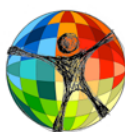


Human Rights, Rule of Law and Democracy in Post-Conflict Cambodia: Failures of the Paris Peace Agreement and Promises for Cambodia's Future



International Human Rights Internships Program - Working Paper Series



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Abstract

More than two decades ago, after years of conflict and bloodshed, Cambodia was near the top of many global priority lists. Consequently, 18 states joined Cambodian representatives at the 1991 Paris Peace Conference to draft an agreement which would restore and maintain peace, promote national reconciliation and ensure a transition towards a system of liberal democracy with special measures taken to assure the protection of human rights. The implementation of the resulting Paris Peace Agreement was no doubt a daunting undertaking, and there is a consensus of opinion that 25 years later the project has failed to fulfill its lofty objectives. Instead of adhering to a democratic rule of law and respecting human rights and fundamental freedoms, the Cambodian government has instead acted in an authoritarian manner, championing the interests of political stability and economic development. Unfortunately, Cambodia is no longer an international priority, and there have been little concerted efforts to set it back on the right path.

This paper has three major objectives. First, to assess the different ways in which the Paris Peace Agreement has failed to fulfill its promise, with reference to four benchmarks of democracy and the rule of law: free & fair elections, civil and political rights, independence of the judiciary and effectiveness in combatting corruption. Second to examine different theories and explanations behind the agreement's failure, with special consideration given to the shortcomings of civil society and the international community in holding the government accountable. Finally, I will provide recommendations and avenues of reflection for future possibilities of change. The entire paper is informed and influenced by my experiences as an intern at LICADHO, a human rights NGO in Phnom Penh, Cambodia, in the summer of 2016. Consequently, the paper was written in late 2016 and cannot therefore claim to account for all subsequent social and political events that have occurred in Cambodia. Nevertheless, many of the main arguments and conclusions remain relevant regardless of the particular time period.

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Introduction & *Mise en contexte*

On July 24th, 2016, thousands of Cambodians participated in a procession in Phnom Penh, to honour the memory of Kem Ley, a popular political commentator who had been assassinated two weeks prior in a suspected government-ordered hit. As I sat with my Khmer colleagues in the back of a pickup truck, looking out on the solemn faces of the thousands of Cambodian supporters, I was awestruck by the impact that Kem Ley had clearly had on his fellow citizens. Kem Ley was a man of the people, a man who spoke truth to power, a man who promoted democracy and civic engagement, and advocated for human rights and social justice. For many, his death represented a turning point in the ongoing clash between the government and Cambodia's dissenting voices. Cambodian opposition politician and Prime Minister Hun Sen's frequent antagonist, Mu Sochua, said it best:

“If Kem Ley's murder was designed to instill fear, it has only stoked outrage and determination. Cambodian officials often issue warnings about a ‘color revolution,’ and the prime minister has cautioned Cambodians against calling for change on social media. The Hun Sen government is afraid of its own people. Perhaps it has reason to be.”¹

By participating in the funeral procession, I had wanted to demonstrate my solidarity with the Cambodian people and my admiration for Ley's fearless and principled defense of democratic ideals. Yet as the day wore on, I could not help but feel that my presence was an intrusion in a deeply personal and historic moment; one marked by grief, self-reflection, and the painful knowledge that Ley's heinous murder, and the ensuing impunity for the crime, was just another illustration of the pitiful state of justice, human rights and rule of law in Cambodia.

Three months after Kem Ley's funeral procession, on October 23rd, 2016, the Paris Peace Agreement (PPA) celebrated its 25th anniversary. Following years of conflict, marked by the atrocities perpetrated by the Khmer Rouge regime from 1975 to 1979, the 1991 PPA put an end to fighting and laid the groundwork for a road to societal reconstruction. Yet 25 years later there is little cause for celebration, given the countless reminders that the Paris Agreement has failed

¹ Mu Sochua, “Cambodia at a Point of No Return”, Editorial, *The New York Times* (20 July 2016), online: <http://www.nytimes.com/2016/07/20/opinion/cambodia-at-a-point-of-no-return.html>.

to fulfill its stated objectives of maintaining peace, establishing a pluralistic liberal democracy and ensuring respect for human rights in Cambodia.² Opposition party leaders have been exiled and subjected to house arrest, human rights defenders and government critics are silenced through imprisonment and assassination, civil society space is continuously shrinking, oppressive laws that curtail fundamental freedoms have been passed, election cycles have been marred by irregularities and the political landscape is largely tilted in favour of the ruling party, making Cambodia a democracy in name alone.³ For all intents and purposes, this was clearly not the societal rebirth that Cambodia and the signatories of the Paris Accords were hoping for.

Nevertheless, it is important to acknowledge that Cambodia is a post-conflict society that has not returned to full-blown civil war since the Paris Accords. Economic growth has thrived and Cambodia's development outcomes have been positive in many spheres. Cambodia's achievements in maintaining a certain degree of social stability and improving the overall quality of life of its citizens through economic development should be commended. However, the Paris Peace process has failed to ensure the establishment of a strong participatory democracy, the production of a 'thick rule of law', or the protection and promotion of human rights and fundamental freedoms. On the contrary, Cambodia has retreated in all three of these fields, and much of the blame must be laid on the flawed implementation of the Paris Accords, the brazen self-interest of Cambodia's own leaders, and the gutless ambivalence and inaction of the

²Cambodia Office of the United Nations High Commissioner for Human Rights, End of Mission Statement, "Statement by the United Nations Special Rapporteur on the situation of human rights in Cambodia: Professor Rhona Smith" (19 October 2016), online: cambodia.ohchr.org [Cambodia OHCHR]; Roseanne Gerin, "Cambodia's Opposition Party Seeks UN's Help to End Political Acrimony", *Radio Free Asia* (18 May 2016), online: <http://www.rfa.org/english/news/cambodia/cambodias-opposition-party-seeks-uns-help-to-end-political-acrimony-05182016164741.html>; Chak Sopheap, "Cambodia still fails to fulfill Paris Peace Agreements' vision", Editorial, *The Phnom Penh Post*, (24 October 2016), online: <http://www.phnompenhpost.com/analysis-and-op-ed/cambodia-still-fails-fulfil-paris-peace-agreements-vision> [Sopheap].

³ Brad Adams, "The Paris Agreements at 25: Requiem Instead of Celebration", Editorial, *The Cambodia Daily*, (4 November, 2016), online: <https://www.cambodiadaily.com/opinion/opinion-paris-agreements-25-requiem-instead-celebration-120195/> [Adams]; United States Mission to the Human Rights Council, Joint Statement, "Human Rights Situation in Cambodia" (14 September 2016), <https://geneva.usmission.gov/2016/09/14/human-rights-situation-in-cambodia-joint-statement/> [HRC Joint Statement].

international community in the face of Cambodia's countless transgressions of its international human rights obligations.

A tension exists in many post-conflict societies, wherein it is believed that pursuing economic growth, political stability and long-term peace may necessarily have to come at the expense of democratic governance, promotion and protection of human rights, and a strong rule of law. I would contend that democracy, respect for human rights and a thick rule of law in post-conflict Cambodia are essential for building a peaceful, stable society, in which quality of life can improve for all citizens. While the Cambodian government has attempted to depict respect for human rights and the maintenance of a peace and social stability as mutually exclusive endeavors, the reality is that they are mutually dependent; a threat to human rights is a threat to peace. Rhona Smith, the United Nations' Special Rapporteur on Cambodia, aptly stated that the Paris Peace process considered "[r]espect for human rights ... as the best protection against any return to the horrors the Cambodian people had endured over the preceding decades...but also as the best guarantee for a stable, prosperous and peaceful future".⁴

Consequently, it is my argument that the consolidation of peace, democracy and rule of law in post-conflict societies is a multi-stakeholder process, which requires sustained efforts to ensure observance of human rights obligations from all levels and actors of society. Grassroots activism, popular movements and civil society action are valuable tools for holding governments accountable, but are limited in restrained democracies, and must be combined with meaningful engagement from the international community.

My goal in writing this paper is to engage with the complexities of Cambodia's situation, situating my own experiences working over the summer of 2016 during a period of serious social upheaval at LICADHO, a prominent Cambodian human rights NGO,⁵ within a much broader historical and societal context. I will begin by delineating an analytical framework for

⁴ Sopheap, *supra* note 2.

⁵ LICADHO, the Cambodian League for the Promotion and Defense of Human Rights, is a national Cambodian human rights NGO established in 1992, which monitors human rights violations and advocates for the rights of Cambodians all around the country.

evaluating Cambodia's adherence to the PPA, by using the dual theoretical concepts of democracy and the rule of law as guiding principles. I will then conduct an overview of Cambodia's human rights situation, the state of the rule of law, and the functioning of democratic institutions, with the goal of illustrating the failures and violations of the PPA. This overview will be accompanied by an appraisal of the PPA and its implementation, as well as an examination of the reasons behind the agreement's failures. Attention will then be given to the role of civil society and the international community in restraining government power and ensuring respect for democracy, rule of law and human rights. Finally, I will present a way forward, concluding my paper by surveying different options and actions that could be taken by Cambodians and the international community to return the country on the path set by the Paris Agreement.

Theoretical Framework: Rule of Law and Democracy

The PPA not only represented an effort to put an end to armed conflict, but also reflected an ideological judgment call that the implementation of liberal democracy, the strengthening of rule of law, and respect for human rights, were the ideal means in which peace could be achieved. In order to evaluate the extent to which this choice was well-founded, and assess Cambodia's achievement of these objectives, it is first necessary to outline the limits of these terms. Upon arriving in Phnom Penh, I was repeatedly told by colleagues that "there is no rule of law in Cambodia" and that "Cambodia is a dictatorship, not a democracy". After witnessing Kafkaesque court proceedings and immersing myself in the turbulent political context, my own gut feeling echoed these sentiments. Yet when forced to elaborate on the essential conditions or qualities of a well-functioning democracy, or the elements of the rule of law, an answer proves hard to concisely express. Consequently, a brief literature review will help identify certain elements of democracy and rule of law, which are well-suited to the Cambodian context, and are workable for the purpose of this paper.

Rule of law

The "rule of law" does not explicitly appear in the texts of either the PPA or the Cambodian Constitution. However, certain provisions make reference to elements that have been identified

in the literature as pertaining to rule of law: respect for the Constitution and the law,⁶ “rule according to the Constitution”,⁷ equality before the law,⁸ and separation of government powers,⁹ just to name a few. Further, the rule of law has been invoked in the Cambodian context by international institutions, foreign aid partners, civil society groups and countless scholars and theorists, all seeking to evaluate the efficacy of the country’s governance, its respect for human rights and its adherence to principles of liberal democracy. That being said, there exists no consensus over the formal and substantive elements of this concept; interpretation of the rule of law is largely influenced by political, ideological and cultural differences.¹⁰

Essentially, the function of the rule of law is to ensure that members of society comply with existing laws, so as to maintain social order, but also to impose certain legal constraints on the government’s power, such that they too respect the law and do not wield their power or discretion boundlessly or arbitrarily.¹¹ Legal theorists have further conceptualized rule of law as involving equal access to, application of and treatment under the law.¹² The rule of law mandates that laws must be prospective, stable, made public, clear in meaning, and be fairly and consistently applied in like cases, in order to allow for greater certainty, predictability and security in day to day interactions between citizens, and with the government.¹³

These philosophical underpinnings are expressed in a range of practical terms, in the structure of a society’s institutions, the rights that are guaranteed in constitutions, and the manner in which these rights are given practical effect. A number of indicators have been identified in the literature as measures of the rule of law, including the state of individual security

⁶ *Constitution of the Kingdom of Cambodia, 1993*, Preamble, art 49 [*Constitution*].

⁷ *Ibid* at art 1.

⁸ *Ibid* at art 31.

⁹ *Ibid* at art 76.

¹⁰ Mahdev Mohan, Jenny Holligan & Lan Shiow Tsai, “Rule of Law in ASEAN – From ‘Competing Conceptions’ Toward A Common Conceptual Framework” in Marc Spitzkatz, ed, *Rule of Law: Perspectives from Asia* (Singapore: Konrad-Adenauer-Stiftung, 2013) 11 at 11 [ASEAN].

¹¹ Brian Tamanaha, “A Concise Guide to the Rule of Law” (2007) St John’s University School of Law Working Paper No 07-0082 at 6 [Tamanaha]; ASEAN, *supra* note 10 at 12.

¹² *Ibid*.

¹³ Thomas Carothers, ed, *Promoting the Rule of Law Abroad: In Search of Knowledge* (Washington DC: Carnegie Endowment for International Peace, 2010) at 4 [Carothers]; ASEAN, *supra* note 10 at 30.

and civil order, effectiveness in fighting corruption,¹⁴ independence of the judiciary, the existence of government accountability mechanisms and institutional checks and balances,¹⁵ fair and effective enforcement of legal and administrative regulations, and protection of fundamental human rights.¹⁶

Competing conceptions of the rule of law have emerged in diverse social, political and economic contexts.¹⁷ A narrow or “thin” approach to the rule of law is based on the aforementioned minimum requirements, allowing for peaceful social order, predictable social relations, the enforcement of economic rights, without necessarily needing to abide by the political values of liberal democracies.¹⁸ Thin rule of law is generally associated with illiberal regimes, which emphasize the existence of procedural and formal aspects of a legal system, like a Constitution, at the expense of substantive considerations regarding fundamental rights or deeper notions of justice. In such regimes, there is a greater risk for government power to go unchallenged, allowing it to remain above the law and maintain control.¹⁹ As a result, the thin conception of rule of law may fundamentally undermine the key principle of equality under the law, leading to a situation wherein the government benefits from “rule by law” rather than a society in which all actors are subject to the principle of “rule of law”. In particular, the thin conception of rule of law has gained popularity in East Asia, based on the models of countries like China and Singapore, who pursue development strategies that subordinate liberal democratic ideals and human rights to interests of political stability and economic growth.²⁰

On the other end of the spectrum lies a “thick” conception of the rule of law, oft associated with mature liberal democracies and championed in post-conflict state-building missions.²¹ The

¹⁴ Kheang Un, “Cambodia: Moving away from Democracy?” (2011) 32:5 Intl Pol Sci Rev at 549 [Un, “Democracy”].

¹⁵ Stephen McCarthy & Kheang Un, “The evolution of rule of law in Cambodia” (2015) 24:1 Democratization at 101 [McCarthy].

¹⁶ World Justice Project, *Rule of Law Index* (Washington DC: 2016) at 4.

¹⁷ McCarthy, *supra* note 15 at 102.

¹⁸ McCarthy, *supra* note 15 at 102.

¹⁹ *Ibid.*

²⁰ ASEAN, *supra* note 10 at 15.

²¹ *Ibid* at 16.

thick conception of rule of law does not simply adhere to minimum requirements related to form and procedure, but also prescribes certain substantive elements. Values associated with liberal democracies, like the importance of individual autonomy and the protection and promotion of civil and political rights, including freedom of expression, freedom of association and due process rights, are generally prized within the “thick” conception. A thick model concerns itself not only with the existence of rule of law indicators on paper, but also strives to ensure that these measures are reflected in practice.²² Thus, it is of no use to inject a laundry list of aspirational goals into the thick conception of rule of law, as this risks muddling the term, to the point that it may become devoid of value if it is constantly being violated.²³

Link between rule of law and democracy

Legal academics and democratization theorists have repeatedly argued that the concepts of liberal democracy and rule of law are fundamentally inter-related.²⁴ The existence of a thick rule of law is said to promote democracy by guaranteeing the civil and political rights at the system’s core, as well as strengthening institutional accountability mechanisms that allow for political contestation and constraints on government power.²⁵ However, while a correlation between the two concepts has been theorized, a causal relationship between the two cannot be presumed, given that autocratic regimes can still adhere to a minimal conception of the rule of law, and even mature democratic regimes are not immune from serious shortcomings in the rule of law without necessarily stripping that particular country’s political order of its democratic status.²⁶

²² Tamanaha, *supra* note 11 at 7

²³ ASEAN, *supra* note 10 at 16 (a more uniform understanding of the rule of law has been promoted by ex-United Nations Secretary General Kofi Annan, whose definition of the term “interweaves both formal elements of the rule of law, such as equality, accountability, and avoidance of arbitrariness with substantive human rights norms and standards, while retaining more traditional concepts, such as supremacy of the law”).

²⁴ Un, “Democracy”, *supra* note 14 at 549; McCarthy, *supra* note 15 at 100; Carothers, *supra* note 13 at 4.

²⁵ *Ibid*; McCarthy, *supra* note 15 at 101.

²⁶ *Ibid* at 113.

Democracy

Both the PPA and Cambodian Constitution identify the principles of liberal, pluralistic democracy as guiding Cambodia's political governing structures.²⁷ Accordingly, both documents expand to some degree on the meaning and content of a liberal democracy.

The Cambodian Constitution stipulates that “Khmer citizens are the masters of their own country. All power belongs to the citizens. The citizens exercise their powers through the National Assembly, the Senate, the Royal Government and the Judiciary”;²⁸ likewise, the PPA acknowledges the desire to “ensure the exercise of the right to self-determination of the Cambodian people through free and fair elections”.²⁹ Evidently, the electoral process was identified during the drafting of the Paris Agreements as a key component in Cambodia's political order, and it was considered necessary that the Constitution provide for “periodic and genuine elections”, and allow citizens a “full and fair opportunity to organize and participate in the electoral process”.³⁰ Furthermore, liberal democracy requires the respect of fundamental rights and freedoms, without which political participation is heavily circumscribed, and a free and fair electoral process risks being undermined.³¹ Additionally, a crucial component within liberal democracies is the existence of inter-institutional accountability mechanisms, such as an independent judiciary, which provide checks & balances on government power.³²

Moreover, a UNGA Resolution adopted in 2000 took steps to elaborate on the common features of democracies, stressing that no singular model of democracy exists, but noting the importance for democracies to promote pluralism, respect human rights, maximize individual

²⁷ *Constitution*, *supra* note 6 at Preamble, arts 1, 50, 51; *Agreement on a Comprehensive Political Settlement of the Cambodia Conflict*, Cambodia and 18 state parties, 23 October 1991, 1663 UNTS 27 at annex 5 art 4 [*Paris Peace Agreement*].

²⁸ *Constitution*, *supra* note 6 at art 51.

²⁹ *Paris Peace Agreement*, *supra* note 27 at Preamble.

³⁰ *Ibid* at annex 5 art 4.

³¹ Sopheap, *supra* note 2.

³² Un, “Democracy”, *supra* note 14 at 553.

participation in decision-making, develop effective public institutions and have fair electoral processes.³³

The existence of a well-functioning democracy does not and cannot rest solely on the guarantee or affirmations of such rights and institutions within legal texts or constitutions, but also requires the implementation and effective exercise of these rights and institutions in practice.

For the purpose of evaluating Cambodia's adherence to the PPA, I will focus in this paper on four benchmarks, based on some of the mostly widely agreed upon elements in the literature pertaining to rule of law and democracy: free and fair elections, respect for civil and political rights, the independence of the judiciary, and effectiveness in fighting corruption.

How & Why the Paris Agreement Has Failed

In the aftermath of a horrific conflict, the task facing the drafters of the PPA, namely to establish a framework that would restore and maintain peace, rebuild Cambodia, and move the country “toward perpetual progress, development, prosperity, and glory”, was a complex and challenging undertaking.³⁴ The sheer devastation left behind as a legacy of Khmer Rouge rule cannot be overstated. Over three years, eight months and twenty days, the Khmer Rouge's radical attempt at Marxist social change was responsible for the death of over 1.7 million people, the dismantling of the country's political and bureaucratic structures, and the destruction of the legal system, including the targeted extermination of political leaders, military officers, civil servants, and nearly all Cambodians with legal education, as well as crucial resources, including court structures, law schools and legal documents.³⁵ Following Cambodia's liberation in 1979, it took more than a decade of Vietnamese occupation and the end of Cold War geopolitics before the international community turned its attention to Cambodia, at which point the country

³³ *Promoting and consolidating democracy*, GA Res 96 UNGAOR, 55th Sess, UN DOC A/RES/55/96 (2000) 1.

³⁴ *Constitution*, *supra* note 6 at Preamble.

³⁵ McCarthy, *supra* note 15 at 104; Sorpong Peou, *International Democracy Assistance for Peacebuilding* (Basingstoke: Palgrave Macmillan, 2007) at 136 [Peou].

was still alarmingly devoid of political and legal institutional capacity.³⁶ Consequently, it is crucial to acknowledge that the signatories to the Paris Peace Agreement faced enormous challenges in their attempt to rebuild legal and political systems from scratch. Nevertheless, 25 years represents more than enough time to reflect on the outcomes of the PPA, as well as to critically consider the numerous theories as to why the agreement has not fulfilled its promise.

Assessing the Paris Peace Agreement

In the previous section I identified four benchmarks that would allow for Cambodia's adherence to the principles of democracy and rule of law, which are fundamental to the Paris Peace Agreement, to be evaluated. Each benchmark will be assessed with references from both my experiences over the summer of 2016 and from examples from the past 25 years of Cambodia's history.

Free & Fair Elections

During my summer in Cambodia it was repeated to me time and time again that the ongoing state harassment of human rights defenders, opposition party politicians and civil society actors was following the same pattern that always preceded election cycles. After narrowly avoiding an unexpected loss in the 2013 elections, the ruling Cambodian People's Party (CPP), led by Prime Minister Hun Sen, was taking no chances with the upcoming 2017 commune and 2018 general elections, as the cycle of political repression was already manifesting itself more than a year before Cambodians were to cast their ballots.

Sam Rainsy, president of the opposition Cambodia National Rescue Party (CNRP), was dealing with a variety of frivolous criminal charges and convictions, forcing him to move abroad in late 2015 for a stint of self-imposed exile, before being officially exiled in October 2016.³⁷ Meanwhile, Rainsy's deputy Kem Sokha faced his own set of spurious charges in a convoluted political scandal, which culminated in a six-month period of de facto house arrest to evade

³⁶ Simon Springer, "Violence, Democracy, and the Neoliberal "Order": The Contestation of Public Space in Posttransitional Cambodia" (2009) 99:1 Ann AA Geog at 143 [Springer].

³⁷ Colin Meyn & Khuon Narim, "Sam Rainsy Officially Exiled From Cambodia", *The Cambodia Daily* (24 October 2016), online: <https://www.cambodiadaily.com/news/sam-rainsy-officially-exiled-cambodia-119625/> (Rainsy officially stepped down as party leader in early 2017).

incarceration for a five-month prison sentence. Though Sokha eventually received a pardon from the King in December 2016, several CNRP politicians and party activists continue to languish in jail after being convicted on trumped up charges.³⁸ The impact of these crackdowns on the legitimacy of the upcoming elections is clear: the ruling party is able to keep the opposition on the defensive, inhibiting the party's efforts to gather support in the lead-up to the election and tarnishing its image and reputation in the minds of many Cambodians in the process.

As the CPP was undermining the CNRP's ability to fully participate in the political process, they were concurrently attacking the electoral process' own procedural legitimacy. The functioning and political independence of the National Election Commission has been severely undermined by the questionable criminal charges brought against two of its CNRP-appointees.³⁹ What was intended to be a balanced oversight body now tilts squarely in favour of the CPP, rendering the possibility of irregularities in the upcoming elections all the more likely. The integrity of the voter registration process has already been called into question, in light of reports of voter registration irregularities and disruptions, ostensibly the result of the CPP's attempts to illegitimately sway the election results.⁴⁰

Lastly, concerns about the peaceful transfer of political power following elections remain significant, given Hun Sen's notorious track record of using brute force to hold on to power

³⁸ Human Rights Watch, Press Release, "Cambodia: Drop Case Against Opposition Leader" (6 September 2016), online: <https://www.hrw.org/news/2016/09/06/cambodia-drop-case-against-opposition-leader>; LICADHO, Press Release, "Deputy opposition CNRP leader Kem Sokha tried, convicted in absentia" (9 September 2016), online: <http://www.licadho-cambodia.org/flashnews.php?perm=190>.

³⁹ Alex Willemyns & Kuch Naren, "If Rong Chhun Goes, CPP Can Veto Any New NEC Member", *The Cambodia Daily* (20 May 2016), online: <https://www.cambodiadaily.com/news/if-rong-chhun-goes-cpp-can-veto-any-new-nec-member-112828/>; Lay Samean & Cristina Maza, "NEC repercussions for Chakrya case: analysts", *The Phnom Penh Post* (26 September 2016), online: <http://www.phnompenhpost.com/national/nec-repercussions-chakrya-case-analysts>; LICADHO, Press Release, "Civil Society Condemns Conviction of Human Rights Defender Ny Chakrya" (22 September 2016), online: <http://www.licadho-cambodia.org/pressrelease.php?perm=409>.

⁴⁰ Khuon Narim & Michael Dickison, "CNRP Reports Voter List Irregularities", *The Cambodia Daily* (19 September 2016), online: <https://www.cambodiadaily.com/news/cnrp-reports-voter-list-irregularities-118151/>; LICADHO, Press Release, "Civil Society Deeply Concerned by Actions Taken to Disrupt, Prevent and Halt Voter Registration Campaigns During Water Festival" (25 November 2016), online: <http://www.licadho-cambodia.org/pressrelease.php?perm=412>.

following contentious elections results and the lack of “institutionalized or peaceful experience of how to handle [electoral] defeats”.⁴¹ This historical context makes Hun Sen’s recent comments, warning Cambodians of the possibility for civil war if the CPP loses the next national elections, especially concerning given his party’s control over the military.

Free and fair elections were the cornerstone of the PPA’s plan to establish a liberal multi-party democracy in Cambodia.⁴² However, while periodic elections have taken place since the 1993 elections overseen by UNTAC,⁴³ subsequent elections have been marred by politically motivated violence and intimidation,⁴⁴ accusations of widespread fraud and illegitimate tactics,⁴⁵ and severe limitations placed on the ability for opposition parties to mobilize popular support through access to media channels and popular demonstrations.⁴⁶ The situation is clear to many observers: Hun Sen knows that his support is wavering, as “the Cambodian people are no longer satisfied by the CPP’s justification for its continuing rule in the name of peace, stability and economic growth”, forcing him to take all means necessary to falsify the appearance of popular legitimacy necessary to portray Cambodia as a genuine democracy.⁴⁷

Civil and Political Rights

My time in Cambodia began with the news that three of my colleagues had been arrested and temporarily detained while attempting to peacefully demonstrate outside of a prison.⁴⁸ The government responded to this peaceful social movement violently, labeling it a ‘colour

⁴¹ Adams, *supra* note 3; Peou, *supra* note 35 at 57; Mona Lilja, “Discourses of Hybrid Democracy: The Case of Cambodia” (2010) 18:3 Asian J Pol Sci at 293 [Lilja].

⁴² *Paris Peace Agreement*, *supra* note 27 at Preamble, art 1, art 12.

⁴³ The United Nations Transitional Authority in Cambodia was a peacekeeping mission with a multi-faceted mandate established to ensure the implementation of the Paris Peace Agreements.

⁴⁴ Adams, *supra* note 3; Lilja, *supra* note 41 at 292; Peou, *supra* note 35 at 55.

⁴⁵ *Ibid* at 57; Un, “Democracy”, *supra* note 14 at 556.

⁴⁶ *Ibid* at 559; Jeroen de Zeeuw, “Projects do not create institutions: The record of democracy assistance in post-conflict societies” (2005) 12:4 Democratization at 493 [de Zeeuw].

⁴⁷ McCarthy, *supra* note 15 at 113.

⁴⁸ LICADHO, Press Release, “Six activists and human rights workers arrested” (9 May 2016), online: <http://www.licadho-cambodia.org/flashnews.php?perm=172>; (this demonstration was part of the first week of the Black Monday campaign, initiated by grassroots activists and NGOs on May 9, 2016 to protest the arrest and detention on politically motivated charges of five human rights workers from local rights group ADHOC).

revolution’ and characterizing it as an attempt to undermine public order.⁴⁹ Using the rhetoric of ‘anarchy’, ‘revolution’ and ‘threat to peace and public order’ was one of the government’s preferred discursive strategies to reject the invocation of human rights principles by peaceful protesters. The government readily exploits the country’s traumatic history, inciting fear of the possibility of a return to war, to quell peaceful attempts by citizens to legitimately exercise their constitutional freedoms. More recently, the government even took steps to relocate the designated space for public protests in Phnom Penh to an isolated location on the outskirts of the city, with the clear intention of constraining the ability for citizens to effectively mobilize and assemble.⁵⁰ Even when demonstrations are allowed to take place, the government’s alternate strategy is often to ignore them completely, “denying their calls for government accountability by simply not responding”, respond with violence and brutality, or to diminish the legitimacy of the public’s demands or claims.⁵¹ Given the complete lack of effective accountability mechanisms within the government’s traditional structure, citizens who are prevented from taking to the street to press their concerns over government policies and actions are left voiceless and without any recourse.

Furthermore, the number of criminal defamation cases that took place while I was in the country was overwhelming: a clear sign that freedom of expression was heavily limited.⁵² The CPP employed defamation lawsuits and its power over the courts as a strategy of control, to quell dissent and punish outspoken critics. Each case followed the same pattern, as Hun Sen and his CPP cronies latched onto any critical speech by journalists, human rights activists or

⁴⁹ Ananth Baliga, Lay Samean & Meas Sokchea, “Eight arrested, released over ‘Black Monday’ protest”, *The Phnom Penh Post* (10 May 2016), online: <http://www.phnompenhpost.com/national/eight-arrested-released-over-black-monday-protest>.

⁵⁰ Lay Samean, “Prime minister sends park packing”, *The Phnom Penh Post* (7 December 2016), online: <http://www.phnompenhpost.com/national/prime-minister-sends-park-packing>.

⁵¹ Springer, *supra* note 36 at 150.

⁵² Sek Odom & Taylor O’Connell, “Analyst Ou Virak Questioned Over Defamation Complaint”, *The Cambodia Daily* (13 May 2016), online: <https://www.cambodiadaily.com/news/analyst-ou-virak-questioned-over-defamation-complaint-112536/>; Khy Sovuthy, “Hun Sen’s Defamation Case Against Rainsy Moves Ahead”, *The Cambodia Daily* (6 August 2016), online: <https://www.cambodiadaily.com/archives/hun-sens-defamation-case-against-rainsy-moves-ahead-116337/>; Khuon Narim, “Senator Sued by Hun Sen for Defamation Skips Court”, *The Cambodia Daily* (9 August 2016), online: <https://www.cambodiadaily.com/brief/senator-sued-hun-sen-defamation-skips-court-116442/>.

CNRP politicians, calling it an affront to their honor and requesting the initiation of criminal, rather than civil, defamation proceedings.⁵³ These defamation suits and other restrictions on freedom of expression no doubt have a chilling effect on the exercise of free speech by dissenters whose opinions and beliefs are contrary to the status quo. Extreme limitations on speech also hinder the ability of the press to operate freely, making self-censorship a necessary survival strategy for many journalists, as publishing critical articles on sensitive topics has resulted in revocation of licenses, intimidation, violence, arrests and assassinations in the past.⁵⁴ Restrictions on freedom of expression limit the opportunity for public discourse and the exchange of diverging ideas on important social issues, as well as the possibility for meaningful political engagement, both of which are essential in a well-functioning democracy.

The passage of the Law on Associations and NGOs (LANGO) in 2015 imposed burdensome obligations and vague, overbroad limitations on the activities of NGOs like LICADHO, representing an egregious restriction of freedom of association.⁵⁵ While the law has been rarely applied, it remains a weapon in the CPP's legislative arsenal that threatens the work of civil society groups. Notably, the potential application of the law was invoked after LICADHO published a fact-based webpage documenting the details of the current political prisoners being held in Cambodia's prisons, with the intent of illustrating "Cambodia's increasingly restricted political environment in which opposition is not tolerated and debate stifled".⁵⁶ Government officials promptly threatened LICADHO with possible suspension or closure for having violated LANGO's vague 'political neutrality' provisions, threats that ultimately were unsubstantiated.⁵⁷ Nevertheless, events like these have an impact on the work of NGOs, who in many cases engage in self-censorship to avoid potential legal repercussions

⁵³ McCarthy, *supra* note 15 at 101.

⁵⁴ Un, "Democracy", *supra* note 14 at 552; Peou, *supra* note 35 at 79.

⁵⁵ LICADHO, Press Release, "ADHOC and LICADHO Urge Cambodian Constitutional Council to Reject Unconstitutional LANGO" (30 July 2015), online: <http://www.licadho-cambodia.org/pressrelease.php?perm=390>.

⁵⁶ LICADHO, "Cambodia's Political Prisoners", online: http://www.licadho-cambodia.org/political_prisoners/.

⁵⁷ George Wright & Khuon Narim, "Rights Group Warned Over 'Political Prisoners' Page", *The Cambodia Daily* (20 May 2016), online: <https://www.cambodiadaily.com/archives/rights-group-warned-over-political-prisoners-page-112823/>.

related to their advocacy work. The work of Cambodian human rights NGOs was further compromised by the government's ongoing siege against ADHOC, one of Cambodia's most respected human rights NGOs, which acted as a public deterrent to the activities of many other NGOs, who feared facing similar repercussions.⁵⁸ Ultimately, the Cambodian government has made a concerted effort to limit the rise of civil society, with special disdain for human rights NGOs, as it views the creation of a "public sphere for political action" as a threat to its stability and grasp on power.⁵⁹

While civil and political rights like freedom of assembly, expression and association are guaranteed in the Paris Agreements and under Cambodia's constitution, in practice these rights are heavily limited and regularly violated.⁶⁰ In particular, human rights defenders, grassroots activists, union leaders, opposition politicians and government critics face intensifying threats, as they are regularly "subjected to harassment, intimidation, restrictions of movement, legal action, and physical violence".⁶¹ The Cambodian government's persistent denial of fundamental freedoms to its citizens is simply antithetical to a thick rule of law and a well-functioning, participatory liberal democracy, which "requires respect for human rights, in particular the freedom to exchange ideas and engage in political discussion, to meet together and express

⁵⁸ LICADHO, Press Release, "Civil Society Condemns Charging of Human Rights Defenders" (2 May 2016), online: <http://www.licadho-cambodia.org/pressrelease.php?perm=404> (Four senior staff, Ny Sokha, Nay Vanda, Yi Soksas and Lim Mony, and one former ADHOC staffer, Ny Chakrya, faced trumped up charges of bribing a witness in a convoluted political scandal involving deputy CNRP leader Kem Sokha and his alleged mistress Srey Mom. The alleged bribery was in fact related to legitimate legal and material assistance that ADHOC provided to Srey Mom, to cover food and transport costs. The five human rights defenders have been detained for over nine months in a clear attempt to punish the activities of human rights defenders and civil society. Several of their colleagues from ADHOC were also summoned to testify by the Phnom Penh Municipal Court in clear attempts to intimidate human rights workers. ADHOC President Thun Saray, fearing for his safety feeling threatened by the possibility that he too would be inculpated in the affair, was forced to flee to Canada).

⁵⁹ Kheang Un, "State, Society and Democratic Consolidation" (2006) 79:2 Pac Aff at 237 [Un, "State"].

⁶⁰ *Constitution*, *supra* note 6 at arts 31, 37, 41, 42; *Paris Peace Agreement*, *supra* note 27 at annex 3 art 9, annex 5 art 2; HRC Joint Statement, *supra* note 3.

⁶¹ Oliver P. Richmond & Jason Franks, "Liberal Hubris? Virtual Peace in Cambodia" (2007) 38:1 Sec Dialogue at 40 [Richmond]; Peou, *supra* note 35 at 77-78; Springer, *supra* note 36 at 147.

shared opinions, including through peaceful protest, and to take part in political life without fear”.⁶²

Independence of the Judiciary

It took only 10 minutes of deliberation for a judge of the Phnom Penh Municipal Court to decide a defamation case involving a Facebook post made by CNRP President Sam Rainsy. Curiously, the judge returned from his chambers with a lengthy written judgment, finding Rainsy guilty of the charges and sentencing him to a heavy fine.⁶³ I attended many trial proceedings during my time in Cambodia, to the point that the consistent violation of defendants’ legal rights no longer really surprised me. Evidently the result in this case had been a foregone conclusion, allowing for the judge to prepare his lengthy judgment before even hearing the case, illustrating the complete lack of judicial independence in Cambodia. Attending the proceedings to hear a verdict had been a mere formality, given the presumed prior knowledge of everyone involved, including Rainsy (neither he nor his lawyers were present at trial), of the obvious conclusion in this case.

Judicial independence is a key component of the rule of law, in order to hold the executive and legislative branches accountable. Judicial independence requires insulation from executive interference or political interests, as “decisions should be contingent upon the objective principles of the law; not the social or political standing of the litigants”.⁶⁴ While judicial independence is enshrined in the Cambodian Constitution, its ineffective implementation has long undermined the perceived, and actual, fairness of Cambodia’s legal system.⁶⁵ The ruling party’s use of judicial power as a tool to promote its political agenda and silence dissenting voices makes the judiciary’s oversight capacity weak and ineffective, preventing it from successfully constraining executive power and running contrary to the goal of inter-institutional

⁶² Sopheap, *supra* note 2.

⁶³ LICADHO, Press Release, “CNRP Leader Sam Rainsy Tried and Convicted in Absentia” (28 July 2016), online: <http://www.licadho-cambodia.org/flashnews.php?perm=181>.

⁶⁴ McCarthy, *supra* note 15 at 101.

⁶⁵ *Constitution*, *supra* note 6 at art 128.

accountability.⁶⁶ Equality before the law has been greatly undermined by this lack of judicial independence, as courts have been found to act in a politically selective and discriminatory manner.⁶⁷ Consequently, the Cambodian people are deeply skeptical of the ability of the judiciary to deliver just outcomes, have little to no confidence in its independence, and view it as “corrupt, incompetent and biased”.⁶⁸

The shortcomings of judicial independence in Cambodia are rooted in many institutional weaknesses, including a lack of technical capacity or trained personnel, inadequate resources, pervasive corruption due to low salaries, and political dependency due to links of patronage between judges and members of the ruling party.⁶⁹ In particular, frequent interventions in cases by CPP politicians, and even negotiations conducted by opposition politicians asking the ruling party to use its influence over the judiciary to free political prisoners, have undermined due process, legal predictability and judicial independence, as judges feel pressured to submit to their requests given serious fears of punishment or retaliation, demonstrating the clear subordination of judges to politicians. The adoption of three laws in 2014 which codify the executive’s interference in the judicial branch have only amplified the problem.⁷⁰ These laws have given broad powers to the executive branch (via the Ministry of Justice) over the composition of the body tasked with ensuring the independence of the judiciary, the management of the court’s budget, and other vital decision-making processes, in direct contradiction with the constitutionally enshrined principle of the separation of powers.⁷¹

⁶⁶ Un, “Democracy”, *supra* note 14 at 554.

⁶⁷ McCarthy, *supra* note 15 at 102; Peou, *supra* note 35 at 96.

⁶⁸ Richmond, *supra* note 61 at 42; International Bar Association, *Justice versus corruption: Challenges to the independence of the judiciary in Cambodia* (London: 2015) at 15 [IBA].

⁶⁹ McCarthy, *supra* note 15 at 109, 112.

⁷⁰ McCarthy, *supra* note 15 at 111-112.

⁷¹ LICADHO, Press Release, “Unconstitutional Draft Laws on the Judiciary should be Rejected” (15 June 2014), online: <http://www.licadho-cambodia.org/pressrelease.php?perm=346>; McCarthy, *supra* note 15 at 104, 111-112; IBA, *supra* note 68 at 17-18; *Constitution*, *supra* note 6 at art 113 (the Supreme Council of the Magistracy is empowered by the Constitution to appoint, dismiss and discipline judges and prosecutors).

Without an independent and effective judiciary, the process of democratic consolidation and the strengthening of the rule of law in Cambodia are seriously hindered, giving rise to continued abuse of power by the government and persistent violations of human rights.⁷²

Effectiveness in Fighting Corruption

A report published by anti-corruption NGO Global Witness in July 2016 caused shockwaves in Cambodia, as it documented the large personal fortunes of prime minister Hun Sen's family, and shed light on an inconvenient truth that many Cambodians were already aware of: "Hun Sen has abused his position as prime minister to allow his relatives control of, or major stakes in, most of Cambodia's major industries".⁷³ Corruption has become a fact of life in Cambodia, as the country has placed near the bottom of Transparency International's Corruption Perceptions Index for years.⁷⁴ Corruption has long been identified as a drain on national resources, a hindrance to social development, and blamed as a significant reason for the "paralysis of democratic government and civil society in Cambodia".⁷⁵ Yet despite the establishment of an Anti-Corruption Unit in 2010, the country's effectiveness in fighting corruption has not improved, as "no-high-ranking government official has ever been punished for corruption"; more recently, the ACU has instead been more actively complicit in politically partisan prosecutions.⁷⁶

The roots of Cambodia's corruption problem have been linked to historically entrenched relationships of patronage in Cambodian culture and society.⁷⁷ Neo-patrimonialism is a key element of Cambodia's governance structure, through which bonds are formed "wherein patrons are obligated to accommodate their clients' requests, tolerate their behaviour, and protect their interests in exchange for support in the form of votes, materials, and political

⁷² Un, "State", *supra* note 59 at 231; ASEAN, *supra* note 10 at 30.

⁷³ Global Witness, *Hostile Takeover* (London: 2016).

⁷⁴ Peou, *supra* note 35 at 60.

⁷⁵ Richmond, *supra* note 61 at 38.

⁷⁶ Un, "State", *supra* note 59 at 229.

⁷⁷ Un, "Democracy", *supra* note 14 at 548.

power”.⁷⁸ The CPP has utilized patronage bonds to link “party elites to economic elites and then to voters to bolster their electoral victories and legitimacy and thus further strengthen their control of the country”.⁷⁹ State officials and agents exploit their positions of political power by involving themselves in economic transactions at every level, accumulating wealth and solidifying their membership as part of the economic elite. Patrimonialism and high-level corruption undermine both democratic consolidation and the rule of law, as they allow for elitist informal networks founded on private interests to “permeate and supersede state institutions”, without any form of accountability.⁸⁰ As a consequence, patrimonialism favors the personal preferences and discretion of those in power, limiting the ability for state decision-making on the basis of law or policies in support of ‘public interest’.⁸¹ Moreover, corruption and kleptocratic governance structures tend to concentrate wealth in the upper echelons of a society, widening the income gap between the rich and poor and aggravating social and economic inequalities.

There is a clear absence of political will to investigate or take action in cases of corruption, given that key members of the ruling party are part of the neo-patrimonial system. Financial, political, career and security interests incentivize inaction and make the voluntary pursuit of reform by the current government unlikely.⁸² The system of patronage has been key to the CPP’s electoral success, as politicians regularly exchange gifts and commitments to infrastructure development for votes and support.⁸³ In addition, the lack of independence within the judiciary makes effectively combatting corruption nearly impossible, given that “a wider socio-political environment dominated by patronage and corruption blurs judges’ perceptions of what constitutes legality and illegality; morality and immorality”.⁸⁴ The close relationship between corruption and Cambodia’s formal democratic institutions has made it

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ *Ibid* at 553; Un, “State”, *supra* note 59 at 227.

⁸¹ Andrew Robert Cook, “External actors and the relative autonomy of the ruling elite in post-UNTAC Cambodia” (2010) 41:2 J SE Asian Stud at 244 [Cook].

⁸² Un, “State”, *supra* note 59 at 229.

⁸³ *Ibid* at 240, 245; Un, “Democracy”, *supra* note 14 at 556.

⁸⁴ *Ibid* at 551; McCarthy, *supra* note 15 at 110.

increasingly difficult to strengthen their autonomy, “making [these institutions] ineffective, irresponsible and dependent”.⁸⁵

Verdict

Having carefully considered the four previous benchmarks it appears clear that since the PPA, Cambodia has failed to establish a genuine democracy or a robust rule of law.⁸⁶ While in many regards Cambodia has succeeded in formally recognizing rights or establishing institutions, these feats have not been coupled with effective implementation or proper functioning. Cambodia’s rule of law barely adheres to even the thinnest conception of the term, and the country’s political structure is only notionally democratic. Consequently, this woeful state of affairs begs the question: Why did the Paris Peace Agreement fail to live up to the promise? This complex question has no single, clear answer, however the next section of this paper will explore some factors and theories that could help explain Cambodia’s situation.

Understanding the Failures of the Paris Peace Agreement

The Paris Peace Agreement was premised on an assumption that the establishment of a liberal democracy, based on adherence to the rule of law and respect for human rights, would be most conducive to the realization of long-term peace, social stability and prosperity. This point of view, long advocated by Western countries and international institutions, receives ample support in the literature. However, it is legitimate to consider whether such a uniform model to state building, based on Euro-centric assumptions, might not necessarily be applicable to the historical, social or cultural context of all post-conflict societies. Furthermore, expecting the process of genuine democratic consolidation to take less than 25 years in a deeply scarred, post-conflict country like Cambodia, when mature Western democracies have in some cases taken centuries to materialize, might simply be unrealistic. Even if the end goal of liberal

⁸⁵ Un, “State”, *supra* note 59 at 230.

⁸⁶ World Justice Project, *Rule of Law Index* (Washington DC: 2016) (Cambodia placed, 112th out of 113 countries evaluated in the World Justice Project’s 2016 Rule of Law Index, measured on the basis of eight primary factors: constraints on government powers, absence of corruption, open government, respect for fundamental rights, order and security, regulatory enforcement, civil justice, and criminal justice).

democracy, rule of law and respect for human rights is agreed upon, there is still significant debate about how best to achieve such a result: the case of Cambodia is particularly informative of the challenges associated with such a daunting and complex institution-building project.

The arguments for and against liberal democracy

Winston Churchill once said, “No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of government except all those other forms that have been tried from time to time”⁸⁷; a point that rings even truer in the current global context, given that the rise of populist movements has challenged assumptions about the value and infallibility of the democratic process, and the growing concerns that support for Western liberal democracies may be in decline.

In the context of Cambodia’s reconstruction in 1991, liberal democracy was nevertheless seen as the preferable mode of governance for the country, one that would restore and maintain peace and ensure the Cambodian people’s exercise of their right to self-determination.⁸⁸ The merits of liberal democracy are evident in the many ways in which it can improve living standards in a society. Citizen engagement and political participation are vital accountability mechanisms to ensure effective governance; as Amartya Sen famously stated, “no substantial famine has ever occurred in any country with a democratic form of government and a relatively free press”.⁸⁹ Studies have found that democracies tend to outperform other systems of governance in development indicators like infant mortality rates and per-capita GNP, and are less inclined to wage war against each other than are dictatorships.⁹⁰ A link between democracy and peace has also been recognized, as “democratic institutions and processes minimize the risk that differences or disputes will erupt into armed conflict or confrontation”.⁹¹

⁸⁷ Peou, *supra* note 35 at 2.

⁸⁸ *Paris Peace Agreement*, *supra* note 27 at Preamble.

⁸⁹ Amartya Sen, *Development As Freedom* (New York: Oxford University Press, 1999) at 51.

⁹⁰ Peou, *supra* note 35 at 3.

⁹¹ Marc Cogen & Eric De Brabandere, “Democratic Governance and Post Conflict Reconstruction” (2007) 20 *Leiden J Intl L* at 670.

Notwithstanding its authoritarian ruling style, the Cambodian government has long maintained substantial popular support, largely due to the improved living standards, high economic growth, and political stability it has been able to secure.⁹² Looking to regional models like Singapore and Malaysia, which have similarly seen improvements in human development notwithstanding a lack of genuine democracy, the Cambodian regime would appear disinclined to challenge the status quo in favor of an uncertain democratic future. This reluctance is then reinforced by the ‘Asian values’ debate, which emerged as a criticism of universalism and Western-centric human rights discourse, and stresses the importance of communal interests, socio-economic rights, social stability and economic growth over liberal democracy and individual civil and political rights.⁹³ The Cambodian government’s anti-human rights rhetoric has regularly emphasized points that are fundamental to the Asian values debate, viewing international criticisms of their human rights situation as a violation of national sovereignty and a form of imperialist neo-colonialism.⁹⁴ However, these arguments do not hold up when placed under closer scrutiny.

First of all, Cambodia has voluntarily committed itself to a number of international human rights treaties, support for which has been confirmed in its own Constitution. Considering Cambodia’s tragic history and the international community’s failure to adequately intervene during the Khmer Rouge regime, the argument that the country’s human rights compliance is a matter of international concern becomes even stronger.⁹⁵ Secondly, the promotion of human rights and democracy is not antithetical to the achievement of social stability and improved living standards. The notion of equality before the law, which is fundamental to human rights, is consistent with the goal of equitable wealth distribution that has been sorely lacking in Cambodia’s economic development policies.⁹⁶ Economic growth, though it has improved Cambodia’s overall living standards, has done so unequally, aggravating the urban and rural

⁹² Un, “Democracy”, *supra* note 14 at 559.

⁹³ Un, “State”, *supra* note 59 at 237.

⁹⁴ Brooks Boliek, “Cambodia Tells Foreign States to Butt Out Over Hun Sen’s Crackdown”, *Radio Free Asia* (2 June 2016), online: <http://www.rfa.org/english/news/cambodia/cambodia-politics-06022016171144.html>.

⁹⁵ Cambodia OHCHR, *supra* note 2.

⁹⁶ Nordic Trust Fund & World Bank, *Human Rights and Economics: Tensions and Positive Relationships* (2012) at 11 [Human Rights and Economics].

poor's feelings of disenfranchisement and undermining social cohesion.⁹⁷ Conversely, democracy and human rights would "contribute to [the] empowerment and social protection of marginalized groups through social mobilization and mechanisms of strengthening accountability".⁹⁸ Lastly, the Asian values argument is less convincing when made by a self-styled strongman like Hun Sen, whose power and popular legitimacy has clearly been shrinking in the past few years. Furthermore, while Singapore and Malaysia present one model of success, countries like South Korea and Taiwan show that democratic consolidation can go hand and hand with economic growth and social stability.⁹⁹ Additionally, the significant gains made by the opposition and the mass protests that followed the contentious results of Cambodia's 2013 elections demonstrate that a democratic awakening may be taking place in Cambodia, a country whose population is increasingly being dominated by an educated, socially conscious and politically active youth demographic that does not view liberal democracy as being inconsistent with its values.

While the Paris Agreement may have failed thus far, its underlying premise, that a well-functioning democracy, thick rule of law, and respect for human rights can lead to prosperity, social stability, improved quality of life and economic development, should not be abandoned.

Flaws in the implementation of the Paris Peace Agreement

Many scholars have questioned the ability for democratic consolidation or a thick rule of law to take root when it has not developed internally, but rather has been externally imposed by the international community, as was the case for Cambodia with the 1991 Paris Peace Agreement.¹⁰⁰ While such a characterization risks robbing local actors of their agency, as Cambodian actors were very much involved in the Paris Peace Conference, it does accurately reflect the challenges of building a democratic culture from the ground up in a post-conflict society. One major fear is that peacebuilding interventions conducted by international actors are "a form of benevolent imperialism", which fail to acknowledge the ways in which the

⁹⁷ *Ibid* at 24.

⁹⁸ Human Rights and Economics, *supra* note 96 at 31.

⁹⁹ Un, "Democracy", *supra* note 14 at 560.

¹⁰⁰ *Ibid*; McCarthy, *supra* note 15 at 109.

content and structure of liberal peacebuilding are derived from “Western norms, ideals, and forms of governance” and might not be able to replace behaviours and practices derived from local needs, customs and experiences.¹⁰¹ In particular, Cambodia’s peacebuilding project has been called into question for failing to adequately deal with existing elements of Cambodia’s social and political order, most notably the influence of entrenched patrimonialism. Establishing institutions, processes and laws aimed at developing a democratic rule of law has largely failed, as many Cambodian elites have foregone meaningful participation and interaction with them in favour of pre-existing indigenous relations of patronage, which are to their greater benefit.¹⁰² Therefore, a process of democratic consolidation cannot limit itself to importing liberal institutions that have been derived in a different social context; it must first engage with local discourses and challenge the locally rooted elements and processes that act as an obstacle to democracy. One of the biggest critiques of democratic peacebuilding is that Western donors focus too many resources on the structural and organizational elements of institution-building, neglecting the importance of influencing and developing informal practices and rules, which are just as crucial in building a democratic culture.¹⁰³

In its attempt to implement a Westernized notion of democracy, the UN did not sufficiently consider the influence of Khmer culture and history in shaping Cambodians’ interpretations of democracy. The implementation of the Paris Peace Agreement faced challenges in that the conception of democracy held by many Cambodians was deeply and traumatically influenced by the Khmer Rouge’s frequent use of the term during the era of “Democratic Kampuchea”.¹⁰⁴ Furthermore, many tenets of democracy, including “popular participation in political-decision making processes and relative equality [...] [were] said to contradict the beliefs ‘inherent’ within the traditional Cambodian culture”, which made it harder for liberal democracy to take root. As opposed to most liberal democracies where votes are cast for parties on the basis of their

¹⁰¹ Jenny H. Peterson, “Rule of Law initiatives and the liberal peace: the impact of politicized reform in post-conflict states” (2010) 34:1 Disasters at 19, 30; David Roberts, “Hybrid Politics and Indigenous Pluralities: Advanced Lessons in Statebuilding from Cambodia” (2008) 2:1 J Interv St Building at 64.

¹⁰² *Ibid* at 76.

¹⁰³ De Zeeuw, *supra* note 46 at 500.

¹⁰⁴ Lilja, *supra* note 41 at 298 (Democratic Kampuchea was the name given to Cambodia under the reign of the Khmer Rouge from 1975 to 1979).

ideologies or policy ideas, Cambodians tend to vote on the basis of a candidate rather than their party.¹⁰⁵ Consequently, some authors posit that democratic statebuilding should allow more room for processes of ‘hybridization’: the merging of local discourses of decision-making with newly implemented liberal democratic processes, ideas and institutions.¹⁰⁶ Understood in this way, a genuine democratic peace attuned to local needs and experiences would be more likely to take shape, one that restores agency to the Cambodian people and is not associated with the baggage of a Western-imposed system.

Accountability Outside State Structures

The entrenchment of power within Cambodia’s elite has greatly undermined the effectiveness of the Paris Peace Agreement’s implementation, as political leaders have had little incentive to implement a genuine democratic rule of law, given the implicit risk that the effective functioning of governmental accountability mechanisms would compromise their unbounded monopoly on power.¹⁰⁷ Thus, successful democratic consolidation and respect for rule of law and human rights requires various levels of accountability, both vertical and horizontal, to ensure that state power is not abused.¹⁰⁸ In Cambodia’s case, horizontal accountability mechanisms within the state structure, such as the judiciary and anti-corruption organs, do not fulfill their mandate. A large reason why this failing has gone unresolved has been the limitations of civil society and the international community as vertical accountability mechanisms.

Civil Society

The role of civil society is provided for under both the PPA, which calls for Cambodia “to support the right of all Cambodian citizens to undertake activities which would promote and protect human rights and fundamental freedoms”, and the Constitution, which has several provisions empowering civil society groups to advocate for human rights, democracy and the

¹⁰⁵ *Ibid* at 301-303.

¹⁰⁶ *Ibid* at 290.

¹⁰⁷ Un, “State”, *supra* note 59 at 225.

¹⁰⁸ *Ibid* at 230

rule of law.¹⁰⁹ Civil society can strengthen state-building, by promoting political and social engagement through education on human rights and democratic values, facilitating dialogue between all sorts of actors, motivating groups and individuals to mobilize and hold the government accountable, and monitoring the state's compliance with its human rights obligations.¹¹⁰ Civil society groups can pressure the government to change its behaviour in adherence with human rights and the rule of law, and increase the citizenry's political knowledge and participation, helping to consolidate democracy in the process.

The Cambodian civil society sector is relatively young, but has grown significantly since 1991, with a large number of NGOs emerging in the realm of human rights and democratic advocacy. Despite their infancy, NGOs have been the preferred partners for foreign donors in a range of projects, and have mobilized on countless occasions with grassroots activists to hold the state accountable.¹¹¹ However, while the NGO community's sustained advocacy efforts have achieved some small victories, they have thus far failed to bring about long-term transformative social or political change. Admittedly, there are limits to civil society action when the government's control over state machinery is as intense, and political will for reform is as weak, as it is in Cambodia.¹¹² Cambodian NGOs face added problems due to the fact that they are heavily dependent on foreign funding and "did not gradually develop out of a society with densely formed social capital and civil society organizations".¹¹³ As a result, human rights and democracy NGOs are largely concentrated in urban areas and due to government restrictions have very little presence in Cambodia's rural provinces.¹¹⁴

Recent attempts at mobilizing popular support to hold the state accountable, such as the Black Monday campaign, have been short-lived or ineffective in achieving their goals, in part

¹⁰⁹ *Paris Peace Agreement*, *supra* note 27 at art 15(2)(a); *Constitution*, *supra* note 6 at arts 35, 36, 41, 42; Un, "State", *supra* note 59 at 233 (civil society groups are associations and organizations located in the realm between state and family, which act to promote and protect the interests and values of members of society).

¹¹⁰ Cambodia OHCHR, *supra* note 2; Un, "State", *supra* note 59 at 233.

¹¹¹ *Ibid* at 234.

¹¹² McCarthy, *supra* note 15 at 114.

¹¹³ Un, "State", *supra* note 59 at 239; Un, "Democracy", *supra* note 14 at 555.

¹¹⁴ *Ibid*.

due to the persistent risk of arrest and imprisonment and a growing sense of ‘activism fatigue’ within the NGO community.¹¹⁵ Nevertheless, the government’s persecution of civil society actors has actually served an unintended consequence of creating ‘human rights martyrs’. In many cases the imprisonment of these individuals has helped raise greater awareness of their struggles for human rights, attracting international attention, and inspiring an increasingly educated and conscientious youth demographic.¹¹⁶ Ultimately, despite the growth of the sector in the past 25 years, space for civil society in Cambodia today is shrinking at an alarming rate, making it impossible to act as an effective counterweight against government power on its own. Consequently, a large part of civil society advocacy involves engaging the international community to use their power and influence in holding the Cambodian government accountable.¹¹⁷

The International Community

The 1991 Paris Peace Conference not only saw the participation of Cambodia’s four warring factions, but also the participation of 18 other states and the UN Secretary General, Javier Pérez de Cuéllar.¹¹⁸ These foreign actors were key in the elaboration of the peace agreement, going so far as to commit themselves “to promote and encourage respect and observance of human rights and fundamental freedoms in Cambodia [...] in particular, to prevent the recurrence of human rights abuses”.¹¹⁹ The Agreement further calls on the signatories to request the assistance and cooperation of other States and international

¹¹⁵ LICADHO, Press Release, “Civil Society Condemns Escalating Intimidation of Human Rights Defenders” (10 May 2016), online: <http://www.licadho-cambodia.org/pressrelease.php?perm=405> (during my time at LICADHO it became apparent that the sheer amount of human rights issues, politically motivated legal cases and ongoing injustices were draining energy and resources from the NGO community, which was unable to maintain sustained protests on all front: a phenomenon I would refer to as activism fatigue).

¹¹⁶ Asia Democracy Network, Press Release, “Statement of the International Conference on the 25th Anniversary of the 1991 Paris Peace Accords on Cambodia” (19 October 2016), online: <http://adn21.asia/?p=3356> [ADN Statement].

¹¹⁷ Un, “State”, *supra* note 59 at 237.

¹¹⁸ *Paris Peace Agreement*, *supra* note 27 (in addition to Cambodia and the UNSG, the participants were: Australia, Brunei, Canada, China, France, India, Indonesia, Japan, Laos, Malaysia, Philippines, Singapore, Thailand, USSR, United Kingdom, United States, Vietnam, and Yugoslavia).

¹¹⁹ *Ibid* at art 15(2)(b).

organizations in its implementation, and mandates that they comply in good faith with all obligations undertaken in the Agreement.¹²⁰ As a result, the foreign signatories have a legal obligation to assist in monitoring Cambodia's efforts to build a liberal democratic state that respects human rights and the rule of law. Further, given its inaction (and in some cases complicit involvement) during the Khmer Rouge era, the international community arguably has a moral obligation to help Cambodia "assure protection of human rights, and the non-return to the policies and practices of the past".¹²¹

While the international community should receive credit for the assistance and massive amount of resources it has expended on Cambodia's state-building efforts, the results of all of its spending should be seriously questioned, as it has failed to hold the Cambodian government accountable to its obligations under the PPA.

Foreign countries, international bodies and multilateral organizations have different tools available to them to deal with state authoritarianism, most notably naming and shaming, and aid-related conditionalities. Diplomatic representatives from several countries and international bodies released statements expressing "deep concern" about the deteriorating situation of human rights in Cambodia over the spring and summer of 2016, to limited effect. While some actors took greater steps by vowing to tie their provision of aid to improvements in Cambodia's human rights situation (a serious threat given Cambodia's heavy dependence on international financial assistance), the efficacy of external intervention has always been undermined by a lack of consistency and coordination from international actors, which has allowed the ruling party to negotiate and manoeuvre around external pressures.¹²² Notably, China's increasing influence and provision of unconditional aid during periods of heavy assault on human rights have allowed Cambodia's government to withstand financial pressure from the West.¹²³

Many scholars have blamed geopolitical and economic interests as reasons for the international community's past shortcomings. Problems can be traced back to the 1990s, when

¹²⁰ *Ibid* at art 29(1).

¹²¹ *Ibid* at Preamble.

¹²² Un, "State", *supra* note 59 at 237; Cook, *supra* note 81 at 246.

¹²³ *Ibid* at 260.

the UN's inability to obtain a complete ceasefire or disarmament from the warring factions, and its failure to ensure the respect of the 1993 election results, allowed Hun Sen to force his way into the position of 'co-prime minister'.¹²⁴ While the UN claimed it wanted to avoid a violent confrontation, cynical observers have suggested that the international community did not want to lose face by accepting the failure of their peacebuilding mission. Other scholars maintained that foreign states were less interested in Cambodia's democratization than by its transition to a free-market economy.¹²⁵ This theory gains credibility when one considers the international community's inaction following the events of 1997-1998, which included a deadly grenade attack on an opposition rally, Hun Sen's violent *coup d'état* against his co-prime minister, and the subsequent sham elections which consolidated Hun Sen's rise to power. In light of these assaults on Cambodian democracy and egregious violations of the PPA, the international community barely intervened, with many States failing to label the coup as a coup, and even going so far as to declare the subsequent elections, in which the CPP announced the results before ballots had been counted, as free and fair.¹²⁶ The international community's apparent disregard for the democratic implications of these events could be explained as being indicative of its prioritization of Cambodia's political and economic stability.¹²⁷ Despite the clear violation of democratic norms, many viewed the coup as having increased stability by consolidating Hun Sen's control, allowing for economic development and a continued transition towards neoliberalization.¹²⁸

The international community's inconsistent and often muted diplomatic responses when confronted with Cambodia's human rights violations have been ineffective in changing the government's behaviour and shown little credible commitment to their obligations under the PPA.¹²⁹ Despite frequent warnings to the government that its actions could engender serious economic consequences, few actors have resorted to aid sanctions as a means of pressure, as

¹²⁴ Richmond, *supra* note 61 at 34; Springer, *supra* note 36 at 143.

¹²⁵ Springer, *supra* note 36 at 144.

¹²⁶ Peou, *supra* note 35 at 193-194; Adams, *supra* note 3.

¹²⁷ Springer, *supra* note 36 at 145.

¹²⁸ *Ibid.*

¹²⁹ Peou, *supra* note 35 at 195.

strategic factors have typically overwhelmed human rights considerations in aid allocation, leading to an unfortunate situation in which foreign donors have seemingly rewarded anti-democratic behaviour with financial aid.¹³⁰ However, it is unclear whether aid sanctions would actually reduce human rights violations, given the documented inefficacy of trade sanctions aimed at the same purpose.¹³¹ Nevertheless, reducing aid dependency could go a long way towards improving the efficiency of the country's governance structure by stimulating local capacity-building and incentivizing domestically rooted structural reforms, as a means of compensating for lost foreign capital.¹³² Even with Chinese support, the Cambodian government values external legitimacy and does not appear ready to alienate itself completely from the international community, at the risk of becoming a pariah state. Therefore, foreign governments must increase their oversight, engaging in sustained and coordinated diplomatic pressure tactics against the government around key periods, like elections and crackdowns on the opposition, to obtain meaningful concessions and genuine commitments to reform.

The consensual nature of the international system and the primacy placed on national sovereignty and non-interference in internal affairs by Cambodia has muted the effective intervention of UN bodies. Over the past 25 years, the Cambodian government has paid lip service to its international human rights obligations, signing onto scores of treaties, but attacking attempts by UN actors to monitor its compliance with them. The UN's Human Rights Council has passed numerous resolutions over the years, calling on the government to resume political dialogue, ensure full respect for human rights and fundamental freedoms, cease the judicial harassment of governmental critics, and embrace the role of human rights defenders and civil society in holding the government accountable.¹³³ Similarly, the UN's Special Rapporteur on the situation of human rights in Cambodia, whose mandate derives from the PPA, has provided vocal criticisms of the country's human rights record, elevated human rights on the national agenda, and engaged in open dialogue with the government, acting as a meaningful ally in human

¹³⁰ Peou, *supra* note 35 at 196; Richard A. Nielsen, "Rewarding Human Rights? Selective Aid Sanctions against Repressive States" (2013) 57 Intl Stud Q at 792.

¹³¹ *Ibid* at 801.

¹³² Richmond, *supra* note 61 at 37.

¹³³ HRC Joint Statement, *supra* note 3.

rights reforms.¹³⁴ While the efforts of UN actors have led to certain short-term and small-scale tangible results, long-term impacts on state behaviour have arguably been minimal given the government's frequent disregard for their recommendations.¹³⁵ Moreover UN affiliated bodies involved with development and economic policies, including the UNDP, World Bank and IMF have been accused of undermining attempts to coordinate diplomatic efforts against civil and political rights violations, by instead stressing the value of political stability in the pursuit of socioeconomic needs.¹³⁶

Though the involvement of Western states in the political and human rights situations of Global South states risks perpetuating neo-colonialist or paternalistic vibes, the Cambodian case is particular given the framework of the PPA, which imposed obligations on the international community to stay engaged in Cambodia's domestic situation and ensure the respect and observance of human rights and fundamental freedoms. While foreign involvement in the resolution of domestic disputes may not generally be desirable (or conducive to the creation of locally appropriate solutions), in the context of post-conflict democratic consolidation in a society as scarred and ravaged as Cambodia once was, it is an essential mechanism for holding the government accountable and limiting the unrestrained exercise of state power.

Ultimately, the hope is that a combination of external support and the emergence of an empowered local civil society sector will act as sufficient means of pressure and accountability, thereby strengthening the consolidation of democracy and rule of law and bolstering respect for human rights. Consequently, the monitoring of Cambodia's performance by the UN and the PPA signatories must be understood as a justified incursion on state sovereignty, for the benefit of democracy, rule of law and human rights.

¹³⁴ *Paris Peace Agreement*, *supra* note 27 at art 17; Surya P. Sabedi, "The UN Human Rights Special Rapporteurs and the Impact of their Work: Some Reflections of the UN Special Rapporteur for Cambodia" (2016) 6 *Asian J Intl L* at 3 (the Special Rapporteur is an independent expert appointed by the United Nations Human Rights Council to follow and report on the human rights situation in Cambodia. Their task is to assess the human rights situation, report publicly about it, and work with the Government, civil society and others to foster international cooperation in this field).

¹³⁵ *Ibid* at 13.

¹³⁶ Peou, *supra* note 35 at 198.

A Way Forward: Recommendations & Avenues for Reflection

For the past 25 years the Cambodian government has managed to maintain a relative level of peace and social stability, and yet the goals of the PPA related to democracy, rule of law and human rights have gone unfulfilled. Concerns about peace in post-conflict societies cannot be limited to a negative peace, meaning the mere absence of armed conflict, but must take a wider approach concerned with creating conditions conducive to a positive peace, a space of social harmony where enjoyment of human rights, genuine democracy and a robust rule of law can flourish.¹³⁷ Cambodia still requires much work before it can reach a state of positive peace, which will require the full engagement of civil society and international actors. Therefore, the question remains: How can we get there?

The situation with regards to the upcoming elections is constantly evolving, and while the pardon and release of some political prisoners may give the impression of a détente between the government and its critics, it is important to remain vigilant about the impact that the government's crackdown has had on the elections' legitimacy. Civil society space is still shrinking, the opposition party leader is in exile, and the neutrality of the election commission remains compromised: all of which affect the possibility for free and fair elections. As the drafters of the Paris Peace Agreement acknowledged back in 1991, free and fair elections are key to ensuring that the Cambodian government legitimately embodies the people's desires for self-determination. Therefore, the 18 state signatories to the Paris Peace Agreement and the international community at large should maintain overt pressure on Cambodia to ensure that elections take place in a free and fair environment, wherein opposition parties do not face constraints on their ability to mobilize support, and procedural safeguards like the election commission are able to carry out their mandate and ensure transparency in the casting and tabulation of votes. If these elections can take place in a free and fair manner, then there is a very real possibility that popular support for the opposition party may be sufficient to lead to their victory. While it is far too early to speculate on what the CNRP could achieve in terms of democratic consolidation and strengthening rule of law and human rights, such a result would

¹³⁷ Sopheap, *supra* note 2; ADN Statement, *supra* note 116.

nevertheless transform Cambodia's political and social landscape. Of course Cambodia's history tells us that there are limits to the electoral process and it would be essential for the international community to be ready to act in the event that the CPP refuses to give up power peacefully. An election loss could lead to a violent response from the government to maintain control, but the hope is that Hun Sen would realize that he has lost popular legitimacy, forcing him to recognize the will of the people, and avoid facing the power of a 'colour revolution'.

Alternatively, I would echo the recommendation made by certain opposition party politicians, commentators and members of civil society, that the Paris Peace Conference be reconvened. This possibility is allowed for under article 29 of the PPA, which states that appropriate consultations will immediately be undertaken in the event of a violation or threat of violation of the agreement, with a view to taking appropriate steps to ensure respect for these commitments.¹³⁸ Ideally, the co-chairs of the Paris Conference (France and Indonesia) and the UN Secretary-General would reconvene a multi-stakeholder meeting following the upcoming elections to review the implementation of the agreement and assess the fulfillment of its objectives. Evidently it may be hard to gather the requisite political will, both domestic and international, to make this second conference a reality, given that the Cambodian government seems to be content with maintaining political stability at the expense of a liberal democratic rule of law, and the international community may reasonably feel that it has other foreign policy priorities. Nevertheless, despite the end of war, the adoption of a Constitution, and the holding of elections in 1993, the challenges associated with the agreement's implementation are still as relevant today as they were 25 years ago, and so are the legal and moral obligations of foreign signatories. For the vision of the Paris Peace Agreements to be fully realized both domestic and international actors need to renew their commitment to the accords and take concrete steps towards changing the current status quo.

Such a conference would need to involve a multi-actor, multi-framework dialogue, including officials from the ruling party and the opposition, representatives of foreign states, officials from UN bodies and international financial institutions, pertinent regional actors from ASEAN, civil society leaders, members of the local business community, so that all relevant

¹³⁸ *Paris Peace Agreement*, *supra* note 27 at art 29.

stakeholders could engage and discuss possible ways of meeting the objectives of the Paris Peace Agreement and solving the country's various issues, whether they be political, social, legal or economic. In order to make meaningful progress, a broad coalition of forces must assemble to push for political transformation and democratic consolidation. While this proposal might seem ambitious, ambition is necessary in order to build a lasting positive peace in Cambodia. The hope is that actors would be motivated by enlightened self-interest, understanding that a strong democratic Cambodia, in which rule of law and human rights flourish, would be to the benefit of all parties.

Ultimately, the ruling party's stubborn reluctance to change its ways and the constant flux of the socio-political situation make Cambodia's future incredibly hard to predict. Cambodia's crisis will only end with a major change in the values and attitudes of those in power, which is unlikely to happen any time soon. Nevertheless, my time at LICADHO taught me an important lesson: despite the challenges of bringing about systemic change in Cambodia, it is important to remain optimistic, form bonds of solidarity with allies far and wide, and remain resilient and resistant, in the hope that Cambodians will one day get the society that they deserve.

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