Council (SNC), a quadripartite body set up to represent Cambodia's sovereignty and promote reconciliation, was not neutral. According to a 1992 interview with Khmer Rouge leader Khieu Samphan, the KR demanded "the implementation of the Paris Agreements in regard to the SNC[.]" According to Khieu:

If the SNC remains without power and means, then UNTAC—either consciously or unconsciously—is cooperating with the Phnom Penh regime and the elections will certainly be held within the framework of the regime set up by the Vietnamese.¹¹

This criticism highlights the difficulty of disarming and demobilizing during a political transition. It also illustrates why the creation of a neutral political environment—including the existence of a legitimate and popular political body to set the framework for elections—may be a precondition to a demobilization program, rather than its end. If disarmament was the "principal step" towards the "neutral political environment," perhaps the neutralization of the SNC should have been the first step.

However, it is also possible that the Khmer Rouge, who signed the Paris Agreements in large part due to international pressure,¹² never intended to disarm and used unattainable demands to justify their disengagement from the process. Indeed, the Khmer Rouge were politically empowered when the international community pushed to include them in the negotiations of the Paris Agreements, putting them in a position to make demands. With a better assessment of the situation on the ground and of the agenda of the various factions, the UN and the international actors might have foreseen the unwillingness of the factions to disarm and adapted the mandate.

3.2. Practices

3.2.1. *Cantonment and Disarmament.*

The UNTAC-led DDR program was actually a cantonment, disarmament and demobilization program.¹³ It encompassed regrouping soldiers from all fac-

11 Nate Thayer, *An Interview with Khmer Rouge Leader Khieu Samphan*, PHNOM PENH POST, Aug. 27, 1992.

12 FINDLAY, *supra* note 9, at 17.

13 The actual cantonment phase is often called "Phase II" in reference to the various phases described in the Paris Agreements regarding the military mandate of the UNTAC. "Phase I" consisted of finding an agreement on cantonment sites within the four first weeks after the arrival of UNTAC military component.

tions, as well as their weapons and equipment. Despite the non-participation of the Khmer Rouge faction, the UNTAC succeeded to an extent. By September 1992, UNTAC had officially disarmed 52,292 soldiers from the three factions participating in the program, out of 200,000 soldiers estimated to be cantoned.¹⁴ This accounted for about 50% of the FUNCINPEC military capacity, the total-ity of the KPNLF forces, and 25% of the SoC regular forces.¹⁵

Regarding disarmament, part of the UNTAC disarmament mandate was landmine clearance. The Paris Agreements state that the military mandate includes: “Assisting with clearing mines and undertaking training programs in mine clearance and mine awareness program among the Cambodian people.”¹⁶ However, Lieutenant General John Sanderson clarified:

First of all, the UN did not provide mine clearers per se, except in the limited sense of having people to clear areas of operation for UNTAC activities [...]. Very early, we acknowledged the fact that the solution to the Cambodian mine problem was to train as many Cambodian mine clearers as we possibly could and create an environment in which they could sustain this activity.¹⁷

In 1992, Sergeant Major Joost Van Den Nouwland from the UNTAC mine clearing unit reported that no mine clearing had yet taken place in the province where he was based: “We do destroy mines, but right from the storehouse, not from the field. It is the only thing which has been done in this province.”¹⁸ By the end of the UNTAC mandate, approximately 2,000 Cambodians had been trained for demining within the newly created Cambodian Mine Action Centre (CMAC),¹⁹ 300,000 square meters of land had been cleared, 11,000 landmines had been deactivated and 12,000 pieces of unexploded ordnance (UXO) had been removed.²⁰ According to the opening statement made on behalf of the King at the International Landmine Conference held in June 1995 in Phnom Penh, 3,400 million

14 *Second Progress Report of the Secretary-General on the United Nations Transitional Authority in Cambodia*, at 5, U.N. Doc. S/24578 (Sept. 21, 1992).

15 FINDLAY, *supra* note 9, at 39.

16 United Nations, Department of Public Information, *Agreements on a Comprehensive Political Settlement of the Cambodia Conflict: Paris, Oct. 23, 1991 (DPI/1180-9277-Jan. 1992-10M)* (hereinafter *Paris Agreements*).

17 Interviewed in *CAMBODIA: RETURN TO YEAR ZERO (ITV 1993)*. Notably, this documentary is very critical on the work of the UNTAC, and only selected parts of the interviews are shown in the video.

18 *Id.*

19 See Raoul M Jenner, *UNTAC: “International Triumph” in Cambodia?*, 25:2 *SECURITY DIALOGUE* 145, 146 (1994).

20 FINDLAY, *supra* note 9, at 74.

square meters of land had yet to be cleared.²¹

By many accounts, the UNTAC effort was a “failed disarmament.”²² This can be explained by a misrepresentation of the number of munitions by UN officials and by an overwhelming mandate. An article in *The Phnom Penh Post* at that time confirms the availability of weapons such as AK-47s or assault rifles at very low prices (roughly \$40) at markets everywhere in the country.²³ When the UNTAC personnel understood that the Khmer Rouge faction, the National Army of Democratic Kampuchea (NADK), would not cooperate in the demilitarization process, making the other factions reluctant to disarm, they re-centered all their efforts on the election process.

3.2.2. Demobilization.

The UNTAC mandate called for the demobilization of only 70% of the military troops of all factions.²⁴ This limit, the result of an agreement signed by the four factions in Pattaya, Thailand, a few months before the Paris Agreements, increased dramatically the costs of UNTAC. As pointed out by former UN Secretary General Boutros Boutros-Ghali, if the mandate had called for demobilization of 100% of the armed factions, the need for UN military personnel for security purposes would have been greatly reduced. However, total demilitarization was unacceptable to the factions.²⁵ This contributed to the UNTAC being the most costly peacekeeping operation to date, with a final budget of a little less than US\$2 billion.²⁶ This extra cost has to be considered when analyzing the design of the UNTAC demobilization program, since budget issues are frequently highlighted as one of the reasons for the negative outcome of the UNTAC mission in terms of peace building and implementation of DDR.

The UN estimated that roughly 150,000 soldiers needed to be demobilized. By the end of its mission, it had demobilized only 36,000.²⁷ Two of the four fac-

21 Chea Sim, High representative of his Majesty the King, Address at the International Landmines Conference on the Human and Socio-Economic Impact of Landmines (June 2, 1995).

22 See, e.g., JIANWEI WANG, DISARMAMENT AND CONFLICT RESOLUTION PROJECT—MANAGING ARMS IN PEACE PROCESSES: CAMBODIA 65 (1996).

23 Kevin Barrington, *Gun Control on Target*, PHNOM PENH POST, Mar. 26-Apr. 8, 1993.

24 See Cambodia UNTAC Background (under “military component”), at www.un.org/en/peacekeeping/missions/past/untacbackgr2.html (“The Secretary-General recommended that the military component be fully deployed by the end of May 1992 and that the regrouping and cantonment process, as well as demobilization of at least 70 per cent of the cantoned forces, be achieved by the end of September 1992.”).

25 FINDLAY, *supra* note 9, at II 4.

26 DAVID CHANDLER, A HISTORY OF CAMBODIA 240 (2000).

27 *Cambodia, Disarmament, Demobilisation and Reintegration Country Briefings*, Escola de Cultura de Pau (2007).

tions were almost entirely neutralized. However, the SoC military wing had only slightly been reduced and the Khmer Rouge faction's military capacity remained the same. Facing the failure of the cantonment and disarmament phase, UNTAC called a halt to the entire process. Hence, the demobilization plan was never fully implemented, even though a good number of cantoned soldiers were sent home to farm rice "on agricultural leave," which represented a de facto demobilization and disarmament since they were released from their military duty and turned in their weapons.²⁸ In fact, a portion of the soldiers quartered in the military camps for cantonment were demobilized de facto when they were released and decided not to go back to their army faction, despite not benefiting from any reintegration program, while others returned to their faction of origin.

3.3.3. *Reintegration.*

It is difficult to assess why the UNTAC left aside the reintegration program. The Paris Agreements stated: "UNTAC will assist, as required, with the reintegration into civilian life of the force demobilized prior to the elections."²⁹ This indicates that there had been a plan for a reintegration phase that was aborted when the demobilization process fell apart. Nevertheless, it appears that the UN would not have been able to implement a reintegration program within the time frame of its mandate, as the cantonment, disarmament and demobilization efforts already required more time than anticipated by the three-year mandate. In the view of Asia Watch:

Even had the deployment of the UN in Cambodia begun on day one of the Paris accords, such a schedule would have been extremely optimistic for a country with minimal communications and electricity whose dilapidated roads are barely passable for motor vehicles in the dry season, and impassable for the five months of monsoon rains each year.³⁰

In conclusion, if the success of DDR programs can in theory be demonstrated by the reintegration of former combatants to a peaceful way of life, their failure can be shown by a return to a state of chaos.³¹ As scholar Craig Etcheson has noted, "The 1991-1993 United Nations peacekeeping mission in Cambodia marked the end of the Third Indochina War, but the fighting in Cambodia

28 FINDLAY, *supra* note 9, at 39.

29 Paris Agreements, *supra* note 16, annex 2, art. V.

30 FINDLAY, *supra* note 9, at 120.

31 Yvan Conoir & Gérard Verne, *DDR, Désarmer, Démobiliser et Réintégrer* (Nov. 2006), at 373.

continued for nearly another decade afterward.”³² The fact that fighting continued after 1993 may thus be, in itself, a proof of the failure of the UNTAC-led DDR program.

4. ALTERNATIVES TO EXTERNALLY-IMPLEMENTED DDR PROGRAMS

4.1. Military Integration

Military integration is a post-conflict strategy used when a conflict ends with a peace agreement that does not clearly identify a dominant group. All the fighting factions are integrated in a new military structure created after the signature of peace agreements. It is also called the “I+I=3 formula.”³³ As DDR consultant Mark Knight explained in 2009: “Success is achieved when no single structure or culture dominates the merged force; instead, a “third force” results from the integration process: hence the I+I=3.”³⁴

Military integration was envisaged in the mid-1990s as a means to address the Cambodian political stalemate since the UNTAC elections. The creation of a new united military structure would theoretically prevent any of the pre-existing armed groups from dominating the coalition. The Paris Agreements discussed military integration as an alternative if demobilization was unmanageable:

Should total demobilisation of all of the residual forces before or shortly after the elections not be possible, the Parties hereby undertake to make available all of their forces remaining in cantonments to the newly elected government that emerges in accordance with Article 12 of this Agreement, for consideration for incorporation into a new national army. They further agree that any such forces which are not incorporated into the new national army will be demobilized forthwith according to a plan to be prepared by the Special Representative.³⁵

In 1993, facing the failure of the UNTAC to demobilize the soldiers from the various factions, the coalition government decided to create a united army, the

32 CRAIG ETCHESON, *AFTER THE KILLING FIELDS, LESSONS FROM THE CAMBODIAN GENOCIDE* 4 (2006).

33 Mark Knight, *Security Sector Reform: Post-Conflict Integration*, Global Facilitation Network for Security Sector Reform (Aug. 2009), at 4, at www.operationspaix.net/DATA/DOCUMENT/5064~v~Security_Sector_Reform__Post-Conflict_Integration.pdf.

34 *Id.* at 8.

35 Paris Agreements, *supra* note 16, annex 2, art. V(2)(b).

Royal Cambodian Armed Forces (RCAF), into which all the armed factions would be integrated. As it is often the case with military integration policies, this policy was inspired by a power-sharing agreement: the political coalition between the FUNCINPEC and the CPP.³⁶ However, the factions had unequal manpower, necessarily creating disparities inside the new structure. Moreover, because the integration policy was implemented by a coalition of only two of four factions, it was clear from the beginning that there would be two main providers of soldiers for the new army. According to a White Paper published in 2000 by the Ministry of National Defence (MINADEF), at its creation the RCAF was composed of 60% of soldiers from the SoC army, 30% from the military wing of the FUNCINPEC, and 10% coming from the military wing of the KPNLF.³⁷

Following the structure of the power-sharing agreement, which provided for two co-heads of each government ministry, the army remained divided between the CPP supporters and FUNCINPEC supporters, who were still under the orders of their former superiors. Military integration was therefore superficial because the military wings of both factions were not dismantled. The two factions remained, and remained dramatically opposed. The only difference was that they both officially had the “RCAF” label.³⁸ This division remained until the collapse of the government power-sharing agreement and the coalition, after which the CPP remained the only ruling party. Nevertheless, because of the military integration policy, the RCAF soon counted about 155,000 personnel,³⁹ or a ratio of 14 military personnel per 1000 capita.

4.2. Self-Demobilization and Self-Reintegration

Self-demobilization is a phenomenon in which combatants demobilize and return to their region of origin by themselves, and their armed group is consequently dismantled without any external intervention or planning.⁴⁰ This process, rarely documented in the literature on DDR, can be commonly found in divided post-conflict societies, in particular among groups such as women or isolated sol-

36 Knight, *supra* note 33, at 12.

37 Defending the Kingdom of Cambodia, Security and Development, Defence White Paper, Cambodian Ministry of National Defence (2000) [hereafter Defence White Paper] at 6, at <http://aseanregionalforum.asean.org/files/library/ARF%20Defense%20White%20Papers/Cambodia-2000.pdf>.

38 According to Jean-Michel Filippi, anthropologist and linguist specializing in Cambodian minorities, and author of various books about the contemporary history of Cambodia. Interview with author, Phnom Penh, July 3, 2013.

39 KAO KIM HOURN, MILITARY REFORM, DEMOBILISATION AND REINTEGRATION IN CAMBODIA: MEASURES FOR IMPROVING MILITARY REFORM AND DEMOBILISATION IN CAMBODIA I (2002).

40 See generally Macartan Humphreys & Jeremy M. Weinstein, *Demobilisation and Reintegration*, 51:4 J. CONFLICT RES. 531 (2007) (introducing the concept after finding no clear evidence that the internationally-funded DDR program in Sierra Leone facilitated demobilization and reintegration).

diers in remote areas who were not targeted by DDR programs.

Another independent phenomenon is also widespread: the process of self-reintegration. It appears in particular when reintegration initiatives are insufficient or not adapted to the targeted population. In Cambodia between 1993 and 2000, and even at the times DDR programs were implemented, self-reintegration was common. This was less due to the structure of DDR in Cambodia than to the structure of the armed factions themselves. Reintegration programs, at least in the form they took in Cambodia, were targeted for a professional army, with soldiers living in army compounds and being integrated as soldiers. However, in Cambodia most soldiers on the army payroll were not professional soldiers but farmers. While receiving a small amount pay from the army, most of them stayed home, and went to the army compound only on registration and census days. Demobilization did not change their daily habits or way of life; they continued to farm and live on their own property.

The post-demobilization transition in Cambodia could thus be classified as self-reintegration. Alternatively, it could be said that there was no reintegration because there was no separation of soldiers from the civilian society in the first place.

5. IMPLEMENTING DDR WITHIN A PUBLIC SECTOR REFORM PROGRAM

5.1. Context

In 1996 Ieng Sary, a Khmer Rouge senior leader and former Minister of Foreign Affairs, defected from the Party of Democratic Kampuchea and joined the government in Phnom Penh, which facilitated a royal amnesty.⁴¹ Following this episode hundreds of Khmer Rouge soldiers defected and were absorbed in the national RCAF army.⁴² The same year, the Cambodian government drafted a Cambodian Veterans Assistance Program (CVAP) to demobilize soldiers from the RCAF, since there had not been a successful demobilization by the UNTAC and the defection of former Khmer Rouge soldiers had swelled the army ranks. However, this program, which the World Bank intended to support, was never imple-

41 Despite this “amnesty,” Ieng Sary was arrested in 2007 and put into trial under the Extraordinary Chambers in the Courts of Cambodia (ECCC), dedicated to prosecuting former Khmer Rouge cadre. Ieng Sary died in March 2013, before the end of trial proceedings.

42 CHANDLER, *supra* note 26, at 242.

mented due to the political crisis of July 1997.⁴³

Between 1998 and 1999, a number of “registration exercises” were organized with the support of the World Bank to establish the number of soldiers in the RCAF. The problem of “ghost soldiers” made demobilization and reintegration programs extremely difficult to set up. The results of the registration exercise showed that the RCAF counted 140,693 soldiers. On top of this, 15,551 soldiers who did not exist were registered on the payroll.⁴⁴ Ministry of Defense statistics point to a higher number, saying there were “approximately 165,000 personnel serving before 1999.”⁴⁵

The unfinished DDR process begun by UNTAC was resumed only in 1999, after another election and the surrender of the last pockets of Khmer Rouge soldiers. In January 1999, the government announced the demobilization of 55,000 soldiers from the RCAF over a three-year period, part of a wider program to reform the public sector. The government-led DDR was supervised by the newly created Council for the Demobilization of Armed Forces (CDAF).⁴⁶ The objective of the demobilization program was to reduce expenditures for the military, in order to re-allocate the funds to Cambodia’s reconstruction and economic development.⁴⁷ It benefited from sponsorship by the World Bank, and aid from various donor countries, including The Netherlands, Sweden, and Japan.

Despite the program’s domestic orientation, its official rhetoric still referred to an overall peace-building objective. In January 2002, the Cambodian Institute for Cooperation and Peace (CICP) issued a policy paper presenting the link between peacekeeping and DDR:

Throughout the 1970s, 1980s and into the early 1990s, Cambodia was plagued by the existence of fractionalized partisan military formations that aggravated the political rivalries, and by soldiers who tried to seize political power. Recognizing the danger that an unreformed, swollen army poses to maintaining peace and stability, the current coalition government with help from

43 The Kingdom of Cambodia: From Reconstruction to Sustainable Development, Country Study for Japan’s Official Development Assistance to the Kingdom of Cambodia, JICA Research Institute (Mar. 2002) [hereafter JICA Report], at 273, at http://jica-ri.jica.go.jp/IFIC_and_JBICI-Studies/english/publications/reports/study/country/cambodia.html.

44 *Id.* at 274 (table 6-12).

45 Defence White Paper, *supra* note 37, at 9.

46 It involved the Ministry of Woman and Veterans Affairs, the Ministry of Interior, the Ministry of Land Management, Urban planning and Construction, the Ministry of Health, the Ministry of Social Affairs, Veterans and Youth Rehabilitation, as well as provincial authorities.

47 According to a 1991 World Bank estimate, the country could have saved up to US \$10.3 million per year in military spending if a DDR program had been properly implemented. JICA Report, *supra* note 43, at 273-74.

international donors has begun a process of demobilisation.⁴⁸

The DDR program was thus not only considered to be a financial and economic necessity in the context of the public sector reform, but also a measure that would reduce the risk of returning to war associated with a bloated army.

5.2. Council for the Demobilization of Armed Forces (CDAF) Practice

5.2.1. *Disarmament.*

The government-led demobilization program was set up in a fairly peaceful context and did not originally include a disarmament program. Nevertheless, in 1998 the government officially acknowledged that the availability of large numbers of illegal light weapons was a threat to the country's stability. Lacking the resources and technical experience to address the problem, the government turned to the international community for help.

A small-arms disarmament program was set up in 2000, called the European Assistance on curbing Small Arms and light weapons in Cambodia, or EU-ASAC. It was intended to provide financial and technical assistance to the government for the collection and confiscation of weapons, as well as the destruction of surplus military weapons. In 2006, 45 weapon storage depots were constructed, 12,775 weapons were officially collected, and 142,871 weapons were destroyed under auspices of the EU-ASAC program.⁴⁹ This program, along with other governmental and non-governmental initiatives,⁵⁰ resulted in a significant reduction of the number of small arms circulating among civilians. Estimated around 400,000 in 1991, the number of arms went down to approximately 207,000 in 2007.⁵¹

5.2.2. *Demobilization.*

In 1999, the government announced an official timetable for demobilization: 11,500 RCAF soldiers would be demobilized in 2000, 11,000 in 2001, 20,500 in 2002, and finally 12,000 in 2003. However this plan was never implemented due to a lack of funding and political consensus.

48 Kao Kim Hourn, *Civil-Military Relations in Cambodia: Measures for Improving Civil-Military Relations in Cambodia*, CICP Policy Paper No 4, Cambodian Institute for Cooperation and Peace, 1 (2002).

49 Adrian Wilkinson & Anya Hart-Dyke, *Evaluation of the EU Small Arms and Light Weapons Assistance to the Kingdom of Cambodia (EU-ASAC)*, South Eastern and Eastern Europe Clearinghouse for the Control of Small Arms and Light Weapons (2nd ed., July 2006), at www.seesac.org/res/files/publication/533.pdf.

50 The most famous example of these initiatives would be a destruction program led by the Japan Assistance Team for Small Arms Management in Cambodia (JSAC) in 2003.

51 AARON KARP, *THE POLITICS OF DESTROYING SURPLUS SMALL ARMS* 128 (2010).

In 2000, a pilot demobilization program was set up with the sponsorship of the World Bank, leading eventually to the demobilization of 1,500 soldiers. Following this, the CDAF planned the demobilization of 30,000 soldiers from the RCAF within a two-year timeframe.

TABLE 5.2.2.

	Number of soldiers (total)	Timeframe
UNTAC target in 1991 (cantonment/demobilization)	203,821 soldiers	2-4 weeks for the cantonment. Approx. 1 year for the demobilization.
Government target in 1999 (demobilization)	55,000 soldiers	4 years (four phases)
Government target after the pilot in 2000 (demobilization)	31,500 soldiers	2 years (two phases)

Table 5.2.2. sets forth the differences between the Cambodian DDR programs and their objectives. As it shows, the UNTAC-led and government-led DDR programs had very different goals for demobilization. One possible reason for the large variance is that UNTAC personnel did not have a sufficient knowledge of the realities on the ground, resulting in a false assumption that they could demilitarize 70 to 100% of the factions.

However, the variance also suggests that after 2000 the government did not have any intention to effectively downsize the army, and that the DDR was not meant to have a nationwide impact, at least not within civilian society. In fact, since 2000, the demobilization process was run at the same time as a conscription program named “selective compulsory military service.” The first phase of the CDAF program—and the only that was implemented—concerned the demobilization of a majority of “category II soldiers,” meaning soldiers either above retirement age, disabled or chronically ill. It certainly permitted a change in the structure of the army, which would count less Category II soldiers on the payroll, but nothing was apparently done to downsize. Consequently, there would not be any savings that could benefit the civilian population by being reallocated to reconstruction and development. It indicates that the government implemented the DDR program primarily to please the international donor community, which was pressing for demobilization and the downsizing of the RCAF.

5.2.3. Reintegration.

For the DDR program led by the CDAF in 2000, a “safety net” was set up to help ex-combatants reintegrate into civilian life. The use of reintegration packages is widespread in the context of DDR programs.⁵² The Cambodian package included money, a motorcycle, a sewing machine, some rice and fish sauce, and some gardening or construction tools. Some demobilized soldiers were also provided with a piece of land⁵³; however, no training was provided.

During interviews conducted by the author in Pursat and Battambang provinces with families who received the DDR package, it was striking that in most instances no one knew how to use the sewing machine. This observation suggests the necessity of a better assessment of the needs and skills of demobilized soldiers when designing reintegration packages. Indeed, a successful reintegration not only implies the ability to earn a living outside the army, but also takes into account the skills of the demobilized soldiers to ensure he or she does not need nor want to return to violence or turn to crime.⁵⁴

According to best practices, the provision of reintegration packages should be a first step by the implementing body to facilitate access to employment. Often the next step is an agricultural program or a program for reconstruction or rehabilitation of local infrastructure including jobs for former soldiers such as rebuilding roads, bridges, and houses. Former soldiers thereby receive professional training and eventually subventions once they are reinstalled, in particular if they are farmers or small producers. Best practices also call for a follow-up by local organizations and civil society to give support (including psychological) to ex-combatants over the long-term reintegration process. None of this was done in Cambodia.

6. DDR AND NATIONAL RECONCILIATION

As noted by Brandon Hamber, known for his scientific articles on reconciliation:

Disarmament and demobilisation are finite tasks, their success is relatively easy to assess in terms of cessation of hostilities or weapons decommissioned. Reintegration is more ephemeral with its success deeply entwined in socio-economic and political

52 Conoir & Verna, *supra* note 31, at 272.

53 According to the primary data and to interviews conducted by the author with former soldiers demobilized in 2001.

54 Conoir & Verna, *supra* note 31, at 253.

reality, whilst also being about psychological rehabilitation. On top of this, the reintegration needs of combatants are dramatically variable.⁵⁵

As a consequence, it is necessary to distinguish between various types of reintegration—economic, political and social—and acknowledge that the social reintegration of ex-combatants must be closely linked to a reconciliation process to ensure long-term conflict prevention in post-conflict societies. In light of the apparent failure of both the UNTAC-led and CDAF-led programs to implement reintegration projects, we may ask who are the best actors to implement such projects: the international community, the government, or civil society? Discussion of this question in the following section will be considered within the framework of definitions of reconciliation and social reintegration of ex-combatants.

6.I. The Concept of “Reconciliation”

The literature gives various definitions of reconciliation, often by linking it to other concepts such as forgiveness. To date there is no agreed definition. A 2003 paper published by the Swedish Institute Development Agency “Reconciliation – Theory and Practice for Development Cooperation” provides a good overview of the various definitions developed in the literature. Here are three of the most famous definitions given by leading scholars in the field:

- According to John Paul Lederach, reconciliation should aim at building new and better relationships between former enemies, but should also represent “a space, a place or location of encounter, where parties to a conflict meet.”⁵⁶
- According to Priscilla Hayner, “reconciliation implies building or re-building relationships today that are not haunted by the conflicts and hatreds of yesterday.”⁵⁷
- According to Daniel Bar-Tal, reconciliation is defined by “a psychological process for the formation of lasting peace.”⁵⁸

Reconciliation theories are difficult to apply to civil conflicts primarily be-

55 Brandon Hamber, *Putting the 'R' Back into DDR*, KOFF Center for Peacebuilding Newsletter, Nov. 1, 2007, at 4.

56 JOHN PAUL LEDERACH, *BUILDING PEACE: SUSTAINABLE RECONCILIATION IN DIVIDED SOCIETIES* 30 (1998).

57 PRISCILLA HAYNER, *UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY* 161 (2002).

58 Quoted in Karen Brounéus, *Reconciliation—Theory and Practice for Development Cooperation*, Sida (Sept. 2003), at 15.

cause they fail to recognize that there are not always two separate groups dividing society: combatants and civilians. As in Cambodia, civil conflicts often involve the entire population, blurring the line between who fought and who did not. Similarly, there is not always a clear line between the victims and the perpetrators. This is particularly true in Cambodia where, after the Democratic Kampuchea era, the Khmer Rouge continued to fight from 1979 and 1991 alongside other factions in an anti-Vietnamese coalition. During this period, the “Khmer Rouge” label progressively lost its stigma for an important part of the rural population of Cambodia.⁵⁹

In their testimony, ex-combatants often present themselves as victims and say they had “no choice.” For example, most soldiers who fought with the Khmer Rouge view themselves as victims who were “forced” to kill to survive, and who must live with a burden of being considered as killers. This is particularly true in countries such as Cambodia where there were a high number of child-soldiers. Notably, a population-based survey conducted in 2009 by scholars from the University of California, Berkeley, reported that 93% of respondents who lived under the Khmer Rouge regime considered themselves to be victims.⁶⁰

6.2. Trust As a Prerequisite for Implementation of DDR Programs

Disarmament and demobilization are commonly identified as factors facilitating confidence building in divided post-conflict societies. A premise of the Paris Agreements was that the demobilization of “at least 70 percent of the military forces [of all Parties]” will “reinforce the objectives of a comprehensive political settlement, minimize the risks of a return to warfare, stabilize the security situation and build confidence among the Parties to the conflict.”⁶¹ However, can disarmament and demobilization be implemented without prior confidence within society? There is in fact a higher risk of failure when there is no trust among the various parties.⁶²

A July 1992 article in *The Phnom Penh Post* highlights the difficulty of implementing disarmament when one of the factions refuses to demilitarize. It discusses how soldiers from the three factions participating in the UNTAC disarmament and cantonment were willing to give up their weapons but were afraid of becoming an easy target for still-armed Khmer Rouge soldiers and did not feel safe, even

59 Author interview with Jean-Michel Filippi, *supra* note 38. Observations by the author during the 8 weeks fieldtrip in Cambodia tend to support this hypothesis.

60 Phuong Pham, Patrick Vinck, et al., *So We Will Never Forget, a Population Based Survey on Attitudes about Social Reconstruction and the ECCC*, Human Rights Center, University of California, Berkeley (2009) at 2.

61 Paris Agreements, *supra* note 16, annex 2, art. V.

62 Conoir & Verna, *supra* note 31, at 57-58.

within the supervised barracks where the cantonment was taking place: “Private Keo Sophal turned in his AK-47 assault rifle and reported to UN-supervised barracks to comply with the peace accord, but he feels anything but secure with Khmer Rouge guerrillas roaming about outside.”⁶³ If trust is not established, people will be tempted to hide and keep weapons for their own security.

Without a secured ceasefire and an engaged and solid peace process involving all the warring parties, DDR programs are bound to fail and cannot lead to long-lasting conflict prevention. The example of the UNTAC-led DDR program illustrates how a lack of trust undermines implementation. In Cambodia, this lack of trust was double: the Khmer Rouge did not trust the Supreme National Council or UNTAC, and the other factions did not trust the Khmer Rouge or the ability of the UN personnel to protect them from the Khmer Rouge. The political unrest of the years 1993-1999 also blocked the process of demobilization, which explains why it only was resumed ten years after the first (failed) attempt to implementing a DDR program in Cambodia.

This is a key observation when studying the link between DDR programs and peace building. According to Eric Y. Shibuya, “the rise of an armed forces is only a symptom of a much deeper issue—the deep insecurity and lack of faith the population has in the State apparatus.”⁶⁴ In other words, even if armed forces no longer exist, or are neutralized through a DDR program, a long-lasting peace will not be secured until the “deeper issues” are faced.

If the positive definition of peace goes further than the simple absence of violence to include addressing the root causes of the conflict and violence, then DDR is obviously not sufficient to promote peace. However, it can help bring security and contribute to the reconstruction of the social fabric. By promoting security and reconciliation, can DDR programs be a comprehensive peace-building tool? The Cambodian case suggests that DDR cannot build peace from the ground up, and that some components of a peace process must be engaged prior to DDR implementation — including trust in an authority and its institutions. Building trust prior to implementation eliminates the uncertainty that often makes soldiers reluctant to demobilize and disarm. To accept demobilization, soldiers (in particular former child-soldiers) must have faith in the future.⁶⁵

The authors of a study on the Demobilization and Reintegration Programs (DRP) in Ethiopia, Namibia and Uganda go further:

As reinsertion and reintegration proceed, the needs of ex-com-

63 Peter Eng, *Soldiers Disarmed under Peace Accords Fear K.R. Attack*, PHNOM PENH POST, July 10, 1992.

64 ERIC Y. SHIBUYA, *DEMobilizing Irregular Forces* 9 (2012).

65 *Id.* at 14.

batants change and call for different support activities. To rebuild community social fabric and engender the understanding necessary to rebuild trust, measures of national reconciliation should form part and parcel of a DRP.⁶⁶

This suggests that the confidence-building phase of post-conflict reconstruction and peace-building should be neither a precondition nor an objective of DDR but instead an integral part of the program. Without this component, DDR may produce only a shift from organized violence between warring parties to disorganized violence.⁶⁷

6.3. The Relationship Between Social Reintegration and National Reconciliation

Arguably, political and economic reintegration can be achieved without reconciliation. However, reconciliation is necessary for a successful social reintegration of ex-combatants because social reintegration is only possible if there is a society in which to reintegrate. From this perspective, reconciliation must be initiated before the social reintegration of ex-combatants is possible. It may be addressed previously or simultaneously, but it is counterproductive to imagine that social reconstruction can start after the social reintegration of former soldiers.

The link between social reconciliation and DDR starts with demobilization. At that point the peacekeeping component of DDR changes from ending violence to reconciling and reconstructing the social fabric.⁶⁸ Directly after the demobilization ceremony, when soldiers hand-in their uniform, insignia, and weapons, they are effectively demobilized and suddenly belong to civilian society. There is no transition period, which is why demobilization, reintegration, and reconciliation should not be considered independent, but parts of a whole process.

Going a step further, some scholars suggest that DDR programs should be “designed or implemented with an eye to their relationship with transitional justice measures such as prosecutions, truth-telling efforts, reparations for victims and vetting or other forms of institutional reform.”⁶⁹ From this perspective, the processes of DDR and transitional justice have implications for each other and failing to recognize these implications can undermine the success of both.⁷⁰ This school

66 NAT J. COLLETTA, MARKUS KOSTNER & INGO WIEDERHOFER, CASE STUDIES IN WAR-TO-PEACE TRANSITION (1996), at Abstract. DRP programs do not include a disarmament step.

67 SHIBUYA, *supra* note 64, at I0.

68 *Id.* at I3.

69 Roger Duthie, Transitional Justice and Social Reintegration, Stockholm Initiative on Disarmament Demobilisation Reintegration (SIDDR) (Apr. 2005), at I.

70 *Id.* at I-2.

of thought is based on the idea that both societal reintegration and justice must be central to a peace process because they promote reconciliation, dialogue and trust among divided societal groups.

When violence ends without programs for reintegration and reconciliation, post civil-conflict societies will often welcome ex-combatants from one of the warring parties and reject combatants from another. In some cases, a country might stay de facto divided because of a geographical partition of the supporters of the various parties. Former soldiers will then choose to demobilize in the location where their social reintegration will be the easiest, even if it sometimes means relocating to a different part of the country far from their place of origin. This happened with former Khmer Rouge soldiers who stayed at the Thai-Cambodian border and did not return to their home provinces. If the reconciliation process had been initiated prior to reintegration, the chances for a successful reintegration might have been more equal among ex-combatants. Although a return to war appears unlikely in Cambodia, in other cases a similar geographical division of a country on political or ethnic lines may facilitate the continuation of the cycle of violence.

6.4. A Role for Civil Society in Promoting Social Reintegration and Reconciliation?

Eric Y. Shibuya writes: “Reintegration is undoubtedly the key aspect of the DDR process. Effective disarmament and demobilization are only symptoms or evidence of movement towards communal reconciliation.”⁷¹ The reintegration and reconciliation process cannot be imposed upon a society but must be generated from within — though there are tools that the international communities or local governments can use to promote and facilitate the process.

Most notably, the involvement of civil society appears necessary after demobilization to encourage the reintegration of ex-combatants. As reported in the Phnom Penh Post: “A two-day conference on the lessons learned from the army demobilization and reintegration program heard that the role of civil society was vital to ensure the process succeeded and that former soldiers were able to maintain a decent standard of living.”⁷² According to the journalist, the officials of the CDAF deliberately turned their backs on civil society, while civil society groups pointed out the need to “undertake research on the specific difficulties and needs of demobilized soldiers, providing them cash and materials, develop their local communities, find markets for their produce, and encourage local authorities to

71 SHIBUYA, *supra* note 64, at 14.

72 Bou Sarouen, *Demobilisation Needs More Help from Civil Society*, PHNOM PENH POST, June 21-July 4, 2002.

assist wherever possible.”⁷³ They also recommended offering training rather than goods. According to Huot Ratanak, Executive Director of the Open Forum of Cambodia, “we should provide them with fish hooks rather than just give them a fish.”⁷⁴ In a previous article, the Phnom Penh Post journalist had already reported on the desire for more contact between the military and civil society, namely to provide workshops and trainings. Quoting the Executive Director of the Cambodian Institute for Cooperation and Peace, Kim Hourn, he pointed out that only civil society could be efficient in establishing trust between former soldiers and civilians, hence preventing future social conflicts.⁷⁵

Nevertheless, it is challenging to make training attractive to demobilized soldiers. Most of the Cambodian soldiers demobilized in the 2000s were “category II soldiers,” which means that they were very often aged and/or disabled. Most of the ex-combatants interviewed by the author could hardly work and viewed themselves as farmers, not former soldiers. Most said that if a program of training had been offered, they would have turned it down because they knew how to work and refused to learn from younger trainers. This also means that the training need to be adapted to soldiers’ specific needs and skills, which might be difficult to set up within civil society’s limited financial means. Moreover, most Cambodians who were demobilized and became farmers faced a situation of poverty that would not allow them to take a few days or weeks off work to be trained without payment. Because of the thirty years of war that plagued the country, Cambodians who lived during that time tend to not consider the long-term future,⁷⁶ making the long-term benefits of training difficult to sell. This is likely true in any society that has suffered decades of conflict.

7. CONCLUSION AND RECOMMENDATIONS

This study has raised two major questions: who is best positioned to implement DDR, and should DDR be considered a peace-building tool?

7.1. Who Is Best Positioned to Implement DDR?

Determining the best actor to implement DDR is a question of who is best able to establish security and trust, and who has the best knowledge of local challenges. International implementing agencies such as the UN have the advantage of

73 *Id.*

74 *Id.*

75 Bou Sarouen, *Civil Society Needed in Military Reform*, PHNOM PENH POST, Jan. 18, 2002.

76 This observation comes from participant-observation during the eight weeks spent by the author on the ground in June-July 2013, and was confirmed by author interviews.

being able to ensure a certain degree of security allowing a disarmament process to begin. The link between security and DDR is extremely important and should not be undermined at any time during the process. In fact, it is arguable whether disarmament can be achieved without security. Compared with government-led programs, DDR included within multidimensional peace-building operations will also have more financial means and thus can target broader objectives, especially in terms of number of soldiers to be demobilized.

However, the Cambodian case shows that the failure of the national authorities to implement DDR programs may not necessarily be due to a lack of funding. Political agendas are also often an obstacle to DDR implementation by governmental bodies. Moreover, although local institutions would appear to have a better understanding of local needs and habits, the experience of Cambodia show that the domestic implementation does not always mean that programs will be well adapted to the situation on the ground. Government officials often live far from the reality of ex-combatants and fail to tailor projects to the needs and existing skills of the soldiers to be demobilized. This observation indicates a need for civil society involvement in reintegration programs.

DDR should be adapted to the specific situation of the country, of the civilian society, and of the ex-combatants, so that the reintegration of ex-combatants can be included in post-conflict states' programs for reconstruction and rehabilitation. This requires a careful audit of the situation on the ground before selecting the modalities of the program, whether it is to be implemented by a governmental body or by an implementation agency. The question of whether DDR programs should be implemented by outsiders or insiders is complex, but the key point is that whoever does it must respect the cultural norms of the affected group.

7.2. Should DDR Be Considered a Peace-Building Tool?

As to whether DDR can be a peace-building tool, this study highlights the difficulty of implementing a DDR program directly after the signature of a peace agreement. The peace being still fragile, a lack of trust jeopardizes the process of disarmament. So long as all the factions formerly at war are not simultaneously involved in a disarmament program, none of the factions will agree to demilitarize, as they will still feel the need to protect themselves. What has been seen in Cambodia is common in cases of DDR implemented during the peace-building phase: the DDR fails because of a lack of cooperation of one or more of the actors. This illustrates not only the fragility and the complexity of such programs, but also the difficulty of finding the right time to demobilize soldiers. It appears that DDR programs should only be implemented when the full cooperation of all the warring

factions, and a strict respect for a ceasefire, are achieved. Nevertheless, if a DDR program is expected to consolidate the peace and prevent the various factions return to combat, implementation must come early enough in the peace process to have an impact. The failure of the UNTAC-led DDR program can thus be linked to the failure of the Paris peace-process. Indeed, the Paris Agreements were extremely fragile for two major reasons: (1) because of the decades of civil war that divided Cambodian society and aroused animosity between the warring parties; and (2) because the Agreements were a product of the international community rather than a “coming to terms” between Cambodians,⁷⁷ leading the factions to progressively disengage from the peace-process.

The Cambodian experience suggests that the implementation of successful DDR programs requires a successful peace agreement, meaning that respect for ceasefire should be a precondition rather than an objective of such programs. A distinction must be made between short-term security, defined as the absence of direct threat and use of weapons, and long-term security, defined as the absence of risk that the combatants will return to violence. The first should be achieved before DDR implementation, and the second should be the objective of DDR programs. Therefore, DDR programs should not be considered a tool for reestablishing law and order—as DDR was during UNTAC. Rather, they should be looked to as an instrument for securing a long-lasting absence of violence. Indeed, disarmament should not be instrumental in implementing ceasefires but in reducing the quantity of weapons that will circulate in the post conflict years during reconstruction.

Thus, DDR should be implemented after the complete cessation of violence, when a comprehensive peace still needs to be built and secured. This finding highlights the difference between the end of fighting, which would correspond to the negative definition of peace, and a more comprehensive positive definition of peace that includes social, economical and political rehabilitation. To achieve the latter, and secure a future in which there is little risk of a return to violence, processes like DDR are necessary for establishing security and working toward reconstruction of the social fabric. The cycle of violence is not broken when soldiers stop using their weapons for organized violence, but when irregular forces are demilitarized and the state controls a singular and appropriately sized army, with demobilized soldiers well integrated economically, politically, and socially into civilian society.

7.3. Did DDR Promote Peace-building and Reconciliation in Cambodia?

The absence of a link between national reconciliation and DDR is a fascinating feature of the post-conflict situation in Cambodia. Politically, reconciliation

77 FINDLAY, *supra* note 9, at 30.

was touted by Prime Minister Hun Sen, who created the National Reconciliation Council with Sihanouk as president as part of a transition program announced during the Paris Agreement.⁷⁸ Among civil society, reconciliation efforts were mostly taken over by victim-oriented NGOs. Nevertheless, although DDR is often identified as a tool for promoting and facilitating reconciliation,⁷⁹ this purpose was never clearly referenced in Cambodia, where DDR programs were instead considered a component of security sector reform.

Despite reform efforts, today the Cambodian military has an unexpectedly high number of soldiers and an army “top-heavy with senior officers,”⁸⁰ while the government keeps promoting officials to the rank of four-star general. These promotions, which have been denounced as politically motivated,⁸¹ are a symptom of the politicization of the army over the past decade that found its latest expression in the repression of the political unrest following the July 2013 elections, and in the use of military units by powerful families in land disputes. In an article published in 2012 in the Phnom Penh Post, Cambodian human rights activist Ou Virak writes:

The government needs to focus on reforming the security sector: far too many police, military police and full military officials are involved in land evictions and other incidents that serve to stain Cambodia’s name, promoting the impression that our nation is still on an internal-war footing—an image that is at least 15 years out of date. . . . People need to trust, rather than fear, the Kingdom’s security forces.⁸²

While a return to armed conflict in Cambodia appears extremely unlikely, the society could have benefited from a better social reconstruction, a more comprehensive care program for veterans after the end of the civil war, and an immediate restructure of the military forces and security sector, especially after the military integration program. It seems that Cambodia has achieved a negative definition of peace—the absence of organized armed violence, in the sense that there is no more armed conflict or militias per se. However, a positive definition of

78 MICHAEL HAAS, *GENOCIDE BY PROXY: CAMBODIAN PAWN ON A SUPERPOWER CHESSBOARD* 130 (1991).

79 Duthie, *supra* note 69, at 3.

80 International Institute for Strategic Studies, *The Military Balance* (2014), ch. 6: Asia, at 229.

81 Meas Sokchea, *Promotions “Tsunami” Political, Says Analyst*, PHNOM PENH POST, Feb. 20, 2014 (quoting local political analyst Kem Ley).

82 Ou Virak, President of the Cambodian Centre for Human Rights, *Letter: Cambodian People’s Party Must Not Fear Reform*, PHNOM PENH POST, Aug. 23, 2012.

comprehensive peace remains elusive. Indeed, we are witnessing the apparitions of old social conflicts and unrest—for example the existence of programs supporting ethnic minorities working in the area of land governance. This observation verifies the argument that peace, according to its negative definition, can be achieved without DDR, but lasting communal harmony and deep reconstruction of the post-conflict society is unlikely if DDR programs are not properly implemented. At the crossroads between peace-building and state-building, DDR programs should be used to secure long-term conflict prevention through the strengthening of social cohesion, trust, safety and security.

HUN SEN'S CAMBODIA

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Hun Sen's Cambodia

To many in the West, the name Cambodia still conjures up indelible images of destruction and death, the legacy of the brutal Khmer Rouge regime and the terror it inflicted in its attempt to create a communist utopia in the 1970s. In *Hun Sen's Cambodia*, Sebastian Strangio, a journalist based in the capital city of Phnom Penh, now offers an eye-opening appraisal of modern-day Cambodia in the years following its emergence from bitter conflict and bloody upheaval.

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About the Author

SEBASTIAN STRANGIO is a former reporter and editor at the *Phnom Penh Post*, Cambodia's oldest English-language newspaper. Since leaving the Post at the start of 2011, he has worked as a freelance correspondent, covering news and events across the Asia-Pacific, in countries such as Burma, Thailand, South Korea, India, Bangladesh and Far East Russia. His writing from the region has appeared in numerous publications including *The Atlantic Monthly*, *The New Republic*, *Foreign Policy*, *Slate*, *The Christian Science Monitor*, *The South China Morning Post* and the *Los Angeles Times*. He is currently a freelance correspondent covering news and events across the Asia-Pacific. Strangio lives in Phnom Penh.

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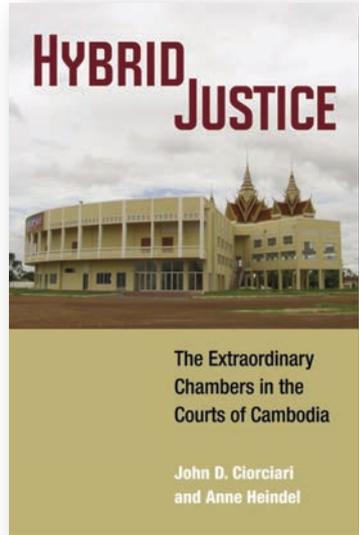
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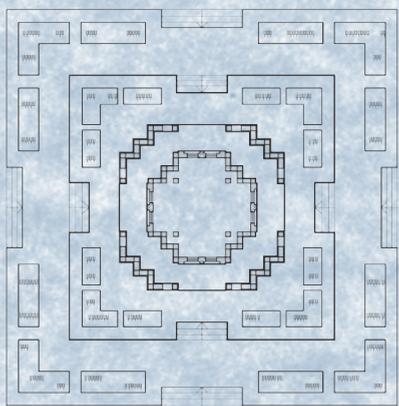
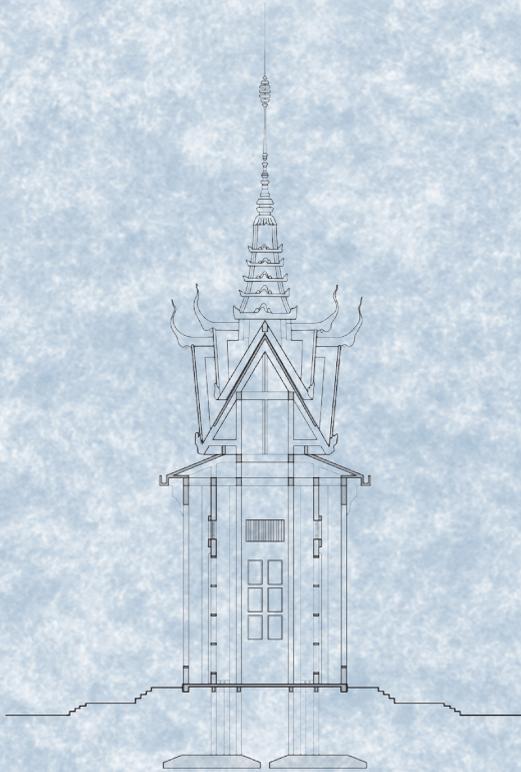
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