PEACEBUILDING IN CAMBODIA:
TRANSFORMING PUBLIC DIALOGUE ABOUT HUMAN RIGHTS

by

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Peacebuilding in Cambodia:  
Transforming Public Dialogue about Human Rights

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Abstract

This explorative thesis asks how theories and practices regarding conflict processes might be applicable to peacebuilding, particularly the development of human rights law, policy, institutions, mechanisms and practices, in and for Cambodia. Current legal development and human rights approaches do not seem adequate to address key features of human rights conflicts in Cambodia, including the ethical nature of human rights conflict, the polarized nature of Cambodian public conflicts and the deep mistrust among stakeholders as a result of the turmoil of the past, including the Pol Pot regime and its aftermath. Also, current efforts have not been very effective in addressing the well-identified lack of respected, impartial decision making and dispute resolution bodies in Cambodia. Further, there has been insufficient attention by foreign human rights, legal development and peacebuilding specialists on building local knowledge in participatory fashion with Cambodian partners. Dominant foreign approaches to human rights and legal development have also tended to overlook Cambodian historic and cultural preferences, including preferences for conciliation. Conflict resolution approaches as articulated in Canadian projects in Cambodia in 1995 and 1996 are examined with the conclusion that some features of the actor-oriented, interest-based approaches currently dominant in the North American field of dispute resolution are not suited to the key challenges presented by Cambodian public conflicts.

Possibilities for addressing human rights conflict in Cambodia are addressed, including consideration of several newer currents in the field of conflict studies. Included are some post-structuralist and post-modernist perspectives that aim to address public "moral conflict," and which try to address inadequacies in current conflict resolution myths and theories about "neutrality." These point to the possibility of constructing dialogical processes that may lead to
sustained and transformative talk among the many human rights stakeholders in Cambodia. Offered as examples are several Cambodian-initiated projects which have emphasized public participation and multi-stakeholder dialogical processes. There are suggestions for further research and support of these Cambodian experiments to further articulate, draw and utilize local understandings that may move toward national reconciliation and justice within the international human rights framework formally supported in Cambodia.
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Preface

This project has been more focused on my own learning than most research and writing projects I have undertaken in the past, often at the behest of others. Why Cambodia? Most of my trips to Cambodia were part of development or research projects conceived by others. I worked hard and long planning for some of these missions. I have spent only short times in Cambodia during my six visits since 1995. I have had little time to reflect, and little opportunity to sit around and talk for a long time with Cambodians to really understand their dreams and visions for their future. Nevertheless, in the rich snippets of conversations with the many people I have had the privilege of meeting, and in the visits to Cambodia – and in the joy and struggle of the work itself – this tiny country has been an important school for me. The Cambodians I have met have been patient teachers. My work in and for Cambodians has enriched me more than it can possibly have benefited Cambodians.

Many questions floated around during hectic visits, planning sessions with colleagues who had many ideas, and particularly during times of standing over Canadian fax machines at all times of the day and night, listening to the Khmer-speaking voice of the operator saying something to the effect that my call could not go through. Now that e-mail is more accessible to Cambodians, even these short times of reflection have eluded me.

When I thought about a topic for a thesis, I thought of many things I could write about. Many of my questions about the field of conflict resolution and new questions about development work were bothering me as a result of my work in Cambodia, so it seemed natural to ponder them in a scholarly endeavour with the assistance of scholars in the Faculty of Law at the University of British Columbia. My questions turned out to be complex ones, not really answered in my thousands of pages of readings on a number of fascinating topics, and certainly not by what I have written in the pages that follow. In many ways this thesis ended up as a kind of summative reflection about my work in progress to date. The project allowed the luxury of time to allow my questions to bother me, to reflect on them and to become bothered by new questions.
My work in the field of conflict resolution since 1983 has challenged me on intellectual, professional and personal fronts. Some of my questions and struggles find expression in these chapters. This thesis is dedicated to those who seek the places where justice, peace, truth and mercy meet – the places of reconciliation.
Acknowledgements

I am grateful to Professors Don MacDougall and Pitman Potter, my supervisors at the University of British Columbia, for not constraining my exploration of all of the themes into which my questions seemed to flow, and for indulging my inclination to go beyond the usual scope (at least in length and breadth) of a Master's thesis in law. I am grateful to many Cambodians and others who now or at one time have lived and worked in Cambodia and who have been very generous to me with their time and always constructive criticism and advice. A number of people assisted me with useful advice or significant logistical assistance, including Ms. Eva Mysliwiec, Mr. Bunleng Men, Dr. Kate Frieson, Dr. David Chandler, Dr. Lao Mong Hay, Dr. Kao Kim Hourn and Dr. William Collins. Several other people have kindly read significant portions of previous draft sections of material which has been incorporated into this thesis. These people include two former Canadian Ambassadors to Cambodia Gordon Longmuir (1995-1999) and Martin Collacott (1993-1995); Dr. Peter Gyallay-Pap, Khmer-Buddhist Educational Assistance Project; Prof. William A.W. Neilson, University of Victoria; Dr. Sorpong Peou, Sophia University, Tokyo; and Ms. Judy Saumweber, Director of the American Friends Service Committee in Cambodia and her colleagues. The portions they read have been improved very significantly as a result of their comments, but, of course, I remain responsible for all the remaining errors. It is also important to acknowledge colleagues with whom I have worked over the years, and whose scholarship or practice has been influential in the development of my own thinking. These people include Andrew Pirie, Stephen Owen, Alex Grzybowski, Michelle LeBaron, Brishkai Lund, Jerry McHale, Craig Darling, Gordon Sloan, Dinah Stanley, Connie Edwards and many others. I am also grateful to my family and several friends for their indulgence and extraordinary patience, particularly my children, Andrew and Elizabeth, and above all my colleague, friend and life partner, Paul Scambler.

Catherine Morris
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Chapter I

1 Introduction, Conceptual Framework, Overview, Methodology, Audiences

1.1 Introduction

Issues of peace and human rights in Cambodia have received considerable world attention during the past decade not to mention billions of dollars of international aid. The focus of current international human rights interest tends to be on redressing the evils of the 1975-79 Pol Pot regime through prosecution of former Khmer Rouge leaders. While Cambodians are interested in addressing the past, there is at least as much interest in a transformed present and future. "Impunity" is the term that continues to haunt the literature, reports and press clippings about the human rights climate in Cambodia. Past and current serious human rights violations by public officials including police and military and the friends and family of high ranking officials are persistently raised by the United Nations, international and local non-governmental organizations (NGOs).

1 Included are the more than $1.6 billion dollars spent on the work of the UN Transitional Authority in Cambodia (UNTAC). M.W. Doyle, "Peacebuilding in Cambodia: The Continuing Quest for Power and Legitimacy" in F. Z. Brown & D. G. Timberman, eds., Cambodia and the International Community: The Quest for Peace, Development, and Democracy (Singapore: Asia Society, Institute of Southeast Asian Studies, 1998); UNDP Information, United Nations Transitional Authority in Cambodia (United Nations Department of Public Information), online: United Nations <http://www.un.org/Depts/dpko/dpko/co_mission/untac.htm> (date accessed: 7 June 2001) at 1. Another $1 billion was spent by the UN on resettlement and rehabilitation of over 350,000 Cambodian refugees. See also A. Peang-Meth, "Understanding Cambodia's Political Developments" (1997) 19:3 Contemporary Southeast Asia 286 at 287.

2 Prince Sihanouk popularized the term "Khmers Rouges" (red Khmers) during the 1960s. The term designated all the leftist anti-government forces. Now the term "Khmer Rouge" is generally used to mean the communist forces who took power in 1975 under Pol Pot, set up the state of 'Democratic Kampuchea' (DK), and continued their insurgency after they were ousted in 1979 until late 1998 when the remaining Khmer Rouge soldiers were amnestyed and integrated into Cambodia's military forces.


4 See e.g., ADHOC, LICADHO, & Human Rights Watch, Impunity in Cambodia: How Human Rights
The primary question of these chapters is: "How might theory and practice regarding conflict processes be applicable to peacebuilding, particularly the development of human rights law, policy, institutions, mechanisms and practices, in and for Cambodia?" This question emerged as a result of my involvement between 1994 and the present time in several peacebuilding projects regarding public policy conflict resolution in Thailand and Cambodia. The themes addressed in these chapters spring from questions and reflections that have emerged during my experiences and study of the field of conflict resolution in North America since the early 1980s as they relate to these experiences in Southeast Asia. This project does not propose or defend a hypothesis. Rather, it is exploratory, utilizing concepts, theories and experiences from the field of conflict studies to consider the question I have posed.

Past work of Canadians in Cambodia in 1995 and 1996 demonstrated and taught Western methods and perspectives on dispute resolution for public sector and human rights conflicts. This work was well received. However, constraints of funding meant we laboured largely without knowledge of Cambodian understandings of human rights, peace, conflict, traditional and current methods of dispute resolution, or Cambodian processes for third party intervention and settlement, particularly in human rights conflicts. Funding did not provide for advance research or in-depth needs assessment. When the work began in Cambodia in 1995, there was little or no available English language literature relevant to dispute processes in Cambodia. Subsequent literature search reveals there is still very little English language material about

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*Offenders Escape Justice,* vol.11(3)(C) (Phnom Penh: Human Rights Watch, ADHOC, LICADHO, 1999) [hereinafter Impunity in Cambodia]. Note that the term Civil Society Organization (CSO) is now sometimes being used instead of non-governmental organization; this designation seems to be very tied in with liberal rule of law doctrine and while now becoming fashionable, I prefer to retain what I see to be the more neutral term "NGO." The term NGO is widely used in Cambodia.

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5 There was sufficient enthusiasm about the idea of mediated participatory planning for public policy decision making, that H.E.Pol Lim, Cambodia Ministry of Interior, championed the adaptation of a Canadian demonstration of a public policy mediation process into a Khmer language teaching video which apparently has been used in various provinces of Cambodia. See the English-language version of this play by A. Grzybowski et al., "Working Together: Constructive Conflict Resolution," in E. Mysliwiec & C. Morris, eds., *Dispute Resolution in Cambodia: A Road to Peace and Reconciliation, Proceedings of a Workshop Held November 28-30, 1995, Phnom Penh, Cambodia* (Victoria, BC: University of Victoria Institute for Dispute Resolution, 1997) at 69. See also the positive comments from Cambodians about this project in G. Armstrong, *What Works? A Case Study of Successful Canadian Governance Programming in Thailand and Cambodia* (Ottawa: CIDA-SEAFILD, 1998).
details of conflict resolution methods in Cambodia.  

Within these limitations, I have attempted to take several steps back to examine more thoroughly several perspectives and topics that impinge on the study of conflict in Cambodia, the role of foreign peacebuilding interventions, and the further development of processes for addressing human rights conflicts in Cambodia. The tasks of this project include, first, a discussion of the major concepts and theoretical perspectives taken throughout these chapters. Second is an overview of the political, legal and human rights context in Cambodia. Third is a “stakeholder analysis” to examine the actors involved in the development of human rights law and policy. Fourth, the discussions about context and actors are focused on a critique of foreign development approaches to human rights issues and public sector conflict resolution. Fifth, I discuss the current possibilities for addressing human rights conflict in Cambodia in consideration of some newer currents within the field of conflict studies. There is a final brief chapter in which I make concluding comments.

1.2 Conceptual Framework

The discussion in these chapters goes beyond an exclusively actor-oriented approach. Taking the lead from peace researcher Johan Galtung, structural and cultural factors are also considered as centrally important.  

This project considers the development of human rights policies, processes and practices in

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7 See especially J. Galtung, Human Rights in Another Key (Cambridge, UK: Polity Press, 1994) [hereinafter Human Rights in Another Key].
Cambodia from the perspective of process. It is not primarily concerned with the substance of international human rights law, nor with Cambodian domestic human rights law. Rather, the discussion is concerned with the ways human rights issues are conceived, approached and processed by those involved in human rights issues in the Cambodian context. However, I challenge the dominant idea within the field of conflict resolution that separates conflict "processes" from the "substantive" matters in the conflict, using ideas that have emerged in a number of disciplines and that are being developed within the field of conflict studies by Cobb, Winslade and Monk, Pearce and Littlejohn, Forester and others. I adopt a social constructionist view of conflict "processing" in which the "process" and substantive "issues" cannot be neatly separated, because they are mutually constitutive. Also, "processes" and "issues" cannot be neatly divided from consideration of patterns of social relations and networks of individual relationships. Thus, contrary to dominant thought in the field of conflict resolution, third party interveners in conflict are never "neutral." They are never involved just in process management. Researchers, analysts, teachers and process managers are involved in non-neutral ways in the building of the actual content of conflict narratives, relationships and outcomes.

1.2.1 What is "peacebuilding?"

The term "peacebuilding" came into widespread use after 1992 when Boutros Boutros-Ghali,
then United Nations Secretary-General, announced his *Agenda for Peace.* It was recognized that sustainable peacemaking goes beyond “getting the parties to the table” and negotiating an end to armed conflict. “Peacebuilding” has become a broadly used but often ill-defined term generally connoting activities that go beyond crisis intervention and peacekeeping toward longer-term development and the building of governance structures and institutions.

Peacebuilding includes building the capacity of non-governmental organizations (including religious institutions) for processing disputes and addressing social conflict. The emphasis of the United Nations (UN) has been on structural transformation, primarily through institutional reform. In the Cambodia context, post-conflict peacebuilding has been defined in the UN context as requiring “unambiguous mandate, specific priorities, central coordination of activities, clear identification of the core causes of conflict, a coherent strategy for financing, cooperation of the contending parties, and support and understanding of the international community in its implementation.”

My definition of “peacebuilding” is broader than this UN-based definition that implies all-party cooperation with centralized control and financing of the peacebuilding effort. Both centralized control and party cooperation may often be unrealistic (or relative) expectations, as the UN learned during the UNTAC period in Cambodia (discussed in Chapter Two.) In my definition,

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14 Theories of “peacebuilding” spring from several sources in international relations theory. For a useful attempt to create a typology of peacebuilding interventions that concisely explains “hard” and “soft” realist approaches, governance based approaches, and social-psychological approaches, see F.O. Hampson, “Third-Party Roles in the Termination of Intercommunal Conflict” (1997) 26:3 *Journal of International Studies* 727.

following Lederach, peacebuilding involves a full range of approaches, processes, and stages needed for transformation toward more sustainable, peaceful relationships and governance modes and structures. Peacebuilding includes building legal and human rights institutions as well as fair and effective governance and dispute resolution processes and systems. To be most effective, peacebuilding activities require careful and participatory planning, as much coordination among various efforts as is possible, and sustained commitments and persistence by both local and donor partners, which desirably include the state party, but can also include others working on multiple levels of the conflicted society, including NGOs. To summarize a construction metaphor used by Lederach, peacebuilding involves a long-term commitment to a process that includes investment, gathering of resources and materials, architecture and planning, coordination of resources and labour, laying solid foundations, construction of walls and roofs, finish work and ongoing maintenance. Lederach also emphasizes that peacebuilding centrally involves the transformation of relationships and social relations. "Sustainable reconciliation" requires both structural and relational transformations. Institution building is included within this transformative framework. In my definition, peacebuilding does not consist of the building of just one centralized edifice, but a multiplicity of "buildings" in an ongoing building process in communities throughout a given society. Thus the focus is more on transformation toward peacefulness than on particular settlements or outcomes, although these are also important.

Sequenced stages of peacebuilding might run from conflict analysis; a multiplicity of informal interventions to encourage private "prenegotiations" or dialogue among local conflict stakeholders and parties; informal or formal interventions to encourage more formal dialogue or negotiations of the parties (e.g. problem solving workshops and other informal interventions by local and foreign groups including civil society organizations; negotiation of peace

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17 *Preparing for Peace; Building Peace*, ibid.
agreements; military peacekeeping interventions; governance strategies such as human rights monitoring, elections, institution building, legal development, conflict resolution training; relationship building; reconciliation or "sustained dialogue" processes. Neat prescriptive sequences do not fit most peacebuilding situations, where, for example, many informal and formal approaches to relationship building, conflict resolution education, advocacy, local coalition building, neutral non-violent observation and media reporting, and sanctions might desirably be going on at the same time. Also, coordination is often ad hoc or impossible, particularly in chaotic or rapidly changing situations, and with the multiplicity of informal interventions and the variety of governance and development programs that inevitably accompany reconstruction. It is all very well to demand better coordination. In practice it is quite difficult, since no one sees the whole picture, and coordination depends on trust among parties and intervenors that may itself need to be developed. Development of multi-disciplinary scholarship, education and networks for peacebuilding might be useful to build a body of shared knowledges and people that interveners might be expected to draw on and share in planning and implementing field strategies. A conceptual map of peacebuilding is found at Appendix I.

1.2.2 What are "human rights?"

The term "human rights" in this paper is used in keeping with the concepts found within international human rights law, with acknowledgement of the complexity and interconnected nature of understandings about human "rights" within the social, economic and political relationships of people in particular contexts. Some of the controversies concerning diverse conceptions of human "rights" are addressed throughout these chapters.

While my emphasis is on human rights processes, it is impossible to extricate ideas about processes from substantive human rights issues. Human rights (civil and political rights as well as social, cultural and economic rights) are bound up with the processes and ways human

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beings are to be treated by state authorities (and in some contexts by other individuals or groups.)

Some preliminary discussion of the nature of human rights conflicts is important because of the issues of power and abuse of power that are inherent in them. Power imbalance and abuse (or allegations of abuse) are the very substance of human rights disputes. There has been controversy in Canada and elsewhere about whether consensual (or informal) dispute processes are appropriate for human rights complaints as a matter of public policy and protection of the rights of complaints and respondents. The relative emphasis on (and definition of) rights and interests within particular dispute resolution processes is of particular interest when considering human rights conflicts. The concern is that "interest"-based approaches may inappropriately distract the focus from the two sides of the "rights" coin – entitlements and obligations. This issue is addressed in Chapter Four.

Critics of the use of mediation or conciliation for rights complaints have said that conflict resolution approaches that are actor-oriented and settlement-oriented may pacify individual complainants and thereby conceal structural sources of conflict and injustice and leave them unaddressed. Legalistic and adjudicative approaches may also be too actor-oriented and adversarial, seeking individual "bad actors, thus leaving structural injustices largely untouched. Galtung's approach, which focuses on the need to consider actors, structures and culture, are considered, along with Lederach's practical approach which considers the importance of various process approaches in progress toward sustainable peacebuilding including activism, advocacy, mediation and enforcement. Processes for institution building within such a transformative framework are the main subject of Chapter Five.


21 Building Peace, supra note 16 at 66.
It is also important to try to situate the discussion in these chapters within the diverse perspectives articulated within the literature on human rights. International human rights discourse historically has been dominated by natural law theory which poses inalienable and universal human rights. However, there are vigorous debates between “universalists” and “relativists.” The various arguments are interesting and compelling; they have also created a circular and combative discourse about international and domestic policies. One can posit and defend universal human rights, but one cannot deny that, with few exceptions, they do not have strong universal legitimacy. Despite some hints that there may be vaguely general human sensibilities and religious perspectives on things like “human dignity” (whatever that may mean among diverse peoples at diverse times and places) it cannot be denied that there is no common human receptiveness to any one divine revelation nor any common reasoned truth about any absolute rights/obligations formula. Postmodernist arguments valuably acknowledge that even basic human experiences are socially constructed, and that there are profound differences in the ways human beings construct even basic grounding human experiences such as death, hunger and sexual desire. The meaning of these experiences is learned, not innate. There is no one


23 A. Pollis & P. Schwab, “Human Rights: A Western Construct with Limited Applicability” in A. Pollis & P. Schwab, eds., Human Rights: Cultural and Ideological Perspectives (New York: Praeger, 1979). Pollis and Schwab are often credited with beginning the lengthy debate about the universality of human rights even though a good deal of their argument about cultural relativity is not new. See R. Benedict, Patterns of Cultures (Boston: Houghton Mifflin, Co., 1934). See also American Anthropological Association, “Statement on Human Rights” (1947) 49:4 American Anthropologist 539 at 539, which discusses out the problem with the UN Charter’s focus on Western ideas about individuals, pointing out that the individual realizes personality through culture. Societal values are relative to the culture from which they are derived. Societal and cultural values are limited by time and history. Also, no technique has been discovered to evaluate a particular cultures’ norms and values. See the discussion in Chapter Four.

explanation of what it means to be human, what constitutes “human nature,” or how human beings should view one another and treat one another. One is driven to the proposition that “rights” are not immutable universal realities to be “discovered” through scientific study. Therefore, I take a social constructionist view of human rights. Human rights are created by human beings through dialogical processes.

However, I agree with those who see the relativist arguments made by several Asian leaders as concealing an agenda of domestic domination.\(^\text{25}\) I also agree with Asian leaders that the universal human rights arguments also conceal an agenda of Western preeminence, which in some cases may be less intentional than it is hegemonic. Notwithstanding the General Assembly's statements of the indivisibility of civil and political rights from economic and social rights, Western human rights agendas are still focussed more on civil and political rights that support economic liberalism. The Western (and non-socialist authoritarian) version of economic and social rights tends to elevate capitalistic economic policies with trickle-down economic benefits to the populace. This infuriates government leaders in underdeveloped countries, for whom generalized poverty is a main issue in their countries. Thus, in the human rights debate, there are two issues. One is the cultural and ethical issue; the other relates to the seemingly competing priorities of “bread and freedom.”

This does not mean that I spend much time with prophecies about the “clash of cultures.”\(^\text{26}\) It is


important to consider the many worries and debates about the foundations (or lack thereof) of universal human rights and whether the content of human "rights," or "the way human beings ought to be treated" ought to be universal or based on local contingencies, or both. In the human rights discourse over the past several decades, many are trying to "have their cake and eat it, too," in the universalism versus pluralism debate, and so shall I.

The Aristotelian\textsuperscript{27} approach of Martha Nussbaum, which rejects ethical relativism, is attractive, in that it proposes a way of conceiving universal principles that are sensitive "to the actual circumstances of human life and choice in all their multiplicity, variety, and mutability."\textsuperscript{28} The Aristotelian approach, while positing universal virtues, "remains open to revision in the light of new circumstances and new evidence."\textsuperscript{29} This approach acknowledges that no culture is static or as homogenous as some versions of relativism fallaciously seem to assume.\textsuperscript{30} Rather, cultures are dynamic: "... hardly any cultural group today is as focused upon its own internal traditions and as isolated from other cultures as the relativist argument presupposes."\textsuperscript{31} Cultural traditions are not immune from scrutiny and revision from within, and from intercultural interaction. Aristotle pointed this out, and we see it in the flow of human history in all parts of the world.

\textsuperscript{27} Nussbaum notes that the "neo-Aristotelian" approach has recently been taken by those from differing political ideologies, first by neo-conservatives who diagnose societies ills as the loss of and excessive individualism, second by communitarian thinkers like Charles Taylor and Michael Walzer who are critical of contemporary capitalism and wish to see reassertion of democratic control and restoration of community, and third by hermeneutical ethical philosophers seeking situationally sensitive but deontological ethics, such as "Non-Relative Virtues," supra note 24 at 332.

\textsuperscript{28} Ibid. at 242.

\textsuperscript{29} Ibid. at 260.

\textsuperscript{30} See, e.g. Renteln's proposal to conduct a world-wide research survey to discover cross-cultural human rights norms so as to foundation for human rights standards that can be more cross-culturally acceptable and more amenable to acceptance and implementation. This idea suffers from the problem of selecting appropriate bearers of cultures for such a survey. Which cultures or sub-cultures would be selected and by whom? Would the research be based on the dominant norms in existing nation states? If so, what about indigenous peoples or cultural minorities within and across state borders? What about the phenomenon that cultures are constantly changing over time and circumstances? A.D. Renteln, "The Unanswered Challenge of Relativism and the Consequences for Human Rights" (1985) 7:4 Human Rights Quarterly 514. See the further discussion in Chapter Four.

\textsuperscript{31} "Non-Relative Virtues," supra note 24 at 262.
Nussbaum also points out that relativist arguments "tend to understate the amount of attunement, recognition, and overlap that actually obtains across cultures, particularly in grounding experiences."\(^{32}\) She argues:

Despite the evident differences in the specific cultural shaping of the grounding experiences, we do recognize the experiences of people in other cultures as similar to our own. We do converse with them about matters of deep importance, understand them, allow ourselves to be moved by them.... [W]hen one sits down at a table with people from other parts of the world and debates with them concerning hunger, or just distribution, or in general the quality of human life, one does find, in spite of evident conceptual difference, that it is possible to proceed as if we were all talking about the same human problem...\(^{33}\)

In international discourse about human rights there are many points of harmony if not agreement. But while there is general normative consensus on a very narrow list of international human rights abuses, including slavery, torture and genocide, even in these areas it is questionable whether there is sufficient international compliance to justify an argument that they have attained the status of customary international law.\(^{34}\) Jack Donnelly\(^{35}\) has applied regime theory to international human rights, using Krasner's definition of an international regime as "principles, norms, rules and decision-making procedures around which actor expectations converge in a given issue-area."\(^{36}\) Donnelly suggests that the strength of an international regime increases with its normative and procedural scope. That is, the more

\(^{32}\) Ibid. at 260.

\(^{33}\) Ibid. at 261.


coherence on norms, the stronger the regime. The stronger the decision making procedures, the stronger the regime. Donnelly's analysis of the international human rights regime is that the norms of the Universal Declaration of Human Rights (UDHR) are considered binding, but that enforcement remains largely national. In Donnelly's analysis, this is evidence of weakness of the human rights regime. He concludes that the international human rights regime is a

... relatively strong promotional regime, composed of widely accepted substantive norms, largely internationalized standards-setting procedures, some general promotion activity, but very limited international implementation, which rarely goes beyond information exchange and voluntarily accepted international assistance for the national implementation of international norms. There is no international enforcement. Such normative strength and procedural weakness, however, is the result of conscious political decisions.37

Nussbaum does not posit universal norms, as do some human rights scholars (like Donnelly). Rather she posits some universal features of humanness and cross cultural commonness in seeking “human flourishing.” She sees some common human functionings as points from which shared human rights norms may emerge. Her current list includes functions of life; bodily health; bodily integrity; senses, imagination and thought; emotions; practical reason; affiliation including friendship and respect; relationship with other species; play; and humans' attempts to control their environment, both political and material.38 She sees all these functions

37 “Regime Analysis,” supra note 35.
38 M. Nussbaum, “Women and Equality: The Capabilities Approach” (1999) 138:3 International Labour Review 227; M.C. Nussbaum, “Capabilities and Human Rights” (1997) 66 Fordham Law Review 273 at 287[hereinafter “Capabilities and Human Rights”]. Note that this approach, developed by Martha Nussbaum and Amartya Sen, differs from the basic needs approach in that it does not posit needs per se, but well-being or “flourishing.” Human “flourishing” in the area of the “life” function, for example, means “being able to live to the end of a human life of normal live; not dying prematurely, or before one's life is so reduced as to be not worth living.” (at 287) People have certain needs in order to function to the point of flourishing. The needs may differ according to situation. Thus, Nussbaum and Sen have envisaged functional equality, not formal equality or equivalency of needs. For discussion, see the collection by M.C. Nussbaum & A. Sen, eds., The Quality of Life (Oxford: Clarendon Press, 1993). For Amartya Sen’s theory of justice which draws on but critiques John Rawls, see A. Sen, Inequality Re-Examined (New York: Russell Sage Foundation, 1992) [hereinafter Inequality Re-Examined].
as fundamental and indivisible: “We cannot satisfy the need for one of them by giving a larger amount of another.”

In order to move international or local public policy discourses any farther forward, we need some ways of looking at “human rights” conflicts that help us to see how the-same-only-different-people can live and flourish together in a world that is ever bringing people closer together in proximity. Charles Taylor points out that existing shared norms flow from peoples with quite different religious and philosophical foundations. Therefore, Taylor sees hope that is may be possible “to come to a genuine, unforced international consensus on human rights” in which we might “agree on the norms while disagreeing on why they may be the right norms, and we would be content to live in this consensus, undisturbed by the differences of profound underlying belief.”

With this hopeful possibility, I take a constructivist approach to the development of human rights policy for the purposes of these chapters. This approach views the entitlement/obligation dyad as constructed through human interaction. However, I do not see “rights” as constructed primarily by legislatures, policy makers or courts as do theorists like Dworkin or Rawls. Validity of ethics is not reached through “monological self-reflection.” Rather “rights” and “truths” are socially constructed through relational dialogical processes in community

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39 “Capabilities and Human Rights,” supra note 38 at 288.


41 Ibid. at 124.


discourses (which do not exclude law and policy makers). The proposals of Rawls, Dworkin, or local sages in other places in the world, may be (in particular cases) important along with the reflections of others in the community in question. Thus, the various and competing views of people in a particular village, country or international region are part of the norm-construction as they participate in dialogical processes. The process of human rights development at the domestic level is desirably a part of and interacts within an international rights “construction” process.

This constructivist conceptual model allows diverse ethical views and interests to be expressed and submitted to vigorous scrutiny through dialogue among relevant actors. This approach does not discount, marginalise or exclude non-secularist and non-humanist approaches; it encourages inclusion of expression of divinely revealed truth as part of the mainstream discourse about rights. In this constructivist framework, I reject the privileging of elitist approaches that would regulate who takes part in the dialogue. Rather, in these chapters, I insist that subjugated groups and ideologies be given equal play in the human rights discourse. They should all be listened to and scrutinized. Also, with Nussbaum, Sen, Rawls and others to be discussed later, I reject utilitarian approaches to ethics or policy in favour of approaches in which functional equality of human beings is a key platform on which to construct state and citizen entitlements and obligations.

The practical problematique posed by realists is acknowledged by strategically taking into account asymmetrical power and inequalities. After all, one begins to suspect that the debates over international differences in human rights policies and practices may be more based on power politics than on any really insurmountable philosophical differences. There are practical strategies for getting the perspectives of oppressed or marginalized people onto the table.

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Coalition building is one. Non-neutral, activist approaches to mediation is another.\textsuperscript{47} There may also be ways of encouraging alternative conceptions and uses of power, discussed in Chapter Two and Chapter Four.

The discussion in Chapter Five envisions processes that might create opportunities for transformation of the highly conflictual and grossly power-asymmetric Cambodian human rights discourse within a constructivist framework, and in the context of policy dialogues that are taking place within international organizations such as the UN and the International Labour Organization (ILO), state governments, regional bodies such as the Association of South East Asian Nations (ASEAN) and non-state actors such as international non-governmental organizations (INGOs).

### 1.2.3 What is “conflict?”

Human rights problems are conceptualized in this project as conflicts and disputes. Following a number of theorists, “conflicts” include problems that may or may not be manifested or articulated into formal complaints or grievances.\textsuperscript{48} Rather “conflicts” are, more broadly, “intense interpersonal and/or intrapersonal dissonance (tension or antagonism) between two or more parties based on incompatible goals, needs, desires, values, beliefs, and/or attitudes.”\textsuperscript{49} I would extend this definition to include dissonance with respect to entitlements. I would also clarify the definition to ensure that the term “party” also connotes a group. “Disputes” have been defined as conflicts that have become particularized around a specific issue or issues.

\begin{itemize}
    \item \textsuperscript{48} W.L.F. Felstiner, R.L. Abel, & A. Sarat, “The Emergence and Transformation of Disputes: Naming, Blaming and Claiming...” (1980-81) 15 \textit{Law & Society Review} 631[hereinafter “Naming, Blaming and Claiming”].
\end{itemize}
Alternatively, Abel proposes that conflict turns into a “dispute” when it is asserted publicly.\(^50\)

Thus, “disputes” are those conflicts which have been crystallized into grievances or complaints. Felstiner et al go farther to say there is really no “dispute” until a grievance or complaint has been “joined” in the sense that the articulated grievance and communicated complaint has not resulted in a response satisfactory to the complainant. These conceptual distinctions are useful, but in practice it is not easy to delineate the moment a “conflict” becomes manifest, or the moment a “conflict” becomes a “dispute.” Therefore, some writers tend to use the terms “conflict” and “dispute” synonymously. While I attempt a vocabulary that distinguishes clearly articulated “disputes” from unmanifest, partially manifest or unclearly articulated conflict, my own tendency is to consider the term “conflict” as more broadly inclusive of the continuum from unmanifest conflict to discrete disputes.

Further, a “dispute” presupposes conflict, and conflict presupposes interaction, but the converse is not necessarily true. A dispute, if no longer asserted, can de-escalate to the status of an unasserted conflict. Conflict may disappear from interactions, either through changed perceptions, changed circumstances, or through resolution. Interaction may subside into mere contact. Contact may cease.\(^51\) The latter often occurs when one disputant decides to “lump it and leave.” In Canada, this is a (rather unexamined) problem in human rights, particularly where employees leave their jobs rather than take up their complaints, or where they find that complaint mechanisms are dysfunctional. In the Cambodia context, there are many refugees who have never returned.

There can be no conflict or dispute without human interaction. Conflicts and disputes, including human rights conflicts, “are not things: they are social constructs.”\(^52\) The meanings and shapes of disputes are constructed not just among the obvious directly involved parties and


\(^{51}\) Ibid, at 227.

\(^{52}\)“Naming, Blaming and Claiming,” supra note 48 at 631.
dispute resolvers, but also among others – sometimes many others – affected either directly or indirectly. These others (along with the parties) are termed “stakeholders.” Stakeholders in Cambodian human rights conflicts are considered in Chapter Three. Conflictual human interactions occur within particular social structures and cultural contexts. Thus, an objective or individualistic, actor-oriented view of disputes often reflected in Western dispute resolution literature\(^{53}\) is inadequate. A consideration of conflicts and disputes must consider the dynamics among the parties and their constituencies within the particular social and cultural context.

Nor do conflicts or disputes “exist” only when they come to the attention of formally appointed complaints bodies or courts. An institutional approach that objectifies disputes as “cases” for disposition or “management” is theoretically inadequate in that it fails to consider the rather more complex origins, development and escalation (and de-escalation) of disputes, within their unique social, legal, geographical and cultural contexts, before they become formal “cases” in a court or other dispute resolution body.\(^{54}\) Also, failing to consider conflicts before they come to the attention of formal bodies fails to consider that the formal bodies may be inadequate to address all the conflicts that are present in society, particularly those conflicts that are actually created or fostered by the dominant social structures represented by the very same elites who dominate the formal institutions. Dominant institutions may not even recognize as “disputes” some of the most important conflicts in society. The naming of an interaction or type of interaction as “dispute” is a political act – one that requires power to gain legitimacy to be addressed within formal bodies.\(^{55}\) For example, domestic violence was not always a “crime” or

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\(^{54}\) “Naming, Blaming and Claiming,” *supra* note 48.

\(^{55}\) Aboriginal law professor, Patricia Monture-OKanee, has noted that “it is important to note who has the power to label an incident or interchanged 'a dispute' and when.” P. Monture-OKanee, “Alternative Dispute Resolution: A Bridge to Aboriginal Experience?” in C. Morris & A. Pirie, eds., *Qualifications for Dispute Resolution: Perspectives on the Debate* (Victoria, B.C.: UVic Institute for Dispute Resolution, 1994). Incidents and situations may be excluded from attention if they do not meet dominantly held ideas of what is legitimately labelled a “dispute” or meet the criteria of what is to be dealt with a particular dispute resolution scheme or mechanism. B. Lund, C. Morris, & M. LeBaron, *Conflict and Culture: Report of the Multiculturalism and Dispute Resolution Project* (Victoria: UVic Institute for Dispute Resolution, 1994) at 30.
even a “dispute. For many women in Cambodia domestic violence is still not taken seriously as a “real” issue by the formal authorities, despite international norms. This may now be changing through the processes of conflictual social interaction I have described in this conceptual model. Thus, it is important to emphasize that conflict (and peace) are not just static social constructs frozen in time and space – they are dynamic social constructs.56

Conflicts do, however, have some “architecture.”57 Defined structurally, a conflict can be defined as “a situation [in which] there are different parties with certain capacities to pursue their preferences with regard to a variety of issues, and their preferences are incompatible.”60

Some theorists have tried to give some structure to the dynamics of conflict by examining it in terms of stages of escalation.62 At the incipient or unmanifest stage, conflict may take the form of privately experienced tension, discontent, grumbling or gossip that may not even come to the

56 Building Peace, supra note16 at 20.


58 Ibid. at 375. Kent defines a party as “an individual, entity, organization, or agency of some sort that has (or can be understood as having) a distinct set of preferences relating to the possible outcomes of a situation.” He points out that some parties may be silent, speaking only through advocates or surrogates. He distinguishes advocates from agents, who have a mandate to act directly on behalf of a party. The term “party” may be slightly narrower than the term “stakeholder,” discussed in Chapter Three. While all parties would be considered stakeholders, not all stakeholders (which includes all those affected in a situation) are necessarily parties in that their preferences may not be represented at all, either in person or through agencies or advocates.

59 Kent’s term “capacities” refers to “resources or powers than cay use to assure that their preferences are fulfilled.” Ibid. at 376.

60 Issues are simply what the conflict is about. Conflicts may have one issue or many.

61 “Analysing Conflict and Violence,” supra note 57 at 379.

attention of the other party. Alternatively it can become manifested through peaceful means of
discussion. Manifest conflict may stay at the stage of trustful and respectful discussion in which
parties focus on what is at issue. Mutually acceptable solutions are possible. At this stage,
conflict can also be manifested through complaints to the legal system or other complaint
bodies (thus becoming “disputes”). Conflicts and disputes that do not abate or become resolved
may fester and escalate through stages of polarization, segregation or violence. Where conflict
escalates to the point of polarization, there may be only indirect communication. Mutual
perceptions of the other party may harden into caricatures or stereotypes. The relationship
deteriorates. Polarized groups may form. Social structures may shift toward segregation of
groups. At the segregation stage, communication may be restricted to threats with perceptions
of one's own group as good and “them” as “evil.” There is mistrust and disrespect. Issues at
stake may be core needs and values of each group. Outcomes may be perceived as zero-sum.
Interaction is characterised by defensive competition. Methods may include nonviolent direct
action, law suits or civil disobedience. Negotiation may be difficult to establish at this stage.
Parties may refuse to negotiate without capitulation on important points by the other party. At
this stage, conflict could be triggered to a stage of being out of control, particular where deep-
rooted sources of conflict are present within the relationships and social structures. At this
advanced stage of escalation, conflict may be characterized by destruction. In extreme cases,
“contagion” may lead to spreading and intensifying of violence. Communication may be only
by direct violence, with each round of violence triggering a reciprocal volley. Parties view the
opposing party as nonhuman or psychopaths. The relationship is seen as hopeless. The issue
becomes survival. Perceived outcomes are “lose-lose” and the chosen method of conflict
management is destroying the opposition. Triggers that cause escalation of conflict include
provocative acts by political leaders, uncertainties around elections, crackdowns on
demonstrations or media campaigns. Conflict may deepen or broaden with perceptions of threat
or distortion of intention. Leaders of conflict groups play key roles in articulation and
expressions of conflict that work toward escalation and de-escalation.

More is known about escalation than about de-escalation. In international conflict terms, the
broad stages of de-escalation may include recognition by the parties of a “mutually hurting
stalemate,"63 prenegotiation stages, formal negotiations, and implementation or peacebuilding.64 The literature generally acknowledges that more needs to be known about de-escalation stages and processes.

If it is not already obvious, I define “conflict” far more broadly than “violence.” The term “violence” itself is often seen more broadly than physical violence and includes all harm done in pursuit of a party's preferences. Galtung is famous for coining the terms “structural violence” and “cultural violence.” Thus, violence may be done directly or indirectly through a variety of means including physical and structural means. Direct violence can include physical, economic, political or cultural violence. Kent describes this with a story about a guerilla's comments to an American volunteer physician in El Salvador:

You gringos are always worried about violence done with machine guns and machetes. But there is another kind of violence that you must be aware of, too. I used to work on a hacienda.... My job was to take care of the dueño's dogs. I gave them meat and bowls of milk, food that I couldn't give my own family. When the dogs were sick, I took them to the veterinarian... When my children were sick, the dueño gave me his sympathy, but not medicine, as they died. To watch your children die of sickness and hunger while you can do nothing is a violence to the spirit. We have suffered that silently for too many years. Why aren't you gringos concerned about that kind of violence?65

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65 Told by Kent in “Analysing Conflict and Violence,” supra note 57 at 382.
This kind of structural “violence” can also be defined as “injustice.” While I agree with a definition of “violence” that includes injustices, I use the term “injustice” to characterize structural, cultural or institutional patterns that lead to oppression, even though no one individual or group may actually intend to harm anyone. Thus, structural injustices may become conflicts that lack specific “parties” per se until conflict becomes manifest as disputes. This factor leads to the need to distinguish “parties” asserting their rights, interests or needs in a dispute from “stakeholders” in a conflict or a dispute. Not all stakeholders in a conflict become parties to disputes. “Stakeholders” are further defined in Chapter Three.

Conflicts that are labelled “human rights” problems have distinctive features and characteristics with variations in specific contexts including their cultural contexts. Human rights conflicts are essentially ethical and moral conflicts that involve international organizations as well as domestic governments, non-governmental organizations, populations and individual human beings. Human rights issues are embedded in particular social contexts, and therefore, societal structures and cultures are important. Many human rights institutions attempt to address structural and cultural issues through educational or advocacy processes that go beyond the processing of individual complaints.

The articulation (through a complaint) of a “human rights” conflict, more than some other kinds of conflicts, poses deeply held “oughts” about how individuals or groups are to be treated. In other kinds of conflicts, the “oughts” may be private and individual. In human rights complaints, the “oughts” take on public dimensions, both domestic and international. The “oughts” of human rights are often contested, as has already been discussed.

66 Habermas draws attention to a distinction between “ethics” and “morality.” Ethical issues are “those that come up when we are concerned with questions of my or our own plan of life..., while moral issues are at stake when we wish to solve interpersonal conflicts in concordance with the interests of everybody involved and affected.” Thus, when dealing with societal conflict over “human rights” one is concerned with the realm of moral conflict. J. Habermas, “Human Rights and Popular Sovereignty: The Liberal and Republican Versions” (1994) 7:1 Ratio Juris 1 at 3 [hereinafter “Human Rights and Popular Sovereignty”].

Finally, like other kinds of serious conflicts, human rights conflicts (both individually expressed and unmanifest structural human rights conflicts) most painfully, distressingly and profoundly affect the health, productivity and general well-being of children, women and men within the networks of their families, institutions, communities and ecosystems. In efforts to move beyond individualist and actor-oriented solutions, it would be wrong to lose sight of the fact that it is individual persons who suffer the effects of structural conflicts. It is assumed in this paper, therefore, that public policy, law and program development in the area of human rights must therefore ensure fair and effective processes not just with respect to abstract, universal, “objective,” international, domestic or institutional standards, but also with respect to particular standards based on the needs and rights of individual people and groups interacting within specific legal, cultural, geographical and social settings.

1.2.4 What is conflict “resolution?”

What is meant by conflict or dispute “resolution”? This question is particularly important in the context of discussion about peacebuilding and human rights conflicts. The discourse within the broad field that includes “conflict resolution,” “dispute resolution,” “alternative dispute resolution,” conflict management,” “conflict transformation,” “dispute processing,” “restorative justice,” “non-violence” and “peacework” raises some questions about terminology. The presence of these differing terms represents philosophical and ideological issues that should be problematised within the field more than they currently are.

1.2.4.1 Diversity of disciplines, processes, goals, and definitions of “success”

First, while settlement and conciliation have been part of the processes of human rights commissions in Canada and other parts of the world for quite some time, and have been advocated by the United Nations and the International Labour Organization (ILO), the literature in dispute resolution reflects little knowledge or reflection of the experiences of conciliation in

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68 For a glossary of some common terms in the field of dispute resolution, including definitions of “negotiation,” “mediation,” “conciliation,” “arbitration,” and other terms, see Appendix II.

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human rights commissions in Canada and elsewhere. With very few exceptions, the Canadian writings on conciliation and settlement policies and practices in human rights commissions reflect little awareness of the considerable literature that has developed in the field of conflict studies over the past two or three decades. It is important to note these limitations on Canadian experiences as relevant to application of conflict theory and practice to the Cambodian context.

Conflict research suggests that the quality of the process may be as important as the outcome in terms of party satisfaction or fairness norms for dispute processes. Definitions of “success” of dispute resolution processes differ with the context, the subject matter in dispute, and the ideologies and culture of the parties. How does one decide that a conflict or dispute has been “resolved” (or adequately “transformed”) and whether the process for resolution or transformation has been a good one? Ideology, ethical and moral values, and policy goals are directly connected with definitions of “success” in dispute resolution programs, among individual dispute resolution practitioners, and among parties to disputes.

There are significantly diverse and sometimes overlapping values within the field of dispute resolution. Choices of goals for dispute processes may include:\textsuperscript{69}

- \textit{party autonomy} and control over outcome. The process is seen as a means to strengthen the parties' capacity for resolving their own problems or developing their own agreements without dependency on external institutions or professionals\textsuperscript{70} or to provide opportunities for increased direct democracy;
- \textit{party satisfaction}. The process and/or outcome satisfies party needs, cost and time efficiency, and stability of business or other interests;\textsuperscript{71}
- \textit{community solidarity}. Particular groups or communities are strengthened in the use of

\textsuperscript{69} This summary is largely taken from “Trusted Mediator,” \textit{supra} note 58 at 304.


\textsuperscript{71} \textit{Ibid.} at 347; R.A.B. Bush & J. Folger, \textit{The Promise of Mediation: Responding to Conflict through Empowerment and Recognition} (San Francisco: Jossey-Bass Publishers, 1994) [hereinafter \textit{Promise of Mediation}].
particular dispute resolution processes to resolve problems themselves, or empowered to achieve greater social justice;  

- **social justice.** Dispute resolution processes and/or outcomes contribute to fairer apportionment of material wealth or power, or prevention or reparation of harms;

- **social order.** Dispute resolution processes may foster social order through the development of increased consensus or resolution of underlying conflicts rather than mere settlement of manifest disputes.

- **personal, group or societal transformation.** Dispute resolution processes provide disputants and groups (including governing groups or other elites) with opportunities for personal change and growth in socially responsible ways. The focus is less on outcomes or settlements than it is on transformed relationships and social relations.

Dispute resolution programs (including court-based adjudication, mediation/conciliation or restorative justice programs) may attempt to serve one or a combination of these goals. Definitions of “success” will differ depending on what goals are assumed. Dispute resolution programs...
programs that strive for efficient case management tend to offer short processes aimed at settlement. An example is the mandatory settlement conferences in the British Columbia Small Claim Court in which judges act as mediators to assist parties to settle small claim cases before trial. The mediation processes tend to last about thirty minutes and focus only on the issues identified in the small claim pleadings. Evaluation of this program has found it successful in terms of saving court time (efficiency). Other dispute resolution programs may emphasize party autonomy, social justice or community empowerment, or social transformation. Often these are community-based mediation programs which utilize community volunteers and co-mediation. These programs may offer longer processes which define parties and issues as broadly as necessary to resolve issues.

Judge-mediators may consider it quite appropriate to use recommendatory methods (also called "evaluative" mediation or sometimes "muscle mediation") during the short time they have available for settlement. In contrast, the community mediators may be non-interventionist and avoid making recommendations to the parties. They may consider that evaluative mediation is unconscionable because of its infringement on party autonomy. Thus, value choices lead to definitions of success, which in turn determine policies and practices.

According to LeBaron:

The dominant culture approach to mediation [in North America] generally favours the individualist over the collectivist perspective... It tends to be decontextualized, taking place away from the site of the dispute in institutional settings with intervenors unfamiliar to the disputants. Dominant culture mediation admonishes intervenors to be "neutral" and dispassionate, and lack of previous experience with either party is an asset. It is generally presented as staged, linear and sequential, and tends to be formal in structure and result....

[M]ediation tends to focus on a rational approach where emotions are alternately

described as needing to be 'vented' or 'processed.' An orientation to action and a willingness to disclose and confront are valued.  

LeBaron's research demonstrated that not all peoples share the perceptions of the dominant culture in Canada as to how conflicts should be addressed. In particular, the individualistic approach to conflict evidenced in Western thinking is not mirrored by those from cultures in which collectivist tendencies are more pronounced, including many aboriginal people and immigrant groups in North America. The image of a fishing net may better impart the kind of "network conflict" reported by members of some communities of collectivist orientation:

Each person is like one of the knots in a large fishing net with its intricate interlacing of innumerable knots. Each person is tied to many others. When all of the knots are firmly tied, the net is in good working condition. If any one of the knots is too loose or too tight, the whole net is skewed. Each knot, each relationship, has an effect on the whole. If there is a tear, a gap, in the net, the net is not a working one.... Nets are to be checked frequently, knots cared for tenderly, and if tears do appear they must be repaired.

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79 M. LeBaron Duryea & B. Grundison, Conflict and Culture: Research in Five Communities in Vancouver, British Columbia (Victoria, BC: UVic Institute for Dispute Resolution, 1993) [hereinafter Research in Five Communities].


This image appears to be somewhat similar to the concept of society in traditional Cambodian society. While many Cambodians consider that their culture has largely been lost over the past decades, Khmer culture traditionally sees people as interconnected with those around them as links in a chain. In fact, in a reference to oneself or to an addressee in conversation, the referring term used, be it a pronoun, title, or kinship term, makes a statement about the relationship. Social implications reside in Khmer language expressions that refer to others, and “proper observance of such relationships is crucial in Khmer society, not only in the way one speaks but also in the way one behaves.” Unlike Canada, where the prevailing myth is that of social equality; in Khmer culture, the inequalities between superiors and subordinates and between strong and weak are overtly acknowledged in social rules about proper chain-of-command. In his discussion of human rights, Galtung also uses the metaphor of the net — saying that a balanced approach would consider the importance of the overall fabric of the net (structure) and the knots (individuals and groups) and the complex reciprocal relationships among fabric and knots.

Similarly, the individualist approach to dispute resolution dominant in Western societies is not reflected in the norms of many non-Western societies, where societal values may reflect loyalty to family, religion or community. LeBaron Duryea suggests that mediators from dominant Western cultures need to be aware that collectivist orientations may affect people's preferences

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84 Ibid. at 98.

85 Ibid.

86 Ibid. at 97.

87 Human Rights in Another Key, supra note 7.

and expectations concerning dispute resolution processes:

Contrast these features [see the LeBaron quote above] with a process that might arise from a collectivist culture: preferred intervenors would be partial, with familiarity and experience with each of the parties and their communities. Interests such as face-saving and the demonstration of filial piety or respect for elders may take precedence over confrontation or free and frank disclosure of all relevant information. Parties may be more inclined to seek harmony than resolution, to demonstrate forbearance rather than seek the strict enforcement of legal rights. Processes may involve few or no direct meetings among parties and may unfold over days or weeks. Emotions may be expressed quite differently from what a dominant culture interveners's common sense would lead him or her to expect.89

Therefore, it must be emphasized that settlement processes labelled as “conciliation” and “mediation” tend to vary among societies, jurisdictions and cultures. Therefore, it is essential that expectations and current practices within a given context be understood when developing policies and education in that setting.

In the course of research, no information was gleaned that provides a satisfactorily detailed understanding of the mediation or conciliation process as it might be practised in Cambodia. This requires empirical research beyond the scope of this project.90 Based on the few remarks I have discovered in the literature, we can, however, assume for the purposes of this project that both “mediation” and “conciliation” involve consensual processes in which the parties

89 “Quest for Qualifications,” supra note 78 at 126.

90 It should be noted that researchers in North American have noted that North American mediation practices have not been well described through observation. The actual practices of skilled and respected North American mediators often do not follow the prescriptions of mediation training. See e.g. the final chapter of D. Kolb, ed., When Talk Works: Profiles of Mediators (San Francisco, CA: Jossey-Bass Publishers, 1994).
themselves decide the outcome with the assistance of a third party. This minimal definition illustrates the need for empirical research, including interviews and observation, by anyone endeavouring to work in Cambodia on dispute resolution approaches to human rights complaints. This definition does not illuminate the characteristics, roles, behaviour, or degree of independence of the third parties, nor does it illuminate the degree and type of mediator persuasion that may be seen as acceptable in Cambodian society and (more relevant) by various Cambodian participants in conciliation or mediation. Further, it would be wrong to assume without inquiry that Cambodians do mediation or conciliation the same way Canadians do, or that they want to or ought to.

Little literature was found to illuminate the preferences of Cambodians in terms of either traditional dispute resolution processes or court-connected conciliation processes, although there are suggestions that at the village level elders and family mediators (as opposed to “outside neutrals”) commonly mediate and may use a directive approach to encourage parties towards accepted social norms. Similarly, it appears that mediation by village officials, court officials and judges may be quite directive or persuasive in style. Some comments in the literature indicate that the desired outcome of such processes may favour social harmony in the community rather than individual satisfaction or the upholding of individual justice, particularly in the case of disputants who are underpowered or whose interests (or rights) may be marginalized in the hegemony of what or who is seen as “important.” Examples of the

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91 This definition of the English words “mediation” and “conciliation” is a universal, generic one, but the identity and roles of the third party may vary considerably including degrees of mediator intervention, neutrality, and coercion. In Cambodia, while there appears to be debate about whether conciliation is mandatory, the conciliation process through the courts is not supposed to use threats, pressure or coercion. See *Introduction to the Cambodian Judicial Process*, supra note 6 at 47, who indicates that while many believe it is mandatory, cases have not been refused on appeal for lack of the step of conciliation. See also S. Sok & D. Sarin, *Legal System of Cambodia* (Phnom Penh: Cambodian Legal Resources Development Center, 1998) at 65. who suggest conciliation is mandatory except for cases involving illegal activities such as smuggling or gambling.

92 See “Quest for Qualifications,” *supra* note 78.

93 *Dynamics of Dispute Resolution*, supra note 6; *Introduction to the Cambodian Judicial Process*, supra note 6 at 47.

marginalized in Cambodia are women, the rural and urban poor, and ethnic minorities.

1.2.4.2 Competing world views about the meaning of social conflict

The terminology of "dispute resolution" "conflict resolution" and "conflict management" points to an important problematique within the field of conflict studies. Practitioners and instructors in the field of conflict resolution in general have been noted by many critics to have a strong structural functionalist bias. This tendency in the field of dispute resolution has been taken to task by critical theorists who have considered the social meaning of the growth of court-related and other institutionalized ADR systems.

Structural functionalism has been associated primarily with Harvard professor, Talcott Parsons,95 the leading sociological theorist in North America during the 1950s and the 1960s. The writings surrounding the field of structural functionalism are vast. According to structural functionalist thinking, social systems have functional requisites in order to be maintained in the long term. Disturbances to equilibrium in the system and the restoration of equilibrium generates learning by the system. Systems experience differentiation, reintegration and evolution through a serious of disturbances and restoration of equilibrium. The world view implicit in structural functionalism is that of a generally harmonious and stable social world in which conflicts are a symptom of disequilibrium, and in which conflict and conflict resolution are part of the process of revealing and ultimately maintaining overall social stability and harmony. Lewis Coser's96 application of structural functionalism to conflict still feeds the conflict resolution movement. His views of conflict center around a structural functionalist view of society that has its focus on social integration. In the field of conflict resolution, systems theory, which springs from structural functionalist thinking, has had a pronounced


influence in family mediation and organizational conflict management. Structural functionalist logic has been criticized for its lack of attention to power, which critique has also perpetually dogged the field of conflict resolution.

For years, critical theorists have raised concerns about the field of dispute resolution, but unfortunately, their arguments have not been given adequate attention or weight within the mainstream of conflict resolution training and ADR education. Some of these concerns are addressed in Chapter Four. For the purpose of this introductory chapter, it is important to set out the overall concern, which is connected to ideological debates about the role of social conflict and appropriate stances toward conflict and peacebuilding. Marxian-influenced understandings of conflict held by most critical theorists are fundamentally contrary to structural functionalist views. In a Marxist world view, conflicts, while seen as disturbances in the system, are not viewed as a part of an overall evolutionary force toward equilibrium and harmony, but as a revolutionary force toward the end of world capitalism and its injustices. Thus, structural functionalism is incompatible with leftist and other social change approaches which are more concerned with the use of power in conflict to achieve radical social change than with maintenance of social order and equilibrium. Thus, in contrast to the mainstream literature by proponents and practitioners of conflict resolution, the critical literature on conflict resolution presents a radically different world view concerning conflict. In a Marxian perspective (as well as that of many non-Marxist change advocates) conflict is not something to be controlled, managed, or settled, but something that should progress in ways that draw attention to social injustices and in ways that maximize progressive pressure on the world.


system. Münch has provided a summary of the chief characteristics of the functionalist view and the “conflict” view of society, outlined in Figure 1.

<table>
<thead>
<tr>
<th><strong>Functionalist view</strong>&lt;sup&gt;100&lt;/sup&gt;</th>
<th><strong>Conflict view</strong>&lt;sup&gt;101&lt;/sup&gt;</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Every society is a relatively persisting configuration of elements</td>
<td>• Every society is subjected at every moment to change: social change is ubiquitous</td>
</tr>
<tr>
<td>• Every society is a well-integrated configuration of elements</td>
<td>• Every society experiences at every moment conflict: social conflict is ubiquitous</td>
</tr>
<tr>
<td>• Every element in a society contributes to its functioning</td>
<td>• Every element in a society contributes to its change</td>
</tr>
<tr>
<td>• Every society rests on the consensus of its members</td>
<td>• Every society rests on constraint of some of its members by others.</td>
</tr>
</tbody>
</table>

**Figure 1.**

This problematique in the field of conflict resolution is addressed in various places throughout these chapters. To prevent assumptions of structural functionalist logic or world view, it may be better to speak of “dispute processing” or conflict “transformation.” However, this begs questions about “processing” for what purposes, and “transformation” how and toward what?

My own stance does not fit comfortably with either structural functionalist logic and the liberal

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<sup>99</sup> It is beyond the scope of this project to dwell more on conflict theories; partly because current proponent and critical literature is very weak in explicating theoretical or ideological bases of the perspectives and models they espouse. A good deal more work is needed to trace the theories and ideologies of the conflict resolution movement.


perspectives that often accompany it. Neither does it fit entirely with Marxist historical materialism, which, while I adopt a good deal of its social diagnosis and ethical concerns, is too bound up in the Western Enlightenment, too closed to the possibilities of spiritual realm and too narrowly focused on economic class struggle, and too prone to counter-violence because of an inadequate repertoire of remedies and processes for addressing inequality and injustice. In the unsatisfying struggle to find an intellectual home, it has been tempting to try to be apolitical. However, there are dangers in trying to take an apolitical or “value neutral” approach to conflict studies. To do so is to remain un-conscious of the theoretical and ideological hegemonies that are the potent sub-texts (or meta-texts) of conflict studies or practice. It is possible neither to avoid this problematique nor to avoid taking a stand. Therefore, I will not pretend that what I am talking about is anything other than moving away from violence and toward peacefulness. However, I argue that this is quite different from moving away from legitimate struggle for justice or toward the superficial settlements and band-aid pacification that critical theorists decry.

If I were to find an intellectual “home” it might be with those Quakers and Mennonites who have been strongly influenced by radical social change ideology, often liberation theology, but who prefer non-violent struggle, rejecting armed revolution. Some of these theorists are drawn to “conflict transformation.” I prefer the goal of transformation of conflict away from that which endangers and destroys lives, and toward that which enables honest and radical change that will improve lives, particularly the lives of the people in the world who are not getting enough of what they need for basic survival, let alone a sufficient share as not to rankle the conscience. One example of a “transformative” approach is Lederach's emphasis on social, structural and institutional transformation. In such approaches, peacefulness (including justice) lies as much in processes as in outcomes. Outcomes, however, are not less important than the processes by which outcomes are reached, nor can processes neatly be separated from outcomes. “Peaceful” processes do not shrink from pointing out sources of conflict that must be eliminated or changed radically for sustainably peaceful outcomes to result. Possibilities for

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102 See e.g. Preparing for Peace, supra note 16 at 25, who draws inspiration in his instruction from the radical popular education theorist P. Freire, Pedagogy of the Oppressed (New York: Seabury Press, 1970).
peaceful outcomes, peacefully reached, lie in the transformation of ways for people to talk and be together when going separate ways is not possible and violence is ethically precluded. To preclude violence is not to eliminate attention to power; rather nonviolence requires increased understanding of and attention to strategic uses of power by parties and intervenors. Unfortunately, the field of conflict studies so far has not contributed as much to understandings about power as it might if more attention were focussed on it.

While I depart from structural functionalist approaches to conflict resolution, I do not rest well with the almost exclusively deconstructive approaches of most critical theorists. Nevertheless, deconstruction is important. To this end, in Chapter Four I critique some dominant perspectives in the field of conflict resolution as they were applied in Canadian projects in Cambodia. While it is temporarily satisfying to deconstruct ideas that do not satisfactorily scratch the itch for a just peace, things quickly begin to chafe again if things are left in pieces. What then? Must one merely sit on the ash-heap of disillusionment scraping still-itching sores with the broken shards, trying to salve them with the ashes? This does not seem very honest or helpful to people and societies that are literally in pieces, such as in Cambodia. Therefore, I press on with constructivist approaches in this less than perfect world. In this world, political strategies move with or against existing power structures, and greater or lesser intrusions are made to existing social relations. Less-than-perfect policies are made. Compromises and settlements are reached. In the absence of perfectly transformed social relations, resolutions (including sometimes temporary and not-entirely-satisfactory settlements) are possible and necessary, if only because they seem better than other alternatives at hand and better than doing nothing. Thus, I attempt to take into account that idealist frameworks, while providing an important and valuable standard, may provide less than completely useful tools for individual disputes of ordinary people who may be less concerned with global justice than they are with just getting by.

In Chapter Five, I consider some approaches that reflect the thinking of critical theorist, Jürgen Habermas, who has moved beyond deconstruction toward constructivist, processual, dialogical

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103 This reference is taken from the story of Job, in which this was Job's first approach to the radical upsetting of his comfortable world (Job 2:8).

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approaches in his ideas about “communicative action.” I also consider some “deliberative”
approaches from the fields of deliberative democracy and public policy, and some “narrative”
approaches to conflict resolution that spring from social constructionist perspectives in the field
of psychology and critical race theory. I do not depart from radicalism. One can be oppositional
without being violent. Deliberative approaches do not the deny the value of good and vigorous
argument (or direct action) aimed at bringing about change for the better in things that matter a
great deal – like fundamental human rights.

What would “transformation” (or resolution) of human rights conflict mean in Cambodia, and
what would a “good” transformation (or resolution) process be like? The answer to this
question may differ for the various stakeholders, some of whom are considered in Chapter
Three. More generalized themes in Cambodians' world views concerning conflict and peace are
considered in Chapter Two. For the purpose of this project, the overall question becomes:
“What kinds of processes might facilitate resolution of individual human rights complaints, and
what processes might facilitate transformation of the bigger public conflicts surrounding the
development and implementation of law, policies and systems for resolving human rights
disputes?” These questions are addressed in Chapter Five. A constructivist approach is
examined which links structures and actors at multiple levels and diverse sectors of society
affected by human rights conflicts.

1.2.5 What is “peace”?

Several conceptions of “peace” identified in Cambodia are discussed in Chapter Two. It is also
important to acknowledge explicitly my own concept of “peace” which speaks throughout these
chapters. Peace is conceptualized in this project as more than the absence of armed struggle.
Such “negative peace” may be unsustainable over time if the sources of conflict that led to
armed struggle remain unaddressed.104 “Peace” is not just a kind of Pax Romana in which what
passes for harmony is the product of apathy, compliance or fear. Rather, I define “peace” in

positive terms that includes addressing structural injustices. This definition of “peace” does not envision the absence of all conflicts or disputes in society. Rather, it envisions practical, rational and passionate commitments along the way to metaphorical places that Hebrew scriptures refer to as shalom: the places where peace, justice, truth and mercy meet. Ideal conceptions of “peace” are sometimes seen as nice for aspirational purposes but impractical for the messiness of everyday human living-together. I do not agree. Visions and metaphors, mediated through language, both guide and constitute our day-to-day theories, thoughts and actions – our praxis. Therefore, a practical “peace,” while certainly connoting some envisioned outcomes, is more usefully considered as processes toward peacefulness, and as some might say, “being peace.” However, being also of activist disposition, I like the metaphor of a “construction project,” and not the construction of just one singular edifice but many, including places of rest and reflection. Construction projects need designers, planners and workers. They also need cooks and medical attendants. They also need the aspirational guidance of prophets, teachers and contemplatives. Such “peace” construction projects may be fraught with errors, failures, clouded vision and troubles of many kinds, but that does not mean such projects are not worthy ones. Nor does it mean that there is never anything to celebrate.

1.2.5.1 Connections between conflict resolution and peacebuilding

In the past several years, we have witnessed a hugely increased interest in “conflict resolution.” This term means different things in different contexts. In international relations literature the emphasis is primarily on mediation within the confines of traditional diplomacy. “Conflict resolution” within UN and diplomatic circles has traditionally evoked images of diplomats and high-level mediators working toward cease-fires and peace accords. “Conflict analysis” conjures up images of diplomatic or military-based “early warning” systems to predict escalating violence. However, increased emphasis on the concept of peacebuilding has elevated awareness of the potential of conflict resolution practitioners and scholars to become involved

105 Building Peace supra note 16 at 28, citing Psalm 85:10.

in development projects under the peacebuilding rubric. And, in fact, broader understandings of "conflict resolution" seem to be coming into vogue. Conflict resolution specialists are working and conducting research and training in other countries in areas that range from dispute resolution at the grass-roots and court-related ADR schemes to enhance court efficiency, to community and public dispute resolution that emphasizes public participation.

Thus, there is movement internationally toward seeing the value of conflict analysis or conflict resolution expertise that is primarily located in domestic and local scenes. For example, in terms of "early warning," some humanitarian NGOs, such as World Vision International, to name just one, are reporting that where there are fears of wide-spread civilian violence, they are increasingly being consulted because of their long-term local relationships and intimate knowledge of local conditions. Even conservative humanitarian organizations are now beginning to give increasing attention to becoming better equipped for conflict analysis and conflict resolution as an essential part of development.\(^\text{107}\) There has also been movement toward inclusion of ADR and community conflict resolution experts in international development and peacebuilding projects. This is largely because of increasing donor emphasis on "building civil society" which involves supporting non-governmental organizations that are promoting respect for international standards of human rights, democracy and the rule of law. For example, the Cambodian Centre for Conflict Resolution has received international funding for training of Cambodian government officials and civil society leaders in conflict resolution skills.\(^\text{108}\) The CIDA-funded Canadian projects considered later in this paper were a part of the earlier stages of this Cambodian initiative.\(^\text{109}\)

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In spite of these developments, it may still be fair to say that the offerings of domestic conflict resolution specialists – particularly the contributions of community dispute resolution and “transformative” schools of conflict resolution – are less well known, less glamorous, less obvious, less appreciated and sometimes even disparaged within the international relations culture. Grass-roots capacity development of local non-governmental organizations in the skills for conflict analysis, prevention and resolution still does not appear to be attracting large-scale or long-term funding.

There are also ideological and methodological issues. Lederach comments on the “bickering” between the international relations community and the conflict resolution community. He caricatures this controversy as follows: International Relations belittles Conflict Resolution, saying “Listen, touchy-feely is good for the glee club, but it holds no answer for the big time. We are dealing with hard-core gangsters out there.”110 Conflict Resolution, in turn, attacks International Relations for being “locked into power paradigms and unable to reach the root of problems in creative ways.”111

Lederach argues that the meeting point between international realists and conflict resolution innovators is the idea of reconciliation112 which he says is at the heart of peacebuilding. Indeed, “reconciliation” is now seen to have moved outside the realm of personal relationships and toward consideration by international relations and legal specialists. This appears largely to be due to the increasing experimentation with truth commissions and the celebrity of the South African Truth and Reconciliation Commission.

Certain ideological issues are important to emphasise. The concept of peacebuilding, as envisioned by the UN and international development agencies is generally tied in with the

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110 Building Peace, supra note 16 at 20.
111 Ibid. at 25.
112 Ibid.
development of democratic institutions based on liberal democratic principles. Conflict resolution initiatives are often tied in with development aid projects tied to “good governance” or “legal development” both of which are usually closely linked with the agenda for economic liberalization. The notion is very prevalent that economic development means free-market liberal economic development. Legal development and “good governance” agendas are linked to the creation of legislative and governance structures to support a market economy. A vast multi-disciplinary literature has been developing on the problems associated with globalization, particularly for the marginalised and poor in developing countries.

Conflict resolution specialists might easily be coopted into the neo-liberal agenda aimed at developing legal systems or social stability that supports economic liberalization to attract foreign investment. This is particular true of conflict resolution specialists whose structural functionalist and neo-liberal biases are unconscious or unexamined. Even in the neo-liberal agenda, however, conflict resolution tends to be marginalised. Legal development and legal reform initiatives are more likely to be aimed at the development of traditional court-centred models. This is the case in Cambodia, where legal reform is tending to neglect the traditional Cambodian preferences for and methods of conciliation and mediation. Projects aimed at community empowerment, participatory community planning, or transformative justice are not as high on funders' lists of priorities. Nevertheless, there is a counterbalancing ideological agenda, and that is the tendency toward the globalization of international human rights standards. While international human rights appears to be dominated by Western advocacy approaches that are largely adversarial in style, the field of human rights, at least national human rights commissions, have adopted conciliation and ombuds-style approaches. Within


114 See M.V.J. Kran & P.M. Rawkins, Good Governance and Rule of Law Program Development and Scoping Mission to Cambodia, June 5-26, 1999 (Ottawa, ON: Asia Branch, Canadian International Development Agency, 1999) [hereinafter Good Governance]. This report on the Cambodian legal system written for CIDA does not mention the existence of the Cambodian court-related conciliation processes, nor the village level conflict resolution processes that are preferred throughout Cambodia.

115 United Nations General Assembly, National institutions for the promotion and protection of human rights,
the agenda of international development, there is room for conflict specialists of a variety of ideological stripes.

It is important to realize that "conflict resolution" and "peacebuilding" are not synonymous or interchangeable. Some peacebuilding efforts are aimed at building capacities not directly related to conflict analysis, negotiation, international mediation, or domestic alternative dispute resolution. Many peacebuilding projects rightly focus on structural causes of conflict, and may see the remedy as institutional reform. Peacebuilding may focus on economic development, participatory community development, parliamentary processes, legal institutions, national institutions to address human rights and complaints of government maladministration, capacity of local human rights NGOs, and many other kinds of initiatives. Attention to conflict analysis, prevention and resolution is an important component in many if not all aspects of peacebuilding.

1.2.6 What is law?

Western legal education tends to assume without much scrutiny that the definition of "law" means positive law within the framework of a liberal constitution. In today's rhetoric, "legal development" tends to mean the development of law that will support liberal economies.¹¹⁶

¹¹⁶ When I use the term liberalism, I am using it to mean the cluster of concepts based on humanism (as distinct from theocratic ideas) and the freedom of the individual. This includes the concept of the dominance of civil society as distinct from government. Civil society, and individuals, are protected through limitations on the powers of the state. This is accomplished through separations between "public" and "private" realms, where government is not to enter into the private realm. Also, government powers are limited through a separation of the powers of the legislative, executive and judicial branches. The power of the executive branch is limited by the concept of the "rule of law" by which it is the law passed by an elected legislature that is dominant (or in the case of the British Common Law system, also by accretions of common law developed by an independent judiciary). The "rule of law" is a stronger concept than "rule by law" by which authoritarian rulers may still make laws or decrees and apply them without necessarily having recourse to an elected legislature. The power of the executive is further limited through oversight by a judiciary that is politically and practically independent of the executive and legislative branches.
It seems fair to say that within the now globally dominant neo-liberal agenda, social welfare agendas are suppressed. This is despite the existence of international agencies dedicated to the relief of poverty, including the World Bank and several UN agencies. Even within the World Bank, social welfare priorities pale beside the forces that are moving toward economic liberalization, which seems to end up serving large capital interests. In these chapters, I try to avoid assuming that “law” means a liberal conception of law, since that is inadequate to a discussion of Cambodia, discussed in Chapter Two.

“Law” is also viewed as more broad than positive law (including “law on books” and legal institutions). Thus, legal development is not just a technicians’ pursuit. Despite the efforts of legal development agencies to measure the results of legal development work against social goals, I do not conceive of law as purely instrumental – as just trying to draft good laws, and then trying to get “law in action” to correspond better with “law on books.” Nor do I conceive of law as just following society’s movements and trends. I do not see law as autonomous or even relatively autonomous from society. As Kessler suggests: “From an ideological perspective, there is no useful distinction between law and society. Rather law is part of social life, not an entity that stands above, beyond, or outside of it. Law and society are inseparable and mutually constituting so that the focus is not on law’s impact on society, but rather on how law operates in society.”

Thus, law is not just rules, rule structures, rule enforcement and dispute resolution mechanisms. I view law as including all the social control mechanisms within society, both formal and informal and including ideological hegemonies. This includes local conceptions

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117 CIDA is currently focused on “results based management.”


119 “Comparative Theory of Dispute Institutions,” supra note 50.

of “law” that may not fit Western positivist ideas of “law.” For example, Geertz, comparing the concepts of Indic adat, Islamic haqq, and Buddhist dharma (all local terms for “law” that might be given the colonial term “customary law”), says it is less important to ask whether adat, haqq or dharma are really “law” than “that their imaginative power not be obscured. They do not just regulate behaviour, they construe it.” Law, says Geertz, is joined to morals, art, science, religion and history; law does not merely reflect social reality but constructs it and makes local sense of it.

This definition of law acknowledges that different societies may conceive of “law” (or what is translated into English as “law”) differently. Some societies place less emphasis on formal state-sponsored adjudicative mechanisms and more emphasis on informal social control and dispute resolution mechanisms. And not all societies privilege liberal democratic approaches to the development of policy and the management of public controversy. Some of the ways Buddhist dhamma and local dispute resolution mechanisms have woven through Cambodian law and society are discussed in the Cambodia context in the next section of this Chapter and in Chapter Two.

In Canada, “alternative” dispute resolution (ADR) is often contrasted with or seen as outside or peripheral to the formal legal system which emphasizes the resolution of disputes through

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123 Ibid. at 215.

124 For a discussion that illuminates this point, see ibid. at 183. An anthropologist, Geertz discusses the legal sensibilities in Islam, Indic, and Malayo-Polynesian systems by “unpacking” the terms haqq, dharma, and adat. Haqq means truth, dharma means duty and adat means “practice.” But Geertz notes that each of these translations is inadequate to describe the concepts which involve a “a great deal more.”
adjudication by courts or quasi-judicial tribunals. ADR has been marginalized and is seen as lesser than and not fully constituting “law.” By contrast, in Cambodia, formal “laws” and lawyers are lacking, and the formal judicial system is not currently a viable option for most disputants because of lack of affordability, lack of training and experience of the judiciary and the legal profession, problems of corruption, and traditional reasons. These factors are elaborated in Chapter Two. Consensual dispute resolution effected through the mediation or conciliation of monks and village chiefs has always been common in Cambodia. In addition, conciliation by court administrators or judges has been articulated as a formal part of the Cambodian court system (in differing ways and under differing statutes) since at the latest 1938 (with the exception of the Pol Pot regime and its aftermath). However, no English language literature was found that discusses the specific process, effectiveness or fairness of conciliation in the Cambodian court system.

1.3 Overview

Following this introduction, Chapter Two provides a brief overview of the human rights situation in Cambodia considering the historical, political and legal context. George Kent comments that conflict analysis and problem articulation is sometimes glossed over in conflict resolution. Chapters Two and Three are an attempt to avoid this trap; read together, they comprise an analysis of Cambodia’s human rights conflicts. Chapter Two emphasises structural

125 Good Governance, supra note 114; K.E. Neilson, They Killed All the Lawyers: Rebuilding the Judicial System in Cambodia (Victoria, B.C: Centre for Asia Pacific Initiatives, University of Victoria, 1996) [hereinafter They Killed all the Lawyers].

126 Good Governance, supra note 114; They Killed all the Lawyers, supra note 125.

127 Dynamics of Dispute Resolution, supra note 6; Introduction to the Cambodian Judicial Process, supra note 6. Note that Venerable Tep Vong, Supreme Patriarch of Cambodia, has urged the development of village-level mediation mechanisms that are independent of authorities. The Venerable Supreme Patriarch Tep Vong, “Keynote Address: A Summary” in E. Mysliwiec & C. Morris, eds., Dispute Resolution in Cambodia: A Road to Peace and Reconciliation, Proceedings of a Workshop Held November 28-30, 1995, Phnom Penh, Cambodia (Victoria, BC: UVic Institute for Dispute Resolution and Cambodia Development Resource Institute, 1997).

128 Introduction to the Cambodian Judicial Process, supra note 6 at 48.

129 Analysing Conflict and Violence”, supra note 57 at 396.
and cultural factors and overall conflict dynamics. Chapter Three is an analysis of stakeholders in the development and implementation of human rights policies and practices in Cambodia. The constraints of length mean that analysis is necessarily limited.

Chapter Four considers the role of the international community in the development of the human rights regime in Cambodia, including the comparatively minor role of conflict resolution specialists. External actors are extremely influential in Cambodia despite the Cambodian government's skilful efforts to manoeuvre among various international interests. No discussion of human rights or virtually any other topic related to Cambodia is complete without a discussion of the various development philosophies and practices that impact this tiny country. This is important because of the heavy emphasis in Cambodia on external assistance in funding, training, advice, infrastructure development, and virtually everything else. The issue is particularly important in the area of human rights where NGOs that monitor human rights rely heavily on foreign aid. Legal aid organizations, legal education organizations including the University of Phnom Penh Faculty of Law and Economics, and the work of the fledgling Bar Association of the Kingdom of Cambodia are largely externally funded. Considerable foreign assistance has also been allocated to projects involving "governance" which involves development projects addressing democracy, anti-corruption, the development of human rights mechanisms and non-governmental organizations (NGOs) and conflict resolution. Chapter Four provides an overview of relevant development theory and practice that has influenced the types of projects funded.

Chapter Four also takes a critical look at Canadian development projects on dispute resolution in Cambodia, one of which focussed on public policy dispute resolution, and the other of

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130 For example, the 1993 election results and the 1998 election, both of which were internationally assisted and supervised though in different degrees, were skillfully used by the Cambodian People's Party (CPP) to retain and consolidate political power. In developing good relationships with China, and receiving large amounts of aid from China, the now formally ruling CPP is able to withstand a good deal of pressure from the US and the UN.

131 Canadian and other Western experiences with the use of alternative dispute resolution (ADR) methodologies to address human rights issues, as well as environmental and other public disputes were examined in workshops held in Cambodia in 1995-96 under the auspices of the Canadian International Development Agency (CIDA) through the its Management for Change program in 1995 and through the South East Asia Fund for Institutional
which focused more specifically on the processes of resolution of human rights complaints within the Cambodia Commission on Human Rights and Reception of Complaints. Experiments with participatory public decision making processes in Canada have relied extensively on dispute resolution theory and practice, including the work of Stephen Owen and his colleagues in the Commission on Resources and Environment (CORE) in British Columbia from 1992-96. The knowledge garnered by practitioners in this Canadian experiment and in the Canadian field of dispute resolution more generally, formed the foundation for Canadian presentations and training workshops in Cambodia in 1995-96. The Canadian development projects are critiqued for their suitability to Cambodia on the basis of political, legal and societal culture; development theory; human rights theory and knowledge; and conflict resolution practice and theory.

In the light of the themes addressed in earlier chapters, Chapter Five examines the possibilities for participatory decision making in the creation of human rights policy in Cambodia. The enthusiasm with which the idea of conflict resolution was received in Cambodia at all levels of government and among NGOs, which have notoriously different perspectives and methodologies, together with the active presence of several public participation experiments by Cambodian driven organizations, suggest the possibility of testing theories associated with

and Legal Development (SEAFILD) in 1996. In November, 1995, a workshop entitled "Dispute Resolution in Cambodia: A Road to Peace and Reconciliation" was held in Phnom Penh under the auspices of the Cambodia Development Resource Institute (CDRI) in which Cambodian, Canadian and British speakers were involved. In December, 1996, Cambodians, Canadians and others were involved in a four-day conflict management and ombudsman skills training workshop for staff of the National Assembly Commission on Human Rights and Reception of Complaints, and a two-day workshop on principles of conflict resolution and ombudsmanship for members of the National Assembly which also included an address by United Nations Special Representative for human rights in Cambodia, Thomas Hammarberg. The Cambodian partner in the 1995 project was the Cambodia Development Resource Institute (CDRI). The Parliamentary Commission on Human Rights under Ken Sokha was the Cambodian partner in 1996. Canadians involved in the project were Stephen Owen, Q.C., then Deputy Attorney General of B.C.; Alex Grzybowski, mediator and planner in private practice; Professor Andrew Pirie, Executive Director of the University of Victoria Institute for Dispute Resolution (1995) and Catherine Morris, Director of Programs of the University of Victoria Institute for Dispute Resolution (1995) and Executive Director (1996); Harley Johnson, then Ombudsman of Alberta, Canada (1996). See Building Democratic Institutions, supra note 109; Dispute Resolution in Cambodia, supra note 5.

participatory deliberative approaches to building the human rights regime in Cambodia. The emphasis on participation in the international discourse about the right to development lends weight to consideration of these ideas. This chapter examines the work of several Cambodian NGOs in promoting and using public participation to address public policy and community issues.

The chapter also notes several key challenges in Cambodia to a participatory approach to the development of the human rights regime in Cambodia. What is striking in Cambodia is the diversity of stakeholders involved in human rights development work as well as the intensity of political controversy touching on human rights issues and processes. A central challenge arises from the question of how the various controversial points of view could be accommodated in a participatory approach given the high level of mistrust among political parties, international organizations and NGOs in Cambodia. Chief among the questions is whether the Cambodian government can or will contemplate, let alone implement, the kind of power sharing that would be involved in a participatory deliberative process. These are questions that have been faced (albeit in different degree) by those conducting similar experiments in British Columbia, seemingly with some success in some sectors.

Chapter Six draws together the themes in the five preceding chapters and presents some suggestions for further work.

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134 R.A. Kelly & D.K. Alper, *Transforming British Columbia’s War in the Woods: An Assessment of the Vancouver Island Regional Negotiation Process of the Commission on Resources and Environment (CORE)* (Victoria, B.C.: UVic Institute for Dispute Resolution, 1995). The stakeholder-representation model of “shared decision making” process tried by CORE, while it has been critiqued, has been seen as successful enough to warrant further experimentation. For example, this approach is currently being seriously considered as a process for planning some changes in the complaints mechanisms of the BC Human Rights Commission. The process is not far enough along to provide a case study for comparative consideration.
1.4 Methodology

While the focus of this essay is on Cambodia, it must be acknowledged that Canadian experiences inform and limit the approach, research and writing in explicit and implicit ways. First, the scope of the project means that empirical research was not possible, except for reflection on experiences and methodology of work, research and interactions in Cambodia. Some discussions were held in English with government officials, human rights NGO leaders, legal aid workers, and staff of international organizations during visits to Phnom Penh in October, 1998 and May-June, 2000. Most of these conversations were with people whose first language was Khmer, or in one case, French. Some conversations were held using Khmer-English consecutive translation. In addition to reflection on these experiences and discussions in Cambodia, methodology for this project has been limited to review of the accessible and relevant English language literature on Cambodia (including some material translated from Khmer to English), and including English language news reports.

Literature reviewed for this study is wide-ranging and includes literature from the disciplines of law, international relations, international development, anthropology, sociology, social psychology, religious studies, philosophy and jurisprudence. Directly relevant literature is very limited. In Cambodia, literature is difficult to find, and is often in the form of workshop proceedings and reports of varying depth and quality. University libraries in Cambodia are woefully inadequate. The most useful libraries are the resource centres of some Cambodian NGOs. Access to local materials, including legal materials, must often be gained through word of mouth and the graciousness of individuals within funding bodies and NGOs. Up-to-date laws and draft laws are difficult to locate, particularly at long distance. My own limited understanding of Khmer history and culture, and particularly my lack of access to Khmer and French language materials certainly impedes understandings considerably.

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135 Notes and summary reports are on file with the author.

136 The graciousness of the resource staff at the well-organized libraries of the Cambodia Development Resource Institute and the Cooperation Committee for Cambodia is noteworthy.
1.5 Audiences

This project was undertaken as a thesis project and as such was primarily geared to my own reflection and learning. Therefore, it is acknowledged that these chapters are currently written in a form suited mainly to academic audiences in Canada. However, it is hoped that the material might also be usefully considered by three other audiences. One potential audience includes those in the international community in Cambodia working on legal development, public policy development, legislative reform, human rights and conflict resolution. Another audience might include practitioners and policy makers in the field of conflict resolution in Canada, particularly those working on public policy conflicts in multicultural settings. A third possible audience is Canadian foreign policy-makers and donors interested in Cambodia in particular and South East Asia in general. Canada's foreign policy and development projects emphasise human rights, often under the rubric of “governance” or “legal development.”

Increasingly Canadians are sought as trainers and consultants to governments and NGOs in other countries seeking to explore the use of dispute resolution for peace building, public participation, institution building and legal development, including programs that address or touch on issues of human rights. It is hoped this project will provide a useful tool for planning or evaluation of Canadian conflict resolution initiatives that have impacts on human rights issues in other countries. Above all, it is hoped that this work will provide some useful illumination concerning the utility of conflict resolution approaches to the resolution of the serious human rights conflicts that face many Cambodians on a daily basis.

137 These terms appear to be used in official government policy statements to avoid the appearance of imposing the Western liberal democratic ideals of the rule of law and human rights.
Chapter II

2 Among Tiger, Crocodile, Wolf and Police: Historical, Legal, Political and Cultural Context

In the sea you find the crocodile, in the earth you find the wolf, in the forest you find the tiger and at the market you find the police. So where can you go?

2.1 Introduction

This Khmer expression metaphorically describes the historical – and current – situation of Cambodians. Cambodia has been historically and geographically caught between the more powerful Thailand and Vietnam, politically caught in the manoeuvres of Cold War

1 Sources for this chapter include interdisciplinary literature review, review of reports, newspapers and documents in Cambodia and conversations and correspondence with Cambodia scholars, diplomats, government officials, civil society leaders, clergy, and officials in international organizations, including discussions in Cambodia in 1998 and 2000 in the context of another research project. Because of the political polarization in Cambodia, it is important that contents of conversations with people in Cambodia be summarized or quoted anonymously. Notes and summaries of conversations are on file with the author.

2 Khmer proverb quoted by C. Chamumeau, "Politics' Behind Attack on TVK" Phnom Penh Post (29 May 1997) at 3. The proverb is drawn from a Khmer folk tale, "Below, the Crocodile; Above, the Tiger": "A man was lost in the jungle when he heard the terrifying roar of a tiger. The man raced for his life, not daring to stop. Ahead, the pathway dropped into the river. With the tiger nearly upon him, the man leaped for a vine hanging down from the trees overhead. He clung desperately to it while the tiger paced back and forth below him. With his heart still pounding, the man carefully inched down toward the river. Suddenly he stopped. What was that noise a quiet swishing in the water below? He looked down, and to his horror he saw an immense crocodile staring hungrily at him. Hand over hand he pulled himself up the vine and away from the grasp of the crocodile's jaws, only to see the tiger still watching him. Below, the crocodile; above, the tiger! His hands burned; he did not know how long he could hold on. Would the tiger or the crocodile ever go away? He wrapped the vine around his waist and prepared to wait. Surely they would not stay forever. But in the quiet another sound struck horror in his heart. Two rats, one black and one white, were gnawing on the vine above his head. He shouted at the rats, but they did not go away. Now it was only a matter of time until he and the vine would crash into the water below." Khmer folk tale, as told by S. Griswold, Below, the Crocodile; above, the Tiger (The Sabbath School Network and Bible Study Center (SSNET), December 1999), online: SSNET <http://www.ssnet.org/qtrly/eng/99d/lessl3.html> (date accessed: 9 June 2001).

3 Peter Gyallay-Pap notes that historically the "Khmer have... perceived themselves as wedged between two predatory neighbours, the 'Tiger' (Thailand) and the 'Crocodile' (Vietnam)." P. Gyallay-Pap, From Conflict to Reconciliation in Cambodia? Toward an Indigenous Approach (1993), at 9 [unpublished, archived at Cooperation Committee for Cambodia]. [hereinafter From Conflict to Reconciliation].
superpowers, wedged among the byways of the ASEAN nations, and mangled in the jaws of civil war and factional politics. Cambodia has been the stage for exotic if ghastly theatre for the past several decades. Alternately enchanted by the mystical beauty of Angkor Wat or transfixed with horrible fascination by the “killing fields” and the aftermath, the world continues watching Cambodia, wondering what will happen next.

In the meantime, most of the people of Cambodia continue to live lives too short and too full of poverty, violence and suffering. Many observers portray Cambodian leaders as caricatured actors (heroes or villains). The lives of the majority of Cambodians, when they are not portrayed as “passive simple lotus eaters” or victims, are often portrayed as backdrops, stage sets and even audiences for the dramas that have unfolded throughout history.

Cambodia is rich in the traditions of theatre and art. Images of theatre are not only entertainment, but also find expression in legal concepts, education and politics. It has been

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4 ASEAN is the Association of South East Asian Nations including Indonesia, Philippines, Singapore, Malaysia, Thailand, Brunei, Vietnam, Laos, Myanmar and Cambodia.

5 Taken from the title of Serge Thion's book of essays, S. Thion, Watching Cambodia: Ten Paths to Enter the Cambodian Tangle (Bangkok: White Lotus Co., 1993) [hereinafter Watching Cambodia].


8 When our dispute resolution project group conducted a demonstration role play in Thailand and Cambodia to illustrate concepts of public dispute mediation, the Cambodian audiences seemed delighted. We were told that plays were a traditional form of teaching in Cambodia, and the demonstration role play was eventually made into an educational videorecording filmed in Khmer using Cambodian actors interspersed with narrative explanations
argued that Cambodian politics echo historic Indic themes of the "theatre state" which emphasizes form and ritual over substance and accountability. This chapter discusses the stage and the sets of the Cambodian dramas about human "rights" from historical, legal, cultural and religious points of view. At the same time, one needs to keep in mind that the people in the communities of Cambodia may not view their own lives, their work, their families, their births and deaths as part of a pageant or sideshow for outsiders. They may not perceive themselves as subjects of stories covered by international news. Cambodians are not mere choruses, backdrops or stage sets for "more important" actors. Cambodians, after all, are human beings like the rest of us who live, love, rejoice, weep, worry, struggle, suffer, die, and ponder the meaning of it all. Cambodians have had more than their share of struggling, suffering, dying and wondering why. Cambodians – and not just the ones whose names are well known to the world – are people who matter.

This chapter's exploration of the context is also in keeping with peace researcher Johan Galtung's point that it is not sufficient to discuss the actors alone, as is often the habit of


12 Do international bodies even consider ordinary Cambodians much at all in a world which still considers primarily state “actors” as the subjects of international law and foreign policy?

Western lawyers accustomed to legal processes involving the evaluation of conduct of individuals (or individual corporate entities). While some key actors and groups of actors are discussed in Chapter Three, the social structures and institutions within which people processes human rights conflicts are also of central importance. According to Galtung, it is important not to overemphasize particular structures and institutions at the expense of examining the cultural context. Therefore, this chapter emphasizes some of Cambodia's historical context, structural and institutional factors and cultural patterns. As a whole, these chapters keep tacking between considerations of the actors, the structures, and the cultural context, keeping in mind that none of these are “elements” that are frozen in time or space. Rather, all are in dynamic processual relationship with one another within fluid patterns of history and social interaction that are created, recreated and recreated again in the imaginations of those currently considering them. The primary task of this chapter is to paint in broad brush strokes the stage setting for an examination of human rights conflicts in Cambodia.

When considering Cambodia, it is important to remember the world's involvement, complicity, silence or apathy in the devastation of the country and its people's suffering. A Cambodian monk told me “... we must be responsible, politically and personally. Everyone was implicated in some way, intentionally or unintentionally.” Speaking about foreigners, a Christian priest who has worked with Cambodians for decades cautioned me: “We must be very humble.”

### 2.2 History

History may not repeat itself, but it often rhymes, says leading Cambodia historian David Chandler, recalling Mark Twain. The rhymes of Cambodian history have included pendulum swings between extreme dependence and xenophobic autonomy. They also include grim

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14 For reader reference, a chronology is found at Appendix VIII. For a list of some of Cambodians numerous acronyms, see Appendix VI.

images of Cambodian rulers' authoritarian "consumption"\textsuperscript{16} of the people and resources, and perpetual destructive internal conflicts among contenders for unbridled and unaccountable power.\textsuperscript{17} The rhymes also include a pattern of polarized, factional politics.\textsuperscript{18} Thus, when the curtain is drawn up, the backdrop murals of Cambodian history are in sharp contrast to romantic notions of a historically tranquil Cambodia cruelly interrupted only by imperialistic intrusions of French colonialism and the destruction of the Vietnam war which together brought on the horrible short chapter of the Pol Pot period and its longer aftermath. The current hierarchical authoritarian governance, hostility to power-sharing and abuse of Cambodians by rulers, are not new.\textsuperscript{19}

The Cambodian sense of national identity is said to date back several centuries to the Angkor period between the ninth and fifteenth centuries when the Khmer kingdom extended not only over its current territory but also over much of what is now Thailand (formerly Siam), Lao, and Vietnam. After the fifteenth century, the power of the Khmer kingdom was gradually eroded. Since Cambodia was wedged between Siam and Vietnam, its rulers, or those vying for power in Cambodia, made territorial concessions to Siam or Vietnam in order to preserve their local autonomy or ascendency. Rulers of the much weakened kingdom continually seesawed between alliances with Siam or Vietnam in order to preserve territory and local autonomy.

\textsuperscript{16} D. Chandler, "Asian Millennium: Might Makes Right" \textit{Far Eastern Economic Review} 162:36 (9 September 1999) 54 [hereinafter "Asian Millennium"].

\textsuperscript{17} Ibid.


2.2.1 French colonization

Cambodia was a French protectorate from 1853 until 1954. The French are said to have imbued Cambodia with a modern sense of nationhood. Some have even suggested that without French intervention Cambodia is likely to have ceased to exist as a political entity.\(^\text{20}\) In addition to exporting Cambodian resources out of the country, the French also “discovered” the ruins of Angkor, and restored a number of its ancient temples. The French articulated to Cambodians a grand heritage that contrasted sharply with its dependency and its small size.

France left behind few Cambodians trained for twentieth century modernization.\(^\text{21}\) Like all colonized countries in the area Cambodians were forced to change from their traditional governance modes.\(^\text{22}\) In general and in varying degrees in Southeast Asia, colonial administrations destroyed indigenous entrepreneurship; fostered industrialization at home and encouraged industrial exports to the colonies; limited the modern sector to resource exploitation and large scale (plantation) agriculture and services related to those activities; launched a population explosion wherever Europeans settled, by improving public health and maintaining law and order; neglected education of indigenous populations (and/or imported slaves); and left behind a legacy of anti-capitalism, anti-liberalism, and anti-Westernism. . .\(^\text{23}\)

\(^{20}\) See “Burden of Cambodia’s Past,” \textit{supra} note 7; \textit{History of Cambodia}, \textit{supra} note 19 at 91.


\(^{22}\) \textit{History of Cambodia}, \textit{supra} note 19 at 100.

Cambodia experienced comparatively less colonial intrusion than did Vietnam. While Cambodia was of economic interest to France, it was of less economic importance to the French than was Vietnam. Cambodia was largely a buffer against incursion of Thailand and British colonial interests in French Indochina. Nevertheless, the French left similar structures in place in Cambodia that were the colonial legacy nearly everywhere else – peripheral dependent economies controlled by small Westernized elites that benefited from their associations and complicity with Western capitalist metropoles.  

The French legacy in Cambodia included a nationalist socialist insurgency. Kiernan traces the rise of the Pol Pot faction to nationalist movements that emerged during the French protectorate. While there were non-communist nationalist movements in Cambodia during the 1930s, there was no Cambodian communist movement until the French government tried to reassert their authority in Cambodia after the end of World War II. This provoked many Cambodians, including monks, to join the nationalist insurgency. In 1946, Son Ngoc Minh and Tou Samouth, both of whom were monks, joined the communists who were working in cooperation with the Vietnamese communist movement. In 1951 a separate Khmer People's Revolutionary Party (KPRP) was formed under Son Ngoc Minh and Tou Samouth, by then...
former monks. Thus, by 1954, the year the French withdrew, there was a functioning communist party in Cambodia. At that time, the communists tried to cooperate with non-communist Sihanouk.

Sihanouk, however, was an autocratic ruler. In 1955, he abdicated the throne and his father became king. Since Cambodia was a constitutional monarchy, this was necessary so that Sihanouk could enter the political arena. The 1955 internationally supervised elections confirmed his power with eighty-three percent of the vote, but the elections were fraught with vote rigging, jailing of candidates, and general intimidation. In effect, Sihanouk's electoral victory meant the beginning of "single party rule in the hands of a single man."27 This period is seen as a time of relative calm in Cambodia when there were advances in education, health care and industrialization. Sihanouk tried to coopt the communists by giving them ministerial positions, but tensions between the left and right increased during the 1960s. By 1967 the communist leadership had retreated to the jungle to prosecute their insurgency and to take refuge from brutal repression by Sihanouk and right-wing elements in government.28 By 1962, Pol Pot had taken over the Cambodian communist party after its party head Tou Samouth was killed by an unknown murderer.29

The Khmer Rouge really took on strength after the republican coup by Lon Nol in 1970, when the deposed Sihanouk joined forces with the communists to resist the US-supported Lon Nol regime. At that time, the United States bombing in Cambodia provoked a great deal of anger in the countryside. Also Sihanouk's presence with the communists and his calls to the people to join him created a powerful force for strengthening the communist insurgency. After five years of civil war, the Khmer Rouge marched into Phnom Penh on April 17, 1975.


28 Ibid. at 110.

29 How Pol Pot Came to Power, supra note 21.
2.2.2 The Pol Pot regime, 1975-1979

Much has been written about the Khmer Rouge that will not be elaborated here. Pol Pot's Democratic Kampuchea (DK) regime of 1975-1979 imposed a radical and strict communism on Cambodia, apparently patterned on China's Cultural Revolution. During this grisly period, at least twenty percent of the population of Cambodia died of privation or illness or were tortured and executed – up to two million people are believed to have perished. Political and other elites were executed. Courts and legal institutions were dismantled. In 1979, fewer than a dozen lawyers were to be found in Cambodia. There were only fifty doctors of the previous 500. Fewer than 5,000 of Cambodia's 65,000 monks survived the 1970s; more than 25,000 were executed. The regime deliberately persecuted monks who underwent hard labour, starvation, torture or execution. Nuns were also persecuted. Buddha statues and wats (temple-monasteries) were destroyed or desecrated and used for storage, live animals, prisons or


31 Pol Pot Regime, supra note 30 at 125-131.

32 Documentation Center of Cambodia, Searching for the Truth (Documentation Center of Cambodia, n.d.), online: Documentation Center of Cambodia <http://www.bigpond.com.kh/users/dccam.genocide/page_1.htm> (date accessed: 31 October 2000). Numbers of dead have been estimated between 1.5 million or more, S-21, supra note 30 at vii, and over three million by the PRK regime, C. Etcheson, “3.3 Million KR Dead and Still Counting - Researcher” Phnom Penh Post 9:8 (14 April 2000).


execution chambers. Only about 7,000 trained teachers could be found in Cambodia in 1979—sixty-five percent of them died, fled abroad, chose other work, or disappeared. Educational institutions and court buildings were taken over and used for storage. Books were burned and religious and historical archives destroyed. Twenty years after the ouster of the Pol Pot regime by Vietnam, Cambodians still struggle to understand what happened, and more particularly, why.

2.2.3 People's Republic of Kampuchea (PRK) and State of Cambodia (SoC), 1979-1991

Vietnam invaded Cambodia in 1978 after border attacks on Vietnamese territory by Democratic Kampuchea (DK). When Vietnam gained control of Phnom Penh, Cambodian people began to try to rebuild their lives. Many flooded to refugee camps along the Thai border. Some found themselves in the US, France, Australia, Canada or elsewhere. The non-communist international community responded to the Vietnamese invasion and its installation of a sympathetic Khmer government (with leadership that included Hun Sen and Chea Sim) by isolating Cambodia for nearly a decade.

The erosion of the Soviet Union during the 1980s and reduced hostility between the Soviets and China created opportunities for internationally facilitated peace negotiations among the conflicting Cambodian factions. Negotiations at the regional level, and later the UN level, eventually resulted in the Paris Peace Accords of 1991. The agreements provided for a UN

35 "Cambodian Political Economy," supra note 19 at 26; see also Secretariat of State for Women's Affairs, Women: Key to National Reconstruction. Cambodia's Country Report by Chantou Boua (Phnom Penh: Secretariat of State for Women's Affairs, Kingdom of Cambodia, 1995) at 13 [hereinafter Women: Key to National Reconstruction].

36 Currently Cambodia's Prime Minister.

37 Currently the President of Cambodia's Senate and Chairman of the Cambodia People's Party.


Transitional Authority in Cambodia (UNTAC)\textsuperscript{40} with a mandate to disarm the conflicting factions, repatriate refugees, facilitate elections, conduct de-mining and mine awareness education, and to create a neutral political environment conducive to the building of civil society and economic rehabilitation.

2.2.4 UN Transitional Authority in Cambodia (UNTAC), 1991-1993

Most commentators have applauded UNTAC's success in facilitating an election in 1993 that drew at least ninety percent of the electorate in an election with "remarkably few incidents of violence"\textsuperscript{41} and "virtually fraud-free polls."\textsuperscript{42} This was in spite of death threats and intimidation from the Khmer Rouge and the Cambodia People's Party (CPP). The CPP had ruled Kampuchea (although under different names) since 1979.\textsuperscript{43} UNTAC was also successful in creating sufficient safety and support for the development of a number of non-governmental organizations including those devoted to human rights monitoring and education.\textsuperscript{44} It repatriated many Cambodian refugees. Unfortunately, despite the huge investment of resources, UNTAC was not able to fulfill several other aspects of its mandate. It was unable to disarm the factions; the Khmer Rouge would not allow the UN even to enter territories they controlled.


\textsuperscript{42} \textit{Ibid.} at 228.

\textsuperscript{43} \textit{Ibid.} at 241.

\textsuperscript{44} E.g. the Cambodian Human Rights and Development Association (ADHOC), the first human rights organization in Cambodia established in 1991 to conduct education and monitoring to promote the respect of human rights and rule of law in Cambodia. The Cambodian Institute of Human Rights (CIHR) was established in 1993 with initial funding from the UN Transitional Authority in Cambodia (UNTAC) and conducts research, education, training and documentation. LICADHO (Cambodian League for Promotion of Human Rights or La Ligue Cambodgienne pour la Promotion et la Défense des Droits de l'Homme) was founded in 1992 and now has 26 other offices in Cambodia for the purposes of education, monitoring and defence of human rights in Cambodia.
UNTAC was unable to control the CPP dominated civil service nor prevent the party from using the civil service to recruit CPP party members and intimidate the population.  

2.2.5 Coalition to “coup,” 1993-1997

Post-election conflicts emerged between political parties when results showed a FUNCINPEC majority. The CPP declined to cede power. Eventually a coalition was arranged in which FUNCINPEC's Prince Norodom Ranariddh was the First Prime Minister, and CPP's Hun Sen the Second Prime Minister. Military forces remained separate with FUNCINPEC forces in some locations and CPP forces in others. There was no effective power sharing. The dysfunctional coalition was gradually corroded by factional power-mongering. Several years of increasing tension erupted in violent military conflict in July 1997 between Hun Sen and Prince Ranariddh. Hun Sen took effective control. Ranariddh lost his parliamentary immunity and was replaced as First Prime Minister by Ung Huot. The Prince was charged with weapons smuggling and colluding with Khmer Rouge. He left the country just before the coup, was tried in absentia and sentenced to thirty-five years in prison and a fine of fifty-four million US dollars. FUNCINPEC chose a new leader who was seen as more cooperative with the CPP.

Through the mediating efforts of an international diplomatic group called the “Friends of

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46 FUNCINPEC is the French acronym for the Front Uni National pour un Cambodge Indépendant, Neutre, Pacifique et Coopératif (United National Front for an Independent, Peaceful and Cooperative Cambodia), led by Prince Norodom Ranariddh.

47 It is widely reported that both Hun Sen and Ranariddh were competing for Khmer Rouge support.
Cambodia," which included Japan and Canada, the way was paved for Ranariddh to be pardoned, and he returned to Cambodia to contest the 1998 elections.\(^{48}\)

Increased factionalism was evident within the remnants of the Khmer Rouge, which had refused to participate in the 1993 elections, but had maintained an armed presence including dry-season offensives in the western part of Cambodia. In 1996, Ieng Sary, another DK leader who had been in the central leadership during the 1975-79 regime, defected to the government and was amnestied amid intense public controversy that pitted "national reconciliation" against justice and accountability. Pol Pot himself died in April 1998 during the run up to the July 1998 national elections, but not before being denounced and sentenced to life under house arrest by the Khmer Rouge in a show trial in July 1997.

### 2.2.6 The 1998 elections and the end of the Khmer Rouge

The 1998 elections were internationally supported and observed, but there was considerable controversy concerning the transparency of the counting process and the formula for party seat allocation, as well as the performance of Cambodia's National Election Commission (NEC) in handling hundreds of complaints.\(^ {49}\) After months of post election wrangling and violent public

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\(^{48}\) A number of commentators have denounced the international community for taking a weak stand concerning what was controversially called a "coup d'état" by some, a "civil conflict" by others, or merely "the events of 1997" by those who hoped for terminological safety. Hun Sen denied there was a coup and said it was rather an arrest of FUNCINPEC leader Prince Ranariddh for criminal acts, followed by FUNCINPEC's selection of a new leader. Whatever one wishes to call what happened in July 1997, they were a violent change in the make up of the government during which a number of disappearances and extrajudicial killings took place, mainly of FUNCINPEC military officials. The United States and the EU responded by terminating bilateral funding, including funding for Cambodia's Parliamentary Commission on Human Rights. For commentary, see e.g. "Failure of Conflict Resolution," \textit{supra} note 45 at 70-72; A. Peang-Meth, "Understanding Cambodia's Political Developments" (1997) 19:3 \textit{Contemporary Southeast Asia} 286.

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\(^{49}\) The actual election day, July 28, 1998, was quite hastily declared "free and fair" by international observers, but see the concerns of the Coalition for Free and Fair Elections (COFFEL) whose reports indicated that the election was peaceful and orderly, but did not declare the elections "free and fair" (contrary to erroneous broadcasts on national radio July 28, 1998). See Coalition for Free and Fair Elections (COFFEL), "Preliminary Report #2, Election Day and Counting Day" (Phnom Penh: COFFEL, 1998); Coalition for Free and Fair Elections (COFFEL), "Preliminary Report #3, Statement August 18, 1998" (Phnom Penh: COFFEL, 1998). In addition to the transparency issues noted above, there were reports of intimidation by the CPP prior to the election, and opposition parties did not have equal campaign access to the media. Conversations between the author and several leaders of non-governmental organizations and individual election observers in Phnom Penh in October 1998.
demonstrations, the result was another coalition more clearly controlled by Hun Sen's CPP. The remaining Khmer Rouge military forces were finally brought into the Cambodian military forces in December 1998 with promises of amnesty.

Now, with the civil war finally over and Hun Sen's CPP having gained firm control, political stability has improved considerably. Since the July 1997 fighting, the international diplomatic community has been sharply criticized for supporting the preservation of order, including the much-criticized 1998 elections, at the expense of human rights and democracy.50

2.3 Constitutional History and Framework

From 1947 to 1993, Cambodia has seen six constitutions. Its constitutional history is rooted in French colonial rule which ended by negotiation in 1954. With the exception of the 1976 constitution created by Democratic Kampuchea (DK) under the Pol Pot regime, its constitutional history must be seen in the light of Cambodia's domination by various foreign interests.51 The most recent 1993 Constitution52 was drafted pursuant to the expectations of the

50 "Failure of Conflict Resolution," supra note 45.


Paris Peace Accords. The 1993 Constitution explicitly provides for a liberal democratic government with an impartial and independent judiciary. Detailed human rights provisions are outlined in this constitution which stipulates the international human rights instruments to which Cambodia is a party. The constitution includes an impressive array of civil and political rights such as "... equality before the law; the right to vote; the right to life, personal freedom and security; equal pay for equal work; the right to strike; rights against physical abuse and unwarranted detention; freedom of expression, religion, press, publication and assembly; and explicit abolishment of 'all forms of discrimination against women.'"

While in most countries there is divergence between written constitutional provisions and actual human rights practices and protection, in Cambodia the disparities are gaping. Economic, political and other factors are involved in the disparities. Little enabling legislation has been passed so far, and where there is new legislation there is lack of enforcement.

The Cambodian 1993 constitution was largely created in response to external international pressures, meaning that its primary audience was outside Cambodia, not within Cambodia. McDorman and Young have suggested that from the Cambodian perspective the primary purpose of the constitution may be to legitimize the government and to provide its

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53 In "Constitutional Structures," supra note 51, at 100-101, McDorman and Young point out that the constitution is interpreted by the Constitutional Council whose relationship to the judiciary is not clear in the 1993 Constitution.

54 For a list of UN human rights conventions ratified by Cambodia, see The UN High Commissioner on Human Rights (UNHCHR) Treaty Bodies Database, online: UNHCHR <http://www.unhchr.ch/tbs/doc.nsf> (date accessed: 16 January 2001).

55 As summarized in "Constitutional Structures," supra note 51 at 100.


organizational framework. This differs from the purposes of many Western constitutions which are based on the liberal democratic premise of restraining the power of the state to abuse the rights of its citizens. Thus, the Cambodian constitution may not be seen by current leaders as serving the same purposes and ideologies as those imagined for it by international advisors imbued with liberal democratic values. While the Cambodian constitution explicitly states the ideals of liberal democracy, it must not be forgotten that Cambodia's dominant leaders, including Hun Sen, have come quite recently from socialist traditions in which constitutional documents serve to articulate state ideology and aspirational goals along the path to socialism. This may partially explain why despite elaborate and strong constitutional language protecting human rights, the legal and political culture does not support enforcement of these rights as though the constitution were a blueprint. Rather, human rights protection in the constitution may be viewed more as an aspirational goal and also as a ceremonial legitimation of the state in front of the audience of the Cambodian population and the international community.

What is abundantly evident in Cambodia is that its written constitution does not translate into practical protection of human rights or reform of the legal system with any kind of vigour or consistency. One might say that while Cambodia has a written constitution, it does not truly have a constitutional polity in the liberal democratic sense. As Hassall points out, constitutionalism requires not just a written constitution but also a supportive legal and political culture which are far from operative in Cambodia. There is disjunction between the dominant

59 "Ideology" in this paper is not intended as a code word for the ideologies of socialism versus liberalism. Rather the term is used more broadly to refer to the "manner or content of thinking characteristic of an individual, group or culture." See Webster's Ninth New Collegiate Dictionary. It has been argued that "ideology" is a dead subject, but my observations do not indicate this to be true either in the world of international development or in the academy. "Liberalism" of right-wing nature is alive and well among those promoting the agenda of the international financial institutions (IFIs) and the global market economy. In the Canadian academy liberal democracy, and particularly the globalization of capitalism continues to be intensively critiqued by scholars. The term "ideology" is au current. Also, scholars and practitioners continue to draw on Marxist and neo-Marxist theory even perhaps without knowing it. Marxism continues to receive attention among scholars who resist both liberal and communitarian ideologies, and the variety of postmodernisms.

60 "Constitutional Structures," supra note 51 at 95-66 & 103.

government approach to the Constitution and the demands of civil society supported by the Western international community. Nevertheless, the public has received a good degree of exposure to concepts of human rights over the past decade. Cambodians, particularly civil society leaders, do appear to have high expectations for the constitution, and they continually refer to it as the appropriate guide for legal discourse and development of law, human rights and public policy.  

2.4 Human Rights in Cambodia: The Current Situation

Many leaders of civil society in Cambodia say that while the government proclaimed “national reconciliation” with the 1998 amnesty of the Khmer Rouge forces and their reintegration into the Cambodian armed forces, there is no true reconciliation. This is because human rights abuses of the past and the present remain unaddressed by the Cambodian government. Deep wounds from the past are still raw and painful. To many people, the amnesties and the talk of “national reconciliation” are like “picking at the scab,” to use a Cambodian expression for conflict. Others believe the wounds are too deep to ignore and need to be addressed through national healing and reconciliation measures.

2.4.1 Summary of the human rights situation

Discussions of human rights in Cambodia must equally consider civil and political rights and


63 This notwithstanding the current UN proposals and debates. One prominent and highly knowledgeable Cambodian civil society leader expresses the view that the proposed trials is likely never to take place because of the presence of former Khmer Rouge leaders in powerful positions in Cambodian society. Discussion with civil society leader in Phnom Penh (May 24, 2000) [Notes on file].

64 Center for Social Development, The Khmer Rouge and National Reconciliation - Opinions from the Cambodians (Phnom Penh: Center for Social Development, 2001) [hereinafter Khmer Rouge and National Reconciliation].

economic, social and cultural rights. While the various regimes of the past decades have recalled Cambodia's ancient grandeur, the current state of Cambodia is impressive only for its extraordinary plight. It is one of the poorest countries in the world with an average annual income of US$300. Cambodia has been moving from a centrally planned economy under the communist regimes toward a market economy under advice from the International Monetary Fund (IMF), the World Bank, and the Asia Development Bank (ADB). Analysts report mixed results from structural adjustment policies which some say were working to a degree until the escalation of political instability and the armed conflict of 1997. The failure of the government to support democratic institutions and principles has undermined liberal economic development.

Other commentators have less faith in the neo-liberal agenda. The privatization of state-

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68 US-based Cambodian scholar, Sophal Ear, taking a neo-liberal perspective, is quite positive about structural adjustment policies and points to improvements in GDP and reduction in inflation; he predicts further progress if there is concerted implementation of economic reforms. However, he does not discuss effects of economic reforms on workers or the grass roots. See S. Ear, “Cambodia and the 'Washington Consensus’” (1997) 11:2 *Crossroads: An Interdisciplinary Journal of Southeast Asian Studies* 73.


owned industries as part of movement toward a market economy has already put many people out of work, particularly women who had few replacement job opportunities.\textsuperscript{71} This has contributed to increasing child labour which is now a problem of "epidemic proportions."\textsuperscript{72} The government is working to reduce the size of its "bloated"\textsuperscript{73} and unneeded military establishment, but the demobilization of soldiers creates enormous challenges including job creation. Agriculture is still the mainstay of the Cambodian economy with eighty percent of the population in rural areas. Over sixty percent of farmers are women.\textsuperscript{74} Women do more than half the work in Cambodia, but control little wealth and comprise few senior positions in government or business.\textsuperscript{75} Since the 1998 election fourteen of 122 Members of Parliament are women, only a slight improvement over the 1993 election.\textsuperscript{76} Cambodia remains highly dependent on foreign aid which in 1999 comprised about forty percent of its total budget. In short, Cambodia's challenges for development and economic equity are enormous.

The scope of this study does not permit discussion of urgent issues concerning Cambodia's still

\textsuperscript{71} "Working Women in Cambodia," \textit{supra} note 70; M.V.J. Kran & P.M. Rawkins, "Good Governance and Rule of Law Program Development and Scoping Mission to Cambodia, June 5-26, 1999" (Ottawa, ON: Asia Branch, Canadian International Development Agency, 1999) [hereinafter \textit{Good Governance}].

\textsuperscript{72} "Child Labor in Cambodia," \textit{supra} note 70.


\textsuperscript{74} "Working Women in Cambodia," \textit{supra} note 70.

\textsuperscript{75} \textit{Ibid.} Also, some literature and a number of male informants (Phnom Penh, May-June 2000) suggest that traditionally Cambodian women are accorded with respect and have control of household matters and finances, but the situation of women and girls in Cambodia reflects little of this supposed traditional form of equity. See J. Ledgerwood, "Gender Symbolism and Culture Change: Viewing the Virtuous Woman in the Khmer Story 'Mea Yoeng'" in M. Ebihara, C. A. Mortland, & J. Ledgerwood, ed.,\textit{Cambodian Culture since 1975: Homeland and Exile} (Ithaca, NY and London: Cornell University Press, 1994).

devastated physical infrastructure including safe water, sanitation, roads, electricity and telecommunications. It is also not possible to discuss Cambodia's pressing environmental problems resulting from deforestation over the past decade including erosion of the banks and silting of Cambodia's largest lake, Tonle Sap, which supports ecologically sensitive and economically crucial fisheries.  

Cambodia remains fraught with corruption, banditry and violence as it has for decades. Its civil and political human rights situation is still poor. Trafficking of girl-children and women for sexual exploitation is a serious problem in Cambodia, including very young children.  

Violence against women and girls, including rape, domestic violence and murder are serious issues particularly in the light of apparent impunity for such crimes. Discrimination against the Vietnamese minority in Cambodia has been a historic reality and remains serious and entrenched. The UN sees the priority civil and political human rights issues in Cambodia as including complaints of killing and brutality by military and police personnel, torture, arbitrary detention, abuse of labour rights; abduction and trafficking and other sexual exploitation of women and children, illegal and often violent expropriation of land, and corruption.

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80 International Centre for Ethnic Studies (ICES), J.H. Ku, & D. Hawk, Minorities in Cambodia (Manchester, UK: ICES and Minority Rights Group, 1995) at 17-25 [hereinafter Minorities in Cambodia].

81 Letter from David Ashley, Advisor, Cambodia Office of the UN Centre for Human Rights, Phnom Penh (18 November 1996); S. Williams, Where Has All the Land Gone? Land Rights and Access in Cambodia (Phnom Penh: OXFAM, 1999) [hereinafter Where Has All the Land Gone?].

82 Commission on Human Rights, Report of the Secretary General, Advisory Services and Technical Cooperation in the Field of Human Rights, 55th sess., Item 19, UN ESC Doc. E/CN/4/2001/102 (9 January 2001);
Military, police and government officials often turn a blind eye or are actively involved. Courts and existing government human rights complaint mechanisms are widely mistrusted. Public frustration with impunity of offenders has led to increasing incidents of violent mob street “justice” in which police have been passive on-lookers.\(^{83}\)

2.4.2 Human rights bodies and the legal system

There are three official human rights bodies in Cambodia. They include the multi-party (CPP-headed) Parliamentary Commission on Human Rights and Petitions, a multi-party Senate Commission on Human Rights (headed by FUNCINPEC-appointed Kem Sokha), and a Human Rights Committee appointed by the government in early 1998 (headed by CPP appointee, Om Yen Tieng). Over the past several years there have been various discussions about creation of an independent national human rights institution. A recent comment by the leader of one of Cambodia's leading human rights NGOs has suggested that while the need for a new national human rights institution is obvious, there is currently no political will to establish a human rights body that would be sufficiently independent or empowered to deal effectively with human rights violations in Cambodia.\(^{84}\) More is said about this in Chapter Five. The only effective human rights education and monitoring is done by several respected NGOs and the Cambodia Office of the UN High Commissioner for Human Rights (COHCHR). These groups continue to report frequent human rights abuses and impunity of politically well-connected people suspected of serious crimes.\(^{85}\)

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Cambodia has a mixed civil and common law legal system. The civil law tradition derives from the French Civil Code introduced during the French Protectorate and maintained after independence in 1953. Because of the number of constitutions and regimes, together with the complete abolition of law in Cambodia during the Pol Pot period, the sources and state of Cambodian law are uncertain in many areas. UNTAC regulations are still being used in some areas of law. The current regime has passed some legislation since 1993. In many areas where there is no current legislation, it is difficult to ascertain what the law is. Much that is done is based on decrees and Ministry circulars. While the civil law system has formally been restored, many common law concepts have been adopted, particularly in the area of commercial law, and there is debate about whether the legal system should continue to develop in the civil law tradition, or whether it should increase its common law content so as to better coordinate with the legal systems of most ASEAN countries.  

*More thorough description of the Cambodian legal system and sources of law is beyond the scope of this study.*

More is said in Chapter Three about several “stakeholders” in the legal system.

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87 There is little up to date literature on the Cambodian legal system, and the situation is rapidly changing. See the following: K. Neam, *Introduction to the Cambodian Judicial Process* (Phnom Penh: Asia Foundation, 1998); S. Sok, ed., *Laws of Cambodia 1993-1998*, vol. 1 (Phnom Penh: CLRDC, 1998); S. Sok, ed., *Laws of Cambodia 1993-1998*, vol. 2 (Phnom Penh: CLRDC, 1998); S. Sok & D. Sarin, *Legal System of Cambodia* (Phnom Penh: Cambodian Legal Resources Development Center, 1998). For more up to date information on laws, please see the website of the Council of Jurists, Office of the Council of Ministers, online: <http://www.bigpond.com.kh/Council_of_Jurists/somg.htm> (date accessed 21 April 2001). The University of San Francisco in cooperation with the Faculty of Business at the Royal University of Phnom Penh has published a number of training manuals on various aspects of Cambodian and international law as it relates to Cambodia. For an important, well-researched commentary on Cambodian land law, please see *Where Has All the Land Gone?,* *supra* note 81.
Cambodia's justice system needs major reconstruction and reform. The legal system suffers from lack of resources, trained personnel and a court system that is not independent from the executive of government. Courts are popularly believed to be corrupt and are widely mistrusted. The University of Phnom Penh graduated its first class of lawyers in 1997. This means the number of lawyers has rapidly burgeoned from just a handful to about 250 newly qualified people. The fledgling Bar Association of the Kingdom of Cambodia is working to foster an independent bar, legal aid, and continuing legal education, but with few resources.

To sum up the civil and political human rights situation in Cambodia, corruption and impunity are the terms that pervade literature, news and anecdotal reports. Past and current serious human rights violations are continually raised by external and internal entities including the United Nations, international human rights organizations, local NGOs and the now official opposition party who now hold fifteen of the 122 seats in the National Assembly and seven of sixty-one seats in the Senate. Much current international interest is focused on prosecution of former Khmer Rouge leaders. While most people have been traumatized severely by their experiences and losses during the Pol Pot regime, Cambodians are ambivalent about how to address the past. Above all else, Cambodians want stability, better personal and economic security and fairer treatment now and in the future.

Many public officials in Cambodia frequently state their anxiety to see better protection of human rights, better governance and elimination of corruption as well as their frustration with the diverse range of momentously difficult tasks in their country complicated by the complex historical context and meagre resources. The UN, the US and opposition leaders continually

88 Good Governance, supra note 71; K.E. Neilson, They Killed All the Lawyers: Rebuilding the Judicial System in Cambodia (Victoria, BC: Centre for Asia-Pacific Initiatives, 1996); Cambodian Justice System, supra note 86.

89 Supra note 85.


91 This statement is based on conversations involving several senior public officials and Members of the National Assembly in Cambodia. See also J. Bosley, S. Owen, & G. Armstrong, “Program Assessment Mission to
pressure the Cambodian government toward trials of high-ranking leaders of the Pol Pot regime including those arrested in early 1999 and some who were amnestied between 1996 and 1998. The IMF also pressures the government to end the corruption that widely and deeply riddles all levels of the public service, military, police, the legal system, the government, and even some NGOs in receipt of aid monies. There is a long-standing habit of corruption based on need among the poorly paid and on greed at the higher levels. Cambodian NGOs join in the clamour for improvements in the legal system to protect civil and political rights and to end impunity and corruption. Along with limited resources, ruling elites have limited political will to make serious change to the entrenched impunity, corruption and polarization, and appear willing to do just enough to keep aid monies flowing. Cambodian rulers also court donors like China, which does not have the same emphasis on international conceptions of the rule of law and human rights as do Western and Western-dominated donors. The people of Cambodia, including its government officials, continue (as ever, it seems) to live among tigers, crocodiles, wolves and police of various complexions and dispositions.

2.5 Cambodian Conceptions of Peace, Governance, Law, and Human Rights

This section considers some strands of thinking about peace, governance, justice and human rights within current Cambodian thought. Historians, anthropologists and religious studies scholars have noted "traditional" Khmer or Khmer-Buddhist patterns that have informed and infused Cambodian structures and institutions for governance, law and human rights. Colonial history and the current overwhelming presence of the international community in Cambodian mean that Western concepts and traditional Khmer-Buddhist conceptions are often intertwined in the discourse.

2.5.1 A caveat: "Thick description"

It is best to try to be humble when describing the ways of people in other places. Even in one's
own comfortable culture, one is often struck by how little one understands what is going on and what it means. The very moment one “gets a handle on things,” the picture shifts through interactions, intervening events and time. Suddenly one is confused again. When one attempts a project elsewhere, especially as a visitor, the snapshots create even more of an incomplete and ever-shifting puzzle.

Even though one cannot understand everything, for the sake of understanding something, this section attempts to describe some things that seem important. While it is certainly desirable to aim for “thick description” so as to gain the fullest possible understanding, it is important to acknowledge that the particular descriptions in these pages may be “thickened” in ways that Cambodians might find difficult to recognize because of a number of factors. First, there is simple lack of knowledge. This project has been attempted without the benefit of lengthy experience in Cambodia, without in-depth ethnographic study, and without the benefit of much relevant literature that focuses specifically on conflict resolution and peacebuilding in Cambodia. Second, there is the problem of language. As an English reader and speaker, I cannot really understand what a Khmer-speaking, or a French-speaking or even an English-speaking Cambodian means to convey through the filters of second language or interpreters. Third, one describes things in one's own terms, which are usually not even in the exact terms of written or oral sources. And, of course, one always understands things through the often rather clouded lens of one's own culture, language and world views. Fourth, there are “oughts” prescribed in description and analysis, some more subtle than others. One chooses what to describe, how to describe it, and the conceptual and analytical frames within which one examines it. Sometimes these choices are not made in fully conscious ways – the fish, while familiar with the water around, does not necessarily understand its unconscious assumptions about the nature of “water” when it finds itself in a different pond. Almost unavoidably and often without realizing it, one brings to unfamiliar water assumptions from home about the way things are, the ways they ought to be and what ought to be done. One is tempted to prescribe

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92 From the concept of “thick description” made famous by C. Geertz, “Thick Description: Toward an Interpretive Theory of Culture” in The Interpretation of Cultures: Selected Essays (New York: Basic Books, 1973). See also the discussion in Chapter Five.
for others what one would prescribe at home when looking through familiar lenses of modern, humanist, liberal democratic understandings, or even when reacting against them or trying to decentre them in one way or another.

In this chapter, there is a constant implicit pull toward Western liberal understandings and frameworks in spite of efforts to be explicit and efforts to give weight to alternative (primarily Cambodian) understandings to the extent possible. Some practical implications of the tendency to pull toward the Western centre are discussed in Chapter Four, since it appears I am not alone in this phenomenon. In the current chapter, it is important to acknowledge with Geertz that

“what we call our data are really our own constructions of other people's constructions of what they and their compatriots are up to. . . Any description of an event is really extraordinarily 'thick' . . ., and this thickness is obscured because most of what we need to comprehend a particular event, ritual, custom, idea, or whatever is insinuated as background information before the thing itself is directly examined.”

2.5.2 Khmer-Buddhist identity

Cambodia's Khmer majority are said to have a distinct sense of nationhood based on the glories of Angkor, a Buddhist heritage, and the Khmer language. The Angkorean grandeur has been used to bolster Cambodian nationalism within the ideologically diverse regimes that have dominated Cambodia over the past several decades – Angkor Wat has appeared on all five Cambodian flags that have existed since the 1940s.

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93 Ibid. at 9.
94 “Cambodia's Historical Legacy,” supra note 18.
2.5.2.1 "Khmeritude?"\textsuperscript{95}

This is not to say that Cambodia is a homogeneous Khmer-Buddhist nation-state. While Cambodia observers often repeat that “to be Khmer is to be Buddhist,”\textsuperscript{96} not all people in Cambodia are Khmer\textsuperscript{97} and not all are Buddhist.\textsuperscript{98} But Cambodian national autonomy is highly valued, and a proudly held Khmer-Buddhist identity dominates its cultural expression and institutions, including its current constitution which makes Buddhism the state religion and refers in several places to “Khmer” rather than “Cambodian” identity and values.

The Khmer majority is notorious for its overt, intense discrimination against the Vietnamese minority including violence and atrocities. This discrimination is historically based. It has fuelled the Sihanouk, Lon Nol and Pol Pot regimes and currently feeds opposition rhetoric against the formerly Vietnamese-supported CPP.\textsuperscript{99}

Some have painted an essentialist image of “unchanging Khmer character and behaviour”\textsuperscript{100} or “Khmeritude” which is described by one Cambodian author as follows:

\textsuperscript{95} Cambodia: A Shattered Society, supra note 27 at 27. The term appears to be primarily used by French authors; see e.g. F. Ponchaud, “In Search of 'Khmeritude'” in The Cathedral of the Rice Paddy: 450 Years of History of the Church in Cambodia (Paris: Le Sarment, Fayard, 1990).


\textsuperscript{97} Ethnic Khmer account for about 90 percent of Cambodians. Other minorities include the Vietnamese and the Islamic Cham people as well as a number of indigenous groups.

\textsuperscript{98} More than 90 percent of Cambodians are Buddhist.


\textsuperscript{100} Cambodia: A Shattered Society, supra note 27 at 27.
Gentle, affable, timid but concealing contention and bitterness, reticent in discussion and preferring the fait accompli; fiercely proud of the past but little informed of the views of non-Khmers; open to new ideas but conservative in regard to all of his surroundings; easily enthusiastic but impatient; witty; refined but appreciative of cheap humor and of feasting.\(^{101}\)

Cambodian social psychologist, Bit Seanglim,\(^ {102}\) notes some themes and patterns in Cambodian culture without being quite so statically essentialist. Bit traces the Cambodian cultural heritage to the historic legacy: “To be Cambodian is to be the warrior, the creator and the builder of Angkor Wat.”\(^ {103}\) The warrior image, Bit says, “occupies a primary place in the Cambodian psyche.”\(^ {104}\) Bit connects this to the role of rulers in Cambodia who alternatively fear loss of power, and evoke fear in the people. Rulers, therefore, compete for dominance.\(^ {105}\)

It is tempting to dismiss or avoid mentioning such approaches since they so easily lead to stereotyping of Khmer people as violent and vengeful. However, shades of this way of thinking are found in the approach of the immediately past chief of the Cambodian Office of the High Commissioner for Human Rights, Rita Reddy, who when she first arrived in Phnom Penh in early 2000 commented on “endemic violence” in Cambodia. She was reported in the Phnom Penh Post as saying: “There has been a bloody history in Cambodia – maybe it has become incorporated into their genes.”\(^ {106}\) The ensuing edition of the Phnom Penh Post contained a salvo of letters to the editor articulating deep insult at this remark, as well as a response by Ms.

\(^{101}\) Ibid. at 27, apparently quoting Sam Sok, La Future Société Khmère (n.p.: Maisons-Alfort, 1981).

\(^{102}\) S. Bit, The Warrior Heritage: A Psychological Perspective of Cambodian Trauma (Le Cerrito, CA: Seanglim Bit, 1991) [hereinafter Warrior Heritage].

\(^{103}\) Ibid. at 3.

\(^{104}\) Ibid. at 8.

\(^{105}\) Ibid. at 14.

Reddy, who said her remarks had been taken out of context.\textsuperscript{107} Her contract with the UN was not renewed the following year.

2.5.2.2 Khmer-Buddhism\textsuperscript{108}

Standing against this stereotype is the teaching of non-violence within Theravada Buddhism, the dominant religion of the Khmer people since the fourteenth century.\textsuperscript{109} Popular Khmer-Buddhism is inextricably interwoven with Brahmanist and animistic beliefs that predate Buddhism.\textsuperscript{110} Central concepts within Theravada Buddhism pervade traditional Cambodian concepts of governance, justice, human rights and peace. “Khmer” values and Buddhism are both enshrined in the 1993 constitution. In short, Khmer-Buddhism is deeply significant to Khmer national and personal identity.\textsuperscript{111}

2.5.3 The individual in society

In comparison to other Asian countries, Cambodian culture is viewed as individualist. The concept of the family emphasises the nuclear family, rather than the extended family as in some Asian countries. There is less collectivist emphasis than is often expected in Asia. This is often

\textsuperscript{107} R. Reddy, “Rita Reddy Comments” \textit{Phnom Penh Post} 9:8 (31 March 2000). The editor’s comments following her letter are: “All comments attributed to Ms. Reddy in quotation marks in the article were verbatim transcripts of the reporter’s notes taken down in shorthand.”

\textsuperscript{108} For a useful general primer on Theravada Buddhism see R.C. Lester, \textit{Theravada Buddhism in Southeast Asia} (Ann Arbor: University of Michigan Press, 1973) [hereinafter \textit{Theravada Buddhism}].

\textsuperscript{109} For a detailed history of Buddhism in South East Asia, see C.F. Keyes, \textit{The Golden Peninsula: Culture and Adaptation in Mainland Southeast Asia} (Honolulu: University of Hawai’i Press, 1977) [hereinafter \textit{Golden Peninsula}]; see also “Communist Resolution and the Buddhist Past,” \textit{supra} note 26.


\textsuperscript{111} See also “Communist Resolution and the Buddhist Past,” \textit{supra} note 26.
attributed to Buddhist ideas of individual responsibility for one's own sin and salvation.\textsuperscript{112} However, Buddhism also repudiates selfishness. The current high levels of self-interest seen in Cambodia are often decried. The Buddhist doctrine of \textit{anatta} teaches that in reality there is "no self to be self-centred about."\textsuperscript{113} In Buddhist teaching, self-interest (beyond need) flows from greed, hatred and delusion. In fact, collectivist tendencies traditionally have been strong, particularly at the village level. Cambodian scholars and civil society leaders recall past times when villagers readily shared labour and produce, particularly at planting and harvest seasons. Village life is said to be relatively egalitarian, with conflicts traditionally worked out among equals through compromises and conciliation.\textsuperscript{114} Current lack of community, violence and breakdown in peaceful governance are often attributed by religious and civil society leaders to breakdown of Buddhist ethics and practice.\textsuperscript{115}

\section*{2.5.4 Theravada Buddhist concepts of religion and society}

Scholars tell us that the "three gems" of Buddhist society include the Buddha, the \textit{dhamma} (Buddhist law and teaching) and the \textit{sangha} (the Buddhist clergy and lay devotees).\textsuperscript{116} Monasteries, while dependent on the laity for offerings, have traditionally maintained their independence as social institutions. Monks are distinguished from laity by following more extensive rules of morality.

\begin{enumerate}
\item See, \textit{e.g.} \textit{Warrior Heritage, supra} note 102 at 21-24.
\item J.A. McConnell, \textit{Mindful Mediation: A Handbook for Buddhist Mediators} (Bangkok: Buddhist Research Institute and others, 1995) at 371. For a description of \textit{anatta}, see \textit{Theravada Buddhism, supra} note 108 at 26-32 [hereinafter \textit{Mindful Mediation}].
\item Discussions by the author with several scholars, civil society leaders and lawyers (Phnom Penh, September, 1998 and May-June, 2000).
\item See \textit{e.g.} M. Kiyota, "The Buddhist Model for Renewal: An Examination of Contemporary Buddhist Sangha in Asia" in R. J. Miller, ed., \textit{Religious Ferment in Asia} (Lawrence, Manhattan, Wichita: University Press of Kansas, 1974).
\end{enumerate}
Historically in Southeast Asia, Buddhism absorbed local folk religions. Cambodians continue to venerate local spirits (*neak ta*). By absorbing folk religions Buddhism “permeated the masses.”\(^{117}\) By subordinating itself to rulers, the Buddhist *sangha* gained their support. The patronage of Buddhism by kings ended up in their assuming political power over the *sangha*.

The Buddhist *sangha* has usually been seen as a conservative influence, upholding the status quo, “even serving as a spiritual tranquillizer for the oppressed by promising happiness in the world to come.”\(^{118}\) Social inequalities have been accepted in traditional Khmer-Buddhist thinking as the result of the doctrine of *kamma*\(^{119}\) which deeply penetrates the thinking of Cambodians. Leaders and wealthy people are seen as privileged because of merit (*bon*) in past lives. Poverty, disability or other bad circumstances are the result of bad actions in former lives. If the rich and powerful commit bad actions in this life, they will “receive their sins” in the next life as a matter of karmic law.\(^{120}\)

In 1979, the PRK restored the monkhood by arranging for seven former monks to be re-ordained in Phnom Penh into the Mohanikay order.\(^{121}\) The PRK restricted the monkhood to men over age fifty, which meant that boys and youth could not join the monkhood as had been the traditional social pattern. Most restrictions on the monkhood were removed by the Hun Sen government in 1989, and Buddhism was restored as the national religion. Another order of monks, the Thommayut order, was restored in 1991 at the instance of Sihanouk and remains

\(^{117}\) *Ibid.* at 131.


\(^{119}\) *Karma* in Sanskrit. The root meaning of *kamma* is “action” and in Buddhist and Hindu thought refers to the moral consequences of people's actions. The individual is responsible for his or her own meritorious and sinful acts and omissions which cumulatively result in good or bad consequences in this and the next life. For discussions of popular ideas of karma in several Buddhist and Hindu traditions, see C.F. Keyes & E.V. Daniel, eds., *Karma: An Anthropological Inquiry* (Berkeley, Los Angeles, London: University of California Press, 1983).


\(^{121}\) See S. Yang, *Khmer Buddhism and Politics from 1954 to 1984* (Newington, CT: Khmer Studies Institute, 1987).
associated with the royal family and, therefore, with FUNCIPEC. More than ninety percent of monks belong to the more popular Mohanikay denomination which remains headed by Venerable Tep Vong and is widely associated with the CPP in the public mind. The revival of Khmer-Buddhism means there are now upwards of 50,000 monks in Cambodia, and about 4,000 pagodas have now been restored or built with voluntary lay offerings. The monkhood remains largely ill-educated and inexperienced because of the loss of educated monks during the Pol Pot period. Many novices are uneducated, and young monks lack traditional discipline because of the lack of experienced senior monks. The monkhood has not been in a position to fulfil its traditional role of teaching the public and political leaders about principles and practice of Buddhist governance. Buddhism is now seen by many as a nominal religion for ceremonial purposes; the general population does not widely practice Buddhist morality or spiritual discipline. Nevertheless, emotional attachment to Buddhism remains strong. In general, monks are revered. The Cambodian population gives a great deal of money to the sangha in spite of severe poverty. The sangha remains a potent social force which must not be underestimated.

2.5.4.1 The Righteous Ruler

The connection between sangha and rulers in Khmer-Buddhist thought has profound implications in Cambodia. In traditional thinking, the nation is held together by the two wheels of the dhamma – the sangha and the righteous ruler (dhammaraja). The Buddhist concept of the dhammaraja replaced the earlier Brahman concept of the “god king.” The dhammaraja is not divine, but a person of merit who has achieved the position of ruler through right actions in previous lives (kamma). The righteous ruler wins over the people through observing the

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122 Two independent anecdotes were told to the author, one by a middle-aged American woman and one by a middle aged New Zealand woman, both NGO workers in Phnom Penh (May-June, 2000) [Notes on file].

123 Discussions with clergy, lay Buddhist leaders and civil society leaders in Cambodia, May-June, 2000.

124 “Communist Resolution and the Buddhist Past,” supra note 26 at 53; From Conflict to Reconciliation, supra note 3.

125 S. Suksamran, Buddhism and Political Legitimacy (Bangkok: Chulalongkorn University, 1993) at 26.
which includes virtue, justice and the law. Thus, the Buddhist concept of kingship is based on righteousness and justice.

In order to maintain political authority the king must be a righteous ruler, observing the Ten Royal Virtues (dasarajadhama). These include:

- liberality (dana) or generosity toward the welfare of the people;
- morality (sila) including observance of the five precepts that preclude corruption;
- duty (paricagga) including self-sacrifice for the people;
- integrity (ajjava) including truthful sincerity;
- kindness (maddava) including concern about people's hardships;
- austerity (tapa) including simple living, spiritual discipline and self-control;
- non-anger (akkodha);
- nonviolence (aavihaansa);
- forbearance (khanti); and
- non-opposition to the people, which concept has been viewed as a “Buddhist endorsement of democracy.”

Thus, the traditional relationship between ruler and sangha is reciprocally supportive. The king supported the sangha to maintain his legitimacy and social control. The sangha aimed to secure the ruler's faithfulness to Buddhist dhamma in order to maintain royal support of the sangha. Thus, as Somboon says, the two interests coincided: “an ideology which needed a supportive political power met a political ruler looking for a legitimizing ideology.”

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127 Ibid, at 173. This chapter contains discussion on each of the Ten Duties of Kings. For an application of these principles to Cambodia, see From Conflict to Reconciliation, supra note 3.

128 Buddhism and Political Legitimacy, supra note 125 at 30.
If the ruler is not righteous, he is considered not worthy of rule.\textsuperscript{129} The well-being of the people is tied to the morality of the king:

When the kings are not righteous, neither are princes, Brahmans, and householders, townsfolk and villagers. This being so, the moon and the sun deviate from their courses, as so constellations and stars day and night. . . months, seasons and years; the winds blow wrongly. . . ; the god (of rain) does not pour down showers of rain, the crops ripen in the wrong season; thus men who live on such crops have short lives and look weak and sickly. Conversely, when the kings, the rulers, are righteous, the reverse consequences follow.\textsuperscript{130}

Thus, the concept of the dhammaraja and the god-king are syncretized in Khmer tradition. In popular thought, the presence of the king has cosmic significance in keeping the society from falling apart. “When the king is absent, the country is shattered.”\textsuperscript{131}

In 1997 after handing out small gifts to villagers, King Sihanouk was quoted as saying: “They continue to believe that I am a god-king, like the kings of Angkor. . . Unfortunately I am not a god. I am a human being.”\textsuperscript{132} Despite this recent modest assertion, Sihanouk has over the years counted on Cambodians willingness to follow him as though he were a god-king. He has patterned his policies and politics to capitalize on Khmer-Buddhism. In 1947, emulating traditional Buddhist monarchs, he went into the monkhood for three months. On his return from the monkhood he became a publicly visible supporter of the sangha.\textsuperscript{133} In 1955, Sihanouk

\textsuperscript{129} From Conflict to Reconciliation, supra note 3.

\textsuperscript{130} Buddhism and Political Legitimacy, supra note 125 at 28, quoting Anguttara, Vol. II, at 74.

\textsuperscript{131} Cathedral of the Rice Paddy, supra note 120 at 197-98.

\textsuperscript{132} “Adored Imp,” supra note 7.

founded the Sangkum Reastr Niyum (Popular Socialist Community) based on the idea of religion and the throne as protectors of the people. He developed the concept of Buddhist Socialism on principles of Buddhist equality, care of the poor through voluntary sharing of wealth as acts of merit rather than by coerced reallocation of wealth. He reinforced his policy of political neutrality with the Buddhist concept of the Middle Path. Sihanouk attributed the failure of his program to the ineffectiveness of Buddhist concepts of compassion, non-violence and neutrality to solve the serious political and economic problems of Cambodia in the 1970s. Buddhist opponents disagreed, pointing to Sihanouk's religious misconduct, in particular the state sponsorship of gambling casinos and resorts, and his flouting of Buddhist principles of non-violence in public executions of political enemies. Despite his shortcomings as a “righteous ruler,” in general the Cambodian people loved Sihanouk. They still do. The idea of the god-king is still alive in Cambodia, although less so among those who grew up during the two decades of the 1970s and 1980s during which Cambodia was without a king. The traditional idea of the role of the ruler greatly accounts for Sihanouk's continued moral power, including his successes as mediator among Cambodia's fractious political parties, including the post-election period of 1998.

Some Cambodian leaders and scholars claim that if Buddhist theories of governance were followed, instead of given lip service, Cambodia would be at peace. Some attack this traditional approach, however, saying that in the absence of rulers who practice these ideals, there is no protection for the people. Aung San Suu Kyi, speaking from the Burmese context, denies that the ideal of the dhammaraja is just “wishful thinking.” She sees Buddhist

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134 Cambodia: A Shattered Society, supra note 27 at 62.

135 The doctrine of the middle path means that extremes are to be avoided. The Buddha's teaching about the Middle Path uses the metaphor of a stringed instrument. If the strings are too loose they will not sound, if too tight they may break.

136 For discussion, see Khmer Buddhism... 1954 to 1984, supra note 133.

137 Conversations between the author and Cambodian civil society leaders, scholars and government officials, May-June, 2000 [Notes on file].

138 Indeed, Thailand's King is often cited as a current example of a dhammaraja. While the Thai king is a constitutional monarch, he has played important roles in resolving political conflicts, notably in 1992.
concepts of rulership as “drawing on time honoured values” that are consistent with a democracy regulated by principles of accountability, respect for public opinion and the supremacy of just laws.”139 Similarly, Gyallay-Pap argues for an understanding and respect of traditional Khmer-Buddhist values in Cambodian governance reform.140 With very few exceptions, attempts to understand Khmer-Buddhist governance traditions, including in grassroots traditional governance, have been noticeably lacking in the efforts of foreign experts.141

The Buddhist model of governance has been critiqued because it promotes a personalized form of rule142 and lacks a liberal democratic institutionalist approach that separates the functions of rule from the individual.143 Liberal institutionalist perspectives appear to be dominant in the discourse of most civil society leaders and international organizations in Cambodia. With the demise of socialism, it is difficult to discern what normative values drive current government leaders, who do not seem strongly guided either by Buddhist tradition or by liberal democratic ideals.

Cambodia's history does not readily bring to mind examples of righteous rulers. Rather, Buddhism has often been manipulated for political purposes.144 Monks were present in the nationalist protests and insurgencies before 1995. Sihanouk invoked Buddhist theory to support his regime during the 1950s and 1960s. Even the Khmer Rouge, in their attempt to replace

139 “In Quest of Democracy,” supra note 126 at 173.

140 From Conflict to Reconciliation, supra note 3; P. Gyallay-Pap, “Buddhism as a Factor of Culture and Development in Cambodia” (1996) II:2 Special Issue on “Buddhism in Cambodia” 8 [hereinafter “Buddhism as a Factor”].

141 The highly useful work of William Collins is one exception. See Grass Roots Civil Society; Dynamics of Dispute Resolution, supra note 114.

142 “In Quest of Democracy,” supra note 126 at 170.


144 Keyes et al suggest that in Cambodia, Laos Thailand and Burma Buddhism has been vulnerable to state manipulation partly because Buddhism is organized state by state, and not organized transnationally as are Christianity or Islam. “Contested Visions of Community,” supra note 133 at 14.
Buddhism with communism, took care to consider the public potency of Buddhism. Prior to coming to power in 1975, the Khmer Rouge instituted rules for its cadres that emulated and exceeded the ten rules (sila) for monks. This was to show their own practice to be "more perfect than the practice of monks."\textsuperscript{145}

2.5.4.2 Current sangha-government relations

The current CPP-dominated regime continues to exercise control over religion. Government officials and supporters point out that Buddhism is the state religion, and therefore is appropriately regulated by the Ministry of Cults and Religious Affairs.\textsuperscript{146} There is currently no law in place to govern religions, but the Ministry has issued a number of policy circulars. The Supreme Patriarch, Venerable Tep Vong, along with many other high ranking monks are widely viewed as partisan supporters of the CPP.\textsuperscript{147} This may be partly because of Venerable Tep Vong's history as Vice-President of the central committee of the PRK government to which he was appointed in 1979 shortly after he was appointed by the government as head of a unified sangha.\textsuperscript{148}

The current government does not appear averse to using force against the sangha. During the

\textsuperscript{145} Khmer Buddhism... 1954 to 1984, supra note 133 at 70.

\textsuperscript{146} Discussions with government officials and some civil society leaders, May-June, 2000 [Notes on file]. The Ministry of Cults and Religion is currently led by a FUNCINEP-appointed minister. No information was obtained about general opinion about the work of the Ministry, except that some Christian churches have found it to be biased against Christianity, which is seen by some (Buddhist) informants as appropriate in a Buddhist-majority country. It was not possible to interview any senior officials of this Ministry.

\textsuperscript{147} Discussions with civil society leaders and religious leaders in Cambodia, May-June, 2000 [Notes on file]; see also C. Sotheacheath & J. Eckardt, "Activist Monks Dare to Defy Authorities" Phnom Penh Post 7:20 Special edition (12 September 1998) [hereinafter "Activist Monks"]; S. Pok & B. Moorthy, "Monks Walk a Tightrope between Peace and Politics" Phnom Penh Post 7:22 (2 October 1998) [hereinafter "Monks Walk a Tightrope"]. Note, e.g. that Venerable Tep Vong has spoken out against the AIDS public education policies of the Ministry of Health, which is led by a FUNCINEP minister, saying that public education policies to control AIDS will lead to immorality. He said that they should instead do similar things that Hun Sen (CPP) did in collecting weapons to curb violence, and punish those whose immorality spreads AIDS: S. O'Connell & C. Sotheacheath, "Top Monks Disagree on Role in Fighting Aids" Phnom Penh Post 9:12 (9 June 2000).

\textsuperscript{148} Khmer Buddhism... 1954 to 1984, supra note 133.
late summer and fall of 1998, a number of monks joined a political demonstration protesting the 1998 election. Government forces responded by beating and possibly killing monks, searching pagodas, and restricting monks' movements.\textsuperscript{149} The CPP is also alleged to use divide-and-conquer strategies, using senior clergy and the public media to foment polarized opinions about cooperative "neutral" monks who stay out of politics versus undisciplined or "political" monks they claim to be politically partisan.\textsuperscript{150}

It is not only the CPP that uses Buddhism for political purposes. All Cambodian political parties have appealed for \textit{sangha} support or otherwise utilized Buddhism. All political parties invite monks to bless events and seek political support by visiting and donating to wats. Sam Rainsy Party (SRP) leader Sam Rainsy appealed to religion when he erected memorial stupas to commemorate a 1997 grenade attack against him that has never been investigated.\textsuperscript{151} The stupas were placed on public property without government permission. When the stupas were forcibly removed or destroyed by military police, public demonstrations were led by Sam Rainsy to protest the sacrilege. The dispute over the stupa appears now to have been settled, but the problems of impunity for the grenade attack remain.

These examples illustrate that Buddhism, as the "endemic"\textsuperscript{152} religion of Cambodia, holds claim to sufficient popular authority that historically Cambodian rulers have tried to coopt it,

\textsuperscript{149} See "Activist Monks," \textit{supra} note 147, in which Venerable Um Sum, second most senior monk in the Mohanikay denomination publicly blamed the monks for being involved in illegal demonstrations which he said was against the rules of Buddhism, and blamed the monks' for their injuries which he said were caused when they "fell down and struck each other"; see also "Monks Walk a Tightrope," \textit{supra} note 147; L. McGrew, "Buddhism and Beatings" \textit{Phnom Penh Post} 7:22 (2 October 1998) [hereinafter "Buddhism and Beatings"]; discussions with researchers and civil society leaders, May-June, 2000 [Notes on file]. For UN reports on the post-election intimidation and violence by authorities, see Special Representative of the United Nations Secretary-General for Human Rights in Cambodia, \textit{Monitoring of Election-Related Intimidation and Violence, August 20-October 28 1998} (Phnom Penh: Cambodia Office of the High Commission for Human Rights (COHCHR), 1998); Cambodia Office of the High Commission for Human Rights (COHCHR), \textit{Killings and Other Instances of Violent Deaths Documented in and around Phnom Penh between 7 and 19 September 1998} (Phnom Penh: COHCHR, 1998).

\textsuperscript{150} \textit{Ibid.}


\textsuperscript{152} "Contested Visions of Community," \textit{supra} note 133 at 10 & 14.
manipulate it, control it, or even destroy it. Unfortunately, it appears that most foreign development workers, diplomats, human rights advocates and legal development experts have tended to treat Khmer-Buddhism as largely ceremonial, and to ignore or marginalise the potent role of religion in Cambodian politics and governance.

2.5.5 Power, governance and social conflict

Cambodian politics has flown far from the benign (though vertical) governance model prescribed by Buddhist traditional teaching about the reciprocal responsibilities practised by the righteous ruler, the sangha and the people (whose role is to comply), all following the dhamma with perseverance, dedication to the common good, and compassionate loving-kindness. In Buddhist teaching, differences would be worked out non-violently and without greed or attachment to wealth or power.

Similarly, the promises of liberalism remain unfulfilled in Cambodia. In spite of constitutional documents and signatures on international instruments, Cambodia's governance style is a far cry from the egalitarian notions of power-sharing and political compromise that mark the ideals of Western liberal democracies.153

A historical feature that pervades Cambodia's culture and institutions is the centralization of personalized or charismatic power.154 There is no tradition of power sharing. There is no such thing as a "loyal opposition." Dissent is viewed as disruptive, disloyal or even tantamount to treason.155 Cambodian society has never been, and is not currently ruled by liberal democratic principles. Rather, networks of individual patron-client dyads remain operative emanating from

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153 Critiques of liberalism and the failure of liberal promises in Western democracies are noted but cannot be elaborated here.


155 Warrior Heritage, supra note 102 at 56.
the centre to the grass roots. Patronage is vertical in nature with the client performing services for the patron in return for benefits and protection.\textsuperscript{156} Cooperation within these vertical dyadic relationships is not seen as an egalitarian working through of differences through dialogue, but rather as remaining in harmony with the patron's authority or power: "If you yourself do not have power, the clever thing to do is to try and associate yourself with somebody who has... [The charismatic leader] is regarded as the center from which Power radiates, and the believer attaches himself to this Power, rather than submitting to it."

Power is conceptualized as a concrete commodity to be kept at all costs. To share power would be to give it up and become weak.\textsuperscript{158} Less power for me means more power for my opponent. And for those in power, perceived opponents are legion. Seen in this zero-sum manner, the retention of power, in itself, becomes a paramount interest of the party who wields it. Cambodia's leaders (like leaders in many places) appear to have no concept of power as an abstract or non-finite resource that can be shared without corresponding loss to ones own power.\textsuperscript{159}

Despite the concept of the righteous ruler, Cambodian rulers have not generally been guided by the idea of using governance power and authority to serve the public. Rather, according to Chandler, throughout Cambodian history to govern has been "to consume."\textsuperscript{160} What counts is power, not legitimacy. Democratic elections may not be viewed as exercises in determining

\textsuperscript{156} To develop better understanding of the types of patronage relationships, see Kate Frieson's brilliant description of patronage in "Cambodian Elections of 1993," \textit{supra} note 41. Patronage is reportedly common to all Southeast Asian countries although it is said to be less important in modernized contexts such as Thailand, C.D. Neher & R. Marlay, \textit{Democracy and Development in Southeast Asia: The Winds of Change} (Boulder, CO.: Westview Press, 1995) at 16.


\textsuperscript{158} "Asian Millenium," \textit{supra} note 16; see also \textit{Facets of Power}, \textit{supra} note 154.

\textsuperscript{159} \textit{Facets of Power}, \textit{supra} note 154 at 9-10.

\textsuperscript{160} "Asian Millenium," \textit{supra} note 16.
who is to have legitimate power to govern, but rather as a public display of who holds defacto
time.\textsuperscript{161} Tepid Western responses to coercion and irregularities during the 1998 election may
have fostered the view that clarifying who is the defacto power-holder (which creates
"stability") is more important than normative ideals of democracy (which may be "ideal but
impractical.") Some Western observers have noted with resignation that what happened in
Cambodia was not a-typical of elections in the region, and therefore is acceptable (though
regrettably) in a newly "emerging" democracy for the sake of regional stability.

\textbf{2.5.5.1 Power and social conflict}

Bit Seanglim uses a social psychological approach to explaining the role of power in
Cambodian violence and conflict. Authorities' fear losing their power, he says, and the people
fear domination. This results in avoidance of personal risk and conflict.\textsuperscript{162} Bit uses a volcano
metaphor to describe the Cambodian pattern of suppression of conflict and emotion, with
sudden eruptions after long repression.\textsuperscript{163} A common Cambodian expression describes conflict
as what happens when people are "up to here" (pointing to the throat), indicating possible
imminent eruption. A Cambodian civil society leader supports this view. He points to Buddhist
teaching that supports long-suffering forbearance (\textit{khanti}) which he says can contribute to
passiveness and fatalism. The practice of \textit{khanti} can lead to sweeping issues under the carpet, or
eventually to explosion:

The Cambodian peasants (I was born in such a family) had exercised their \textit{khanti}
and were forbearing and forgiving abuses by their rulers for so long that at the
end many of them turned Khmer Rouge and joined in the massacre of their
better-off countrymen (town folks, government officials). It is better now when
there are democratic channels (demonstrations, strikes, letters of complaints,

\begin{footnotes}
\item \textsuperscript{161}\textit{Facets of Power}, supra note 154 at 13.
\item \textsuperscript{162}\textit{Warrior Heritage}, supra note 102 at 33.
\item \textsuperscript{163}\textit{Ibid.} at 33.
\end{footnotes}
other forms of protests, protests by the opposition, NGOs or newspapers on their behalf) whereby they could vent their anger and express themselves. Khanti cannot solve our problems and conflicts.164

2.5.5.2 Power, independence and neutrality

Given the above-described power patterns in Cambodian society, the idea of an “independent” or “impartial” body or individual is a considerable threat to a power-holder, and may not make much sense. It may sometimes even be dangerous to be “independent” in Cambodia.165 While an independent judiciary, human rights body, and other regulatory and conflict resolution bodies are widely urged for Cambodia, there appears to be little understanding of how these might be implemented in a political culture where the very idea of independence is an anathema to power-holders. This is particularly problematic in the current political culture in which some power-holders have the capacity and will to mobilize an armed clientele within a patronage system marked by lack of public accountability and impunity. So far, advocacy approaches demanding compliance with the constitution have wrought virtually no change. Political “compromise” continues to look more like accommodating the ruling power-holders of the past two decades, the CPP. It is also important to note that ideas of independence may not be very important to CPP rulers who operated within socialist systems for more than two decades before the Paris Peace Accords brought the idea of liberal democracy.

Historically, rulers in Cambodia have no tradition of pluralism, accountability, public service, or power-sharing. In practice, real power sharing and compromise are reserved for equals at the village level.166 People in Cambodia have a tradition of conservatism and subservience to authorities or people of higher social rank. The belief in merit within Khmer Theravada

164 Correspondence from Cambodian civil society leader (9 July 2000) [Notes on file].

165 Conversation between the author and an individual in Phnom Penh whose attempt at an independent stance had resulted in death threats (October 1998) [Notes on file].

166 Grassroots Civil Society; Dynamics of Dispute Resolution, supra note 114.
Buddhist traditions is widely cited as leading to public compliance with those in power who are seen to deserve their lot in life because of meritorious past lives. As noted previously, Buddhist theory of causation (kamma) teaches that bad actions will have bad consequences to the perpetrator, either in this or the next life. Thus, popular Buddhism is held responsible for public apathy.

Chandler believes these historically entrenched power structures may be changing. "For the first time in history..." he claims, "they are under serious threat, largely from the young." He sees the concept of individual human rights, civil society and the rule of law as posing serious challenges to authoritarian rulers through the work of local NGOs.

The notion of empowering the powerless, through the protection of their individual rights, is genuinely revolutionary. So is the notion that power can exist outside the grip of those at the top of a regime... Ironically, the apparently abstract concept of human rights has become, like the ancient Southeast Asian idea of power, almost a palpable possession. What makes the idea revolutionary is that, unlike power in the past, it is freely available to every one in the region.

Chandler's description does not suggest any essential change in the concept of power, however. Power remains a concrete "commodity" rather than an abstraction. The metaphor of commodified power means the concept of power is still subject to zero-sum thinking in which power is an "interest," "resource" or possession that can be the subject of competition or trading. Using this conception, youth may see a "right" as being a kind of currency that gives universal power in a more globalized community. It remains to be seen whether ruling elites of the future will share this view or recognize the "currency" of rights as equal in weight to their other more familiar commodities of power, such as rank, wealth and military might.

167 "Asian Millenium," supra note 16.

168 Ibid.
Some in Cambodia see other signs of change in traditional patronage power structures. Loyalty to particular patrons is no longer assumed, he says; rather patronage now “can be bought.” Patrons are now more easily changed. Also, more people are connected with a variety of networks beyond patronage networks. This Cambodian scholar has a theory of societal power-diffusion based on the development of people's affiliations with multiple interconnected informal networks. His theory must be distinguished from liberal democratic institutionalist understandings of power-diffusion. In liberal democratic theory, power is dispersed by disassociating power from individuals and instead placing power in positions and abstract concepts. The theory suggests that power resides in the position, not the person, and powers are separated into different kinds of institutions that check and balance one another. Regarding Cambodia, Lizée suggests that the web of personalized patronage networks, which he sees as a central structure in Cambodia, works against the development of institutions that rely on depersonalized abstractions, such as the rule of law and independent judiciary.

One wishes to be hopeful about signs of an end to practices that seem to have been harmful to those at the lower end of vertical power structures. At this point in time, caution needs to be exercised before proclaiming too quick an end to the historic patterns of patronage and the exercise of personalized charismatic power in Cambodia.

Contemporary theories of justice and good governance are best developed in Cambodia using local knowledge that connects existing concepts and patterns with transformative possibilities inherent within them. Foreigners may perform their most useful mediating roles not when they try to transplant liberal democratic ideas from places far away (both geographically and conceptually), but when they listen deeply and commit themselves to a facilitative role for Cambodian development of Cambodian understandings and Cambodian experimentation toward constructive social transformation. This is not to say that Cambodians are, or should be, closed to all foreign ideas. Most Cambodians welcome concepts of democracy, international

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169 Discussion with Cambodian scholar (1 June 2000) [Notes on file].

standards of human rights and conflict resolution. Bit notes that Fisher and Ury's *Getting to Yes* might be suited to the Cambodian context with some adaptation.\(^{171}\) Conflict resolution theory that incorporates alternative theories of power\(^{172}\) could be considered to see whether some ideas resonate with Khmer-Buddhist ideas about participatory democracy. Research into the qualities of impartiality of acceptable traditional conflict resolvers in Cambodia might unlock some ideas that could be useful in the human rights arena.

### 2.5.6 Concepts of justice and human rights

So far, the discussion in this chapter on law and human rights has emphasized international concepts of human rights, justice and the rule of law. This section discusses some concepts and controversies about justice and human rights in Cambodia.

In Southeast Asia, it is important to note the ideological factor of the so-called “Asian values” debate in which it is argued that human rights protections are merely Western creations and part of continued Western (or Northern) imperialism.\(^{173}\) This is often accompanied by a resource-based argument, in which economic development priorities are placed before democratic

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\(^{171}\) *Warrior Heritage*, *supra* note 102.


development and human rights. Many Asian scholars and human rights activists anxious to see the protection of human rights improved in Asia have criticized these arguments. The stance of the Cambodian government has not tended to include “Asian human rights” arguments with particular volubility. In practice, however, the government maintains an emphasis on economic growth and political stability and gives very little practical or financial priority to human rights, judicial reform, labour fairness or public accountability.

The Cambodian concept of justice (juttethor) is tied up with the central Khmer-Buddhist concepts of the dhamma (Buddhist ethical teaching) and the concept of kamma. Ideas of justice are reflected in traditional Khmer theatre, literature and dance in which the idea of justice is connected with punishment of those who commit wrongs. However, justice is different from revenge. Revenge is sought by the wronged individual whereas justice is left to karmic consequences. “Forgiveness is mine. Revenge is mine. Kamma is beyond myself.” Juttethor is also connected to ideas of fairness, honesty and impartiality in conflict resolution, traditionally conducted by monks or lay administrations (achaar) within the local wat or pagoda.

Popular ideas about justice have been linked by the current government and its supporters with revenge and contrasted with forgiveness. In controversies connected with the trials of Khmer

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176 E.g. the Cambodian Institute for Human Rights in Phnom Penh, headed by Cambodian human rights educators, trainers and researchers, Kassie Neou and Meang Ho Leang.

177 M. Brandt & C. Oung, “Cambodia’s Obligation to End Violence against Women” in Cambodian Journal of International Affairs (Phnom Penh: Cambodian Institute for Cooperation and Peace, 1996); Chantou Boua's research in Women: Key to National Reconstruction, supra note 35.

178 Conversation by the author with leader of non-governmental organization (June 7, 2000).
Rouge leaders, government leaders and their supporters have invoked the Buddhist concept of forgiveness which is connected to Buddhist teaching that victims should not take revenge but should instead leave justice up to *kamma*. Hun Sen and other government supporters amnestied some Khmer Rouge leaders in 1998 in order to end the civil war and they have resisted the idea of trials for amnestied leaders. They appeared to justify this (at least implicitly) by evoking Buddhist ideas of non-revenge: “Bury all of the past” said Hun Sen in 1998. “Forgive and forget” said one monk in 2000.

In contrast to this seemingly politically motivated construction and manipulation of Buddhist concepts of forgiveness and justice, others point out that Buddhism connects forgiveness to the acknowledgement of sin (*bap*) by the wrongdoer and an intention to change his or her behaviour. In this Buddhist teaching, forgiveness is linked to the wrongdoer's

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180 Conversation by the author with monk widely perceived to be politically sympathetic to the government (17 May 2000).

181 Conversations with a monk (27 May 2000) and a lawyer (30 May 2000) who both referred to the story of Angulimala is cited by Cambodian informants to illustrate this principle. Ahimsaka (later changed to Angulimala or “necklace of fingers”) was a murderer who cut off the thumbs of his victims to complete a necklace of 1000 thumbs of his victims. Angulimala now had 999 fingers and needed just one more. Angulimala was running after his final victim who happened to be his mother, when he saw the Buddha. “Why kill my mother?” thought Angulimala, “I will get this ascetic instead.” He began to run after the Buddha, but could not out-run Him. Tired and discouraged, he shouted to the Buddha to stop. The Buddha replied, “I have stopped. It is you who should stop.” Perplexed, Angulimala stopped and questioned the Buddha. The Buddha then explained that He had stopped all evil and that Angulimala too should do the same. After listening to the *dhamma* of the compassionate Buddha, Angulimala threw down his sword and asked to be ordained as a disciple. He then followed the teachings, meditated, and reached the supreme bliss of enlightenment. Angulimala changed from a fearsome murderer into a compassionate and caring monk. Both informants said that forgiveness should be practised with such wrongdoers. The monk informant contrasted this story with that of a monk who was continually violating the Buddhist rule. Even though everyone advised him to stop opposing the Buddhist rule, he did not. One day, he and his followers were swallowed up in an earthquake. My informant advised: “compare the two stories and you will see justice.” Interestingly, the story of Angulimala is also referred to by Alan Channer in *A. Channer, Twilight of the Khmer Rouge?* (June/July 1997), online: <www.mra.org.uk/fac/jun97/cambodia.html> (date accessed: 8 June 2001) [hereinafter *Twilight of the Khmer Rouge?]]. Channer’s story points out Ghosananda’s choice of a painting of Angulimala (or “Finger-garland”) to hand out booklets on wise leadership. He points out that “... the path of Buddhism beckons Cambodians ... towards compassion and equanimity.” Channer notes that Finger-garland repented, and “went through the villages he had terrorized spreading a message of harmlessness. Villagers pelted him with sticks and pots, but the Buddha advised him ‘Bear it, bear it. You are experiencing here and how the results of deeds for which you might have been tortured in hell for thousands of years.’ Finger-garland himself exclaimed: ‘There are some who tame with beatings, some with goads and some with whips; but I was tamed by such alone who has no weapon.’” See also the Declaration on the Role of Religion in the Promotion of a Culture of
acknowledgement of sin as well as a change of moral direction. This concept of forgiveness is not a unilateral forgiveness achieved by the victim without the accountability of the wrongdoer.

Venerable Maha Ghosananda, a senior monk famous for his peace work in Cambodia connects Buddhist concepts of forgiveness with concepts of justice:

I do not question that loving one's oppressor – Cambodians loving the Khmer Rouge – may be the most difficult attitude to achieve, but it is a law of the universe that retaliation, hatred and revenge only continues the cycle and never stop it. Reconciliation does not mean that we surrender rights and conditions, but rather that we use love. Our wisdom and our compassion must walk together. Having one without the other is like walking on one foot; you will fall. Balancing the two you will walk very well, step by step.

While Venerable Maha Ghosananda and other monks point to Buddhism as balancing unconditional forgiveness with the need for accountability, many human rights leaders in Cambodia see distinctions between juttethor and the concepts and processes of international human rights. However, while international human rights largely has been based on Western theories of natural law, and current international norms have been largely dictated by Western

Peace, at “The Contribution by Religions to the Culture of Peace,” organized by UNESCO and the Centre UNESCO de Catalunya, Barcelona from 12 to 18 December, 1994, at which Buddhist leaders participated, and which Declaration states: “6. Religions have contributed to the peace of the world, but they have also led to division, hatred, and war. Religious people have too often betrayed the high ideals they themselves have preached. We feel obliged to call for sincere acts of repentance and mutual forgiveness, both personally and collectively, to one another, to humanity in general, and to Earth and all living beings.”

For a summary of the work of Maha Ghosananda until 1992, see the introduction by the editors in Maha Ghosananda’s Step by Step, supra note 33. Since then he is famous for leading the dhammayietra movement, which has included annual peace marches of monks, nuns, laity and foreign supporters through various parts of Cambodia, including Khmer Rouge occupied territories, and during particular times of tension including the 1993 and 1998 election periods.

neither monks nor civil society leaders in Cambodia see any contradiction between Cambodian Buddhist tradition and contemporary international human rights movements. Buddhist precepts and Cambodian culture contain elements which favour all the basic human rights found in international law, although they "find expression, typically phrased as duties, obligations, or values rather than rights per se." For example, the Buddhist prohibitions against killing and doing harm correspond to human rights to life and against torture. Cambodia is a signatory to major international human rights instruments, and its constitution and civil society leaders uphold these principles. Civil society leaders see the need for social institutions, structures and attitudes that support deterrence, accountability and justice in this life-time, without waiting for karmic forces to take care of things.

The controversy in Cambodia about the appropriate interpretation and practice of forgiveness and justice is intense, politicized, and far from over. After nearly two years of pressure by the United Nations for a trial of leaders of the Pol Pot regime, the Cambodian government and the UN finally agreed in September 2000 to a trial process. Enabling legislation has been passed by the Cambodian National Assembly and a law was signed by the King on August 10, 2001. However, already the United Nations is said to be expressing caution as to whether the law complies with the agreement. Some wonder whether there will ever be a trial in spite of continued pressure by the United Nations, and particularly by the United States. "The

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186 Ibid. at 8.

187 Ibid. at 8.

188 Eaton, D., "Rough Road Ahead for Cambodian Khmer Rouge Trial" Reuters (16 August 2001).
Cambodian people have not been consulted about whether this tribunal will appease their need for truth and justice regarding the Pol Pot regime.\(^{189}\)

There is a chasm between the “forgive and forget” stance that has been taken by the dominant government leadership, and the needs of ordinary Cambodians to understand and somehow address the extreme human rights violations of the past. In the government's reluctance to pursue prosecution of Khmer Rouge leaders some people see a manipulation of Buddhist theory of *kamma*. It is important to note that current government leaders and their supporters have been the main proponents of a forgiveness ideology in connection with the past actions of the Khmer Rouge. Many former Khmer Rouge leaders are currently in positions of significant power and wealth in Cambodia.

Writing in 1997, Channer records his perceptions of the attitude of Cambodians to the Khmer Rouge. “There is a surprising amount of unanimity amongst ordinary people . . . that lower-ranking Khmer Rouge solders and their families should be pardoned and re-integrated into normal society. However, there is significant disagreement on what fate should befall Pol Pot's close associates and commanders.”\(^{190}\) In 2000, public forums in three Cambodian cities involving hundreds of Cambodians from all walks of life also recorded these diverse views. Many Cambodians do want to see international trials of at least the senior leaders of the Pol Pot regime who were responsible for decisions and policies that allowed the killing, dying and suffering during 1975-79.\(^{191}\) Overall, a majority of people polled in the forums believed that trials of former Khmer Rouge leaders would be advantageous to national reconciliation.\(^{192}\)

However, Cambodians want and need much more than this. They need to understand the past.

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\(^{189}\) *Khmer Rouge and National Reconciliation*, *supra* note 64 at 4.

\(^{190}\) *Twilight of the Khmer Rouge?*, *supra* note 181.

\(^{191}\) “Buddhism and Beatings,” *supra* note 149 at 5; *Khmer Rouge and National Reconciliation*, *supra* note 64.

\(^{192}\) *Khmer Rouge and National Reconciliation*, *supra* note 64.
They want an end to the climate of impunity and fear. Westerners who seem bent on emphasizing retributive justice need also to consider the relief that is now being experienced by Cambodians by virtue of the end of the civil war that was wrought through amnesty of Khmer Rouge forces and several leaders in late 1998. Many people say Cambodia is now at “peace” in the sense that it is now possible for people to pass freely to all parts of the country. Cambodians appreciate this and fear losing it again. Thus, in the minds of contemporary Cambodians, concepts of governance seem intertwined confusingly with concepts and practical needs in and around justice, forgiveness and peace. This is especially so when one considers the human rights abuses of the past thirty years of war and violence together with the continuing culture of impunity.

2.5.7 Cambodian concept of law

Varying concepts of “law” seem to be at play in Cambodia. The 1993 Constitution, based on Western liberal concepts, provides for essentially liberal constructions such as the “rule of law,” which in classical liberal thought provides that government is subordinate to law, and independent and impartial judges arbitrate any overstepping by the executive. Civil society leaders, largely funded by foreign donors, quote the principle of “rule of law” frequently. Cambodian leaders have not been overly preoccupied with putting these principles into effect. In fact, it is not always obvious what people mean when they talk about the “rule of law.” Some scholars point out that meanings vary throughout Asia. “Rule of law” often means “rule by law” or “rule through law” in which the executive utilizes legal frameworks more as guidelines within which to operate. In this view, law may serve to clarify and legitimate state power rather than to reflect or mediate interests of private actors within civil society as in liberal

193 “Buddhism and Beatings,” supra note 149 at 15-16.


Lawyers and civil society leaders tend to separate modern concepts of law from traditional views, particularly given the colonial roots of civil law. Therefore, it is important to note some traditional notions about “law” that are not based on liberal notions of positive law but on dhamma. According to Geertz, Indic dhammic ideas of law incorporate concepts of duty, obligation and merit. Geertz suggests that the idea of dhamma as law may be closer to the Western idea of “rights” (and obligations) than it is to “law” in the sense that dhamma is less concerned with positive laws, rules or decrees than it is with what is proper, right and fitting. Geertz suggests that the concept of dhamma as “duty” is grounded in the Buddha’s revelation, and as such is “a cosmic doctrine of duty in which each sort of being in the universe, human, transhuman, infrahuman alike, has, by virtue of its sort, an ethic to fulfil. . . Snakes bite. . . warriors kill. . . sons obey mothers. . . It is their dharma to do so.” Rights and obligations of individuals are related to their position in the social order, and that

"the position in the social order is transcendentally defined. What is just for the absolute goose is not for the absolute gander, for the priests, for the warrior, the monk, the layman, the householder the hermit, the once-born, the twice, the inhabitant of fallen times the inhabitant of golden ones. Social category, whether ritually characterized as in caste Hinduism or ethically so as in merit Buddhism, represents a sorting out of groups and individuals into natural classes according to the rules they naturally live by. . . Status is substance."
In contrast to the Western positivist notion of law as the ruler's commands, the acceptance of \textit{dhamma} is the acceptance of both duty and nature. The flouting of \textit{dhamma} is the flouting of nature – a denial of the way thing are. It is tempting to draw connections between traditional dhammic ideas and the current normative urgings by Cambodian civil society leaders toward the rule of law. Some Cambodian thinking hints at this,\textsuperscript{201} but in the absence of literature or other material from Cambodia specifically on this topic, such connections may be presumptuous.

\section*{2.5.8 Public Participation and Governance}

Participatory development is prescribed by the UN,\textsuperscript{202} the World Bank and others as important to equitable and effective economic and democratic development. One might imagine that the international donors who proclaim this gospel might take an approach that encourages consultation with the broad range of people in Cambodia concerning development of human rights approaches and mechanisms. This is especially so given the positive evaluations of existing participatory approaches to economic development in Cambodia, including the UNDP-supported SEILA program.\textsuperscript{203} In Cambodia itself, Buddhist leaders have pointed out that

\begin{itemize}
\item \textsuperscript{201} "Steering the Middle Path," \textit{supra} note 185.
\item \textsuperscript{203} See, \textit{e.g.} \textit{Good Governance, supra} note 71 at 26-27 for a discussion of the UNDP-supported Cambodian government initiative \textit{SEILA} (meaning "foundation stone") which has developed systems for decentralized participatory planning and management of rural development in five provinces. See also Doyle, \textit{supra} note 45; J. Ledgerwood, "Rural Development in Cambodia: The View from the Village" in F. Z. Brown \& D. G. Timberman, ed., \textit{Cambodia and the International Community: The Quest for Peace, Development, and Democracy} (Singapore: Asia Society, Institute of Southeast Asian Studies, 1998). These authors see the \textit{SEILA} program as a useful example of bottom-up democratization connected to ongoing peacebuilding. Successful participatory planning experiments at the village level have also been conducted in areas where hydro-electric dams were being proposed. See NGO Forum on Cambodia, \textit{Mekong People: The Role of Local Communities in Hydro-Planning 102}
\end{itemize}
Khmer-Buddhist traditions support participatory democratic approaches. Experiments in participatory planning at the village level demonstrate that wide-spread illiteracy at the grassroots level does not bar the sharing of valuable local knowledge and experience, nor is it a bar to learning, nor does it block capable participation in community decision-making.

There have been repeated calls for foreign development workers to concentrate on facilitating grassroots development and to become knowledgeable of Cambodian culture and situations:

Well-meaning efforts by outside benefactors will fail once again unless they are based on insightful understanding of the people and culture they are intended to assist. . . Western ways, particularly colonial hierarchical ways of helping, will not profit that society. Helpers not only need a clear knowledge of the Cambodian psychology, in context of its culture and history, but also must approach from a grass-roots rather than from 'the hierarchical management' level.

2.6 Conflict Resolution in Cambodia

One might expect the field of conflict resolution in Cambodia to look quite different, given the participatory values it espouses. Unfortunately, "conflict resolution" activities have been funded in the context of foreign donors' agendas concerning liberal economic development and corollary governance goals. Cambodian and foreign conflict resolution scholars or practitioners...
have been provided with few opportunities to do sustained research and education in conflict resolution in the Cambodian context.

2.6.1 The meaning of “conflict resolution” and “peace”

It is important to recognize that in Cambodia, as elsewhere, “conflict resolution” and “peace” mean different things in different contexts. Several conceptions of “peace” (santipheap) are currently at play within Cambodia.207

The term santipheap has been manipulated politically at the national level. Cambodia is proclaimed to be at “peace” since the last Khmer Rouge soldiers were amnestied into the Cambodian armed forces in 1998. This negative-peace208 conception is much narrower than the ideas about santipheap held by most human rights and civil society leaders, and particularly by Cambodian conflict resolution specialists and peaceworkers.209

Cambodian conflict resolution and peace workers often draw on traditional Khmer-Buddhist understandings about positive peace in which santipheap is said to begin with inner peace, borne of compassion and loving-kindness in the individual mind. Through example and teaching, peace within the individual radiates outward to the family, the community, the nation and the world. Community peace is also tied to individual practice of the five Buddhist ethical precepts against killing, stealing, sexual misconduct, wrong speech (including lying), and intoxicants. In this perspective, the peacebuilder’s role is education toward the goal of a critical

207 These findings are drawn from interviews conducted for a research project on “Religion and Peacebuilding” conducted in Cambodia in May and June, 2000. Also see an interesting study conducted by the Mennonite Central Committee in May, 2000 among Cambodian Christians on definitions, attitudes, activities related to conflict and peace, including a needs assessment. K. Sopheap, K., Mennonite Central Committee (MCC) Cambodia Peace Program (2000) [unpublished, archived at Mennonite Central Committee, Phnom Penh].

208 Negative peace is the absence of physical violence. I define violence broadly as including not only physical violence, but also economic, political and cultural and other structural forms of violence. Positive peace is the absence of all kinds of violence. For a concise discussion of these terms, see G. Kent, “Analyzing Conflict and Violence” (1993) 18:4 Peace and Change 373.

mass of ethical and peaceful individuals within society.\textsuperscript{210}

Another conception of "peace" emphasizes social order and the absence of open conflicts and disputes. The Buddhist concept of forbearance (\textit{khanti}) has been associated with prevention of conflict (\textit{hingsa}) or violence.\textsuperscript{211} In this conception, "peace" is seen not as the absence or resolution of conflict, but as the absence of \textit{manifest} disharmony.\textsuperscript{212} Thus, it is not really a positive peace concept, but rather connotes lack of open conflict. The role of \textit{khanti} in exacerbating conflict by keeping it hidden has already been discussed, and shows how ideas of forbearance are implicated in harmony styles of conflict resolution which may not build a lasting peace based on foundations of social justice.

Cambodian peace workers and conflict resolution educators, usually trained in both Buddhism and peacemaking, tend to hold broader conceptions of peace that go beyond individual peace and harmony ideology. Their efforts include intentional community peacebuilding through teaching and facilitation of village projects that build understanding, trust and community relationships. In this relational approach, "peace" does not emerge from silently putting up with injustice. Rather, a "culture of peace" will only come about "through communication and dialogue."\textsuperscript{213} One example of this approach is a Buddhist-led project of the Local Capacities for Non-Violence program of the American Friends Service Committee. Some villages are interested in Buddhism but have no nearby wat. In these villages, the project facilitates local building of a simple open-air structure (\textit{salabon}) for community meetings, Buddhist


\textsuperscript{212} "Harmony ideology" within the Western conflict resolution movement has been criticized as denying the importance of manifesting and maintaining social conflict to create pressure for change. L. Nader, "Harmony Models and the Construction of Law" in K. Avruch, P. Black, & J. Scimecca, eds., \textit{Conflict Resolution: Cross Cultural Perspectives} (Westport, Conn: Greenwood Press, 1991) at 41-59.

\textsuperscript{213} Discussion with civil society leader, Phnom Penh, May 19, 2000.
celebrations and visiting monk preachers. Another example of this approach is the work of the Cambodia Institute for Cooperation and Peace (CICP). While not overtly Buddhist in approach, the CICP has been working on development of dialogue, respect and trust among people of the varying parties and factions through holding resolution-based discussion round tables on issues of public controversy.

Another Cambodian conception of peace is associated with mutuality within society. Some Cambodian proverbs commend social complementarity; for example, “the rich people must keep the poor people because the poor people keep the rich people in clothes.” Such proverbs do not challenge social inequalities, but rather suggest that social harmony depends on addressing the needs of poor people.

Some Cambodian peace workers go farther, saying peace does not exist “until people can trust each other, and until [there is] no gap between rich and poor...” referring to “material gap, social gap and relationship gap... If the gap is too big, violence might happen. For example, the rich need to provide money for schools. The poor can use their manpower. But if the rich don't pay attention to the poor, the poor may become angry and use violence.” These peacemakers attribute land disputes, the biggest source of conflict in Cambodia, to the rich taking and occupying the land at the expense of the poor. Using this conception of “peace,” peacebuilders work toward closing gaps between rich and poor. Some Buddhist groups do this by fostering development. An example is Buddhism for Development in Battambang province, founded by Venerable Heng Mony Chenda, who has now left the monkhood but continues in development work.

Finally, some see “peace” not primarily as an outcome or a product. Rather it is a process that as one peace worker says “must go without stopping. It is like breathing.”

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214 Discussion partly in English and partly through interpretation with Cambodian peace workers, Phnom Penh, May 23, 2000.

215 Discussion in English with Cambodian civil society leader, Phnom Penh, May 19, 2000.
2.6.2 The field of conflict resolution in Cambodia

There are diverse perspectives concerning the "how to's" of continuing to build peace and human rights in Cambodia. Foreign approaches range from legalistic to structuralist, institutionalist or cultural transformation approaches. Conflict resolution approaches have been given little foreign attention in Cambodia compared to other approaches to peacebuilding.

The field of conflict resolution in Cambodia is fledgling but has been active and committed since the early 1990s. Its values seem similar to those in the field of conflict resolution field in other parts of the world in emphasizing values of non-violence and cooperation, inclusivity and non-discrimination, and participatory decision-making by stakeholders in conflicts. As in other parts of the world, however, diverse values feed the field of conflict resolution in Cambodia, including government players whose main agenda may be social control.

The most highly visible conflict resolution program is the Centre for Peace and Development in Phnom Penh, formerly the Cambodian Centre for Conflict Resolution (CCCR), sponsored by the prominent NGO, the Cambodia Resource Development Institute (CDRI). This program has received international funding for training of Cambodian government officials and civil society leaders in conflict resolution skills and the translation of John McConnell's *Mindful Mediation: A Handbook for Buddhist Peacemakers*, a respected text among Asian Theravada Buddhist thinkers which develops Buddhist theory as it relates to conflict resolution and mediation.

Canadian projects discussed in Chapter Four were a part of early stages of this CDRI initiative. In 2000, a good deal of the Centre's training in conflict resolution was still being

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217 *Mindful Mediation, supra* note 113.

218 E. Mysliwiec & C. Morris, eds., *Dispute Resolution in Cambodia: A Road to Peace and Reconciliation*, *Proceedings of a Workshop Held November 28-30, 1995, Phnom Penh, Cambodia* (Victoria, BC: UVic Institute
done by foreign trainers, although now there are more Cambodians who are equipped to conduct training themselves. Those active in conflict resolution and grass-roots peacebuilding have expressed the need for more networking among conflict resolution researchers, educators, and practitioners in order to enhance and build the field of conflict resolution.\textsuperscript{219}

Conflict resolution training is also starting to be of interest for legal training.\textsuperscript{220} The University of San Francisco law program in Phnom Penh now offers training in conflict resolution. Human rights training in Cambodia has sometimes included some content in conflict resolution. Judging from available English language evaluation literature about conflict resolution training that was part of human rights training in the SEILA program, and without the benefit of viewing the SEILA course syllabus or syllabi from other settings, it appears that the conflict resolution training done by some local trainers in human rights settings has largely taken a formalistic legal approach, focussing on educating officials about relevant laws, such as land laws and human rights principles.\textsuperscript{221} Compliance with law and the use of courtesy to prevent conflict with members of the public is also a strong focus. The conflict resolution components of SEILA's human rights training were found inadequate in trainee feedback and testing.\textsuperscript{222}

Several Buddhist clergy and lay people have been among the pioneers and leaders of Cambodian initiatives in conflict resolution. Many of these efforts have been peacebuilding initiatives at the national level, directed toward prevention and amelioration of factional conflict in Cambodia. The work of the Venerable Maha Ghosananda is the most frequently

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{219} Interview with conflict resolution practitioners (5 June 2000) [Notes on file].
\item \textsuperscript{220} E.g. the Cambodian Defenders Project includes about three hours of negotiation training in its one-week training program for lawyers.
\item \textsuperscript{222} \textit{Ibid.} at 3, 94.
\end{itemize}
\end{footnotesize}
cited example of peacebuilding and conflict resolution work in Cambodia. With Yos Hut Khemacaro and lay Buddhists, he was instrumental in founding the dhammayietra movement in Cambodia which has been lauded for its inspiring courage including successful contributions to peaceful elections in 1993 and 1998. Connected to this work is the work of the Cambodian Coalition for Peace and Reconciliation (CPR) which has sponsored training in conflict resolution and non-violence for many people including monks and nuns.223 The dhammayietra movement has aimed at teaching “peace, reconciliation and compassion” and exemplifying an “alternative, nonviolent way.”224 The movement has been largely inspired by Gandhi’s thinking225 and has aimed at discerning and enhancing local knowledge about conflict resolution and peace.

The dhammayietra movement sponsored peace marches annually from 1992. The dhammayietra movement is marked by its careful and thorough work and training in preparing for these walks through armed conflict zones. The experiences of the dhammayietra movement have also contributed significantly to ideas about impartiality and neutrality in Cambodia, although it is important to reiterate that ideas about impartiality have not been well developed generally in Cambodia.

The Cambodian term apyearkret (neutrality, impartiality) is defined as “in the middle, representing those in the middle, not entering any group.”226 The definition is capable of several meanings including the taking of moderate positions, being independent or being apart from relevant parties.227 The dhammayietra movement has taken engaged Buddhist approaches to being “in the middle” and has developed practical theory through experience. Dhammayietra

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223 One Million Kilometres for Peace, supra note 183.

224 Ibid.

225 Step by Step, supra note 33.


training emphasizes non-partisanship in conflict, particularly when conflict is highly polarized. They define non-partisan behaviour as “neither endorsing nor opposing any party in a conflict, while often making clear statements of opposition to policies being used.”228

Yos Hut Khemacaro has contributed to the discourse about neutrality, including the potential roles for the monkhood in peacebuilding.229 This senior French-educated monk has been active in peace-work for several decades. He was involved with Venerable Maha Ghosananda in missions of monks to encourage the process of the negotiations toward the Paris Peace Accord. Writing in 1998, after a great deal of foreign intervention in Cambodia, he emphasizes the need to ground peacebuilding initiatives in Cambodian culture, and particularly within Buddhism which he points out is an institution that cuts across the political divisions in Cambodia. He points to the Buddhist message of non-violence and compassion. He comments on the challenges monks face in the politically polarized political climate in Cambodia: “Cambodia's monks face real challenges and dilemmas as they seek to reconcile a greater public role with traditional Buddhist edicts requiring them to adopt a strictly non-partisan approach – the so-called ‘Middle Path’”230 Yos Hut reconciles the dilemma by conceiving of the middle path as non-partisan activism. He has also reconciled Western ideas of public participation, democracy and human rights with similar ideas found in dhamma. He maintains that the Buddha himself advocated democracy within the monkhood and participation of citizens in government.”231 He also maintains that to justify inaction in the face of injustice is to misunderstand Buddhist teaching about forgiveness. “Non-partisan activism” in his view includes such activities as peace walks, teaching about community-based development, training about human rights, and exercising moral authority with political leaders by instructing them about their duties to the people. Non-partisan activism in Cambodia is particularly challenging because of the extremely polarized political climate. The expression of any opinion at all tends to mark people as either

228 One Million Kilometres for Peace, supra note 183.
229 “Steering the Middle Path,” supra note 185.
230 Ibid. at 71.
231 Ibid. at 73.
pro-government or pro-opposition. Thus, even the discourse about “neutrality” is politically charged. Some conceive of “neutrality” as expressing no opinion at all and remaining unengaged.232

What is glaringly missing in foreign peacebuilding efforts in Cambodia is sustained, focussed attention on conflict resolution and peacebuilding that goes beyond Western legal models of human rights advocacy and institutionalist models for building the legal system and an independent judiciary. Within the deluge of literature about peacebuilding in Cambodia, very little attention has been focussed on examining local Cambodian knowledge about conflict and methods of conflict resolution.233 What seems to be missed by many donors is the emphasis Cambodians place on informal and consensual conflict resolution, and their repeatedly expressed interest in learning more about mediation and conciliation in community conflicts, legal disputes and human rights conflicts.234 Recent initiatives for conciliation of land disputes in Cambodia illustrate the need for more understanding about what kinds of mediation and conciliation processes will be useful in Cambodia.235 While some research has been done on

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232 Conversations with government officials and civil society leaders (May-June 2000) [Notes on file].


234 Evaluation of the Impact of CIHR Training, supra note 221.

235 See S. Williams, Land Ownership Disputes in Cambodia: A Study of the Capacity of Five Provinces to Resolve Conflicts over Land. (Phnom Penh: OXFAM GB, 2000). This study documents the work of the newly formed National Land Dispute Settlement Commission (NLDSC) in five provinces after its first year of operation during 1999. The study found that public confidence in the Commission is very low, and civil society organizations have not been invited to participate in any of the provincial Commissions included in the study.
wat-based styles of participatory governance,\textsuperscript{236} and village-level conflict resolution methods,\textsuperscript{237} much more research is needed to understand Cambodian conflict styles and to enhance methods of conflict resolution suited to the Cambodian context.

The modest international attention to conflict resolution has been ad hoc and underfunded. It also appears that conflict resolution training in Cambodia has relied largely on foreign theory with little opportunity for foreign educators to do extensive preparatory research, participatory planning or identification of local experts.\textsuperscript{238}

Commentators on peacebuilding tend not to use Galtung's approach to analyse the Cambodian situation from diverse perspectives considering the actors, the structures and institutions and the culture and history. They tend to emphasize one or the other. Still fewer take a in-depth process-oriented view in their examination of conflict in Cambodia. Exceptions are found in several unpublished reports of people, primarily anthropologists, who have considered grassroots conflict resolution.\textsuperscript{239}

In summary, the Cambodian scene has developed within a complex historical and cultural setting that has developed through the interactions of diverse international and local actors with a fascinating array of philosophical and ideological dispositions, theories and normative perspectives about conflict, power, governance, human rights, and peacebuilding.

Footnote 4 at 4 states: “The research team attended one hearing of National Land Dispute Settlement Commission at O'Smach in December 1999 at which the complaints were inadequately presented, the accused was absent, the atmosphere was threatening and the involuntary agreement reach was inadequately documented. As a consequence, despite the NLDSC confidence they had resolved this dispute, 70 complainants came to Phnom Penh again in January 2000 to demonstrate their anger.”

\textsuperscript{236} Grassroots Civil Society, supra note 114.

\textsuperscript{237} Dynamics of Dispute Resolution, supra note 114.

\textsuperscript{238} See, e.g. Dispute Resolution in Cambodia, supra note 218; Building Democratic Institutions, supra note 8; P. Condliffe, Mediating Public Issue Disputes: Managing Land Disputes in Cambodia (Phnom Penh: Field Office of the United Nations Centre for Human Rights, 1993).

\textsuperscript{239} Dynamics of Dispute Resolution, supra note 114.
2.7 Summary of Sources and Dynamics of Human Rights Conflict in Cambodia

This section attempts an analysis of human rights conflicts in Cambodia using four conflict analysis approaches aimed at discerning sources and dynamics of conflict. Christopher Moore's conflict analysis framework is applied in which he categorizes sources of conflict in terms of data (information), relationships, interests, values (including political ideology and religious values), and structural factors (including entrenched cultural patterns.) Moore suggests that by identifying the sources of conflict, one can design appropriate conflict resolution strategies. I use Moore's diagnostic framework not to "pigeon-hole" a particular problem as having one single source, since most complex public conflicts have multiple and interconnected sources. Rather, Moore's framework helps to tease out and bring into focus the multiple sources of conflict regarding a particular issue. Moore's focus on sources of conflict is also keeping with my observation of Cambodian speakers whose orientation has been to view conflicts in terms of their sources, based on Buddhist theory. This emphasis on sources of conflict differs from the now-dominant Western a-historical and a-cultural "Getting to Yes" approach that emphasizes analysis of the party interests, assessing potential for accommodation of needs and interests of conflict actors. At the same time, Maire Dugan's "nested" model of conflict is applied. Dugan tries to improve on Moore by situting conflict issues within relationships which are in turn nested with structural sub-systems and systems. I also consider a Buddhist framework for understanding the sources of conflict as set out by Heng Mony Chenda and

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241 See the various lectures of Cambodian government officials, religious leaders and civil society leaders in Mysliwiec & Morris, *supra* note 218.


Finally, to avoid seeing conflict as static, I consider the conflicts in terms of their dynamics including stages and triggers for escalation.

2.7.1 Issues

While political stability has increased since 1998, the country remains fraught with issues involving economic and social equity, public accountability, ethnic relations, violence and factionalism. Economic issues are implicated in conflicts from domestic violence and interpersonal disputes to public conflicts and demonstrations concerning land tenure, land and resource use and development, housing, labor and related political issues. Human rights issues include the manner in which authorities treat citizens, how children and women are to be treated, widespread land rights and labor issues, and public accountability of government officials. Issues about creation, compliance and enforcement of policies and laws are persistently raised regarding all sectors.

2.7.2 Relationships

Human rights issues are nested within historically turbulent relationships between contenders for power, between rulers and people (including NGOs), and between Cambodians (particularly rulers) and foreign powers including, in present times, international organizations. Perceived competition of economic, political, cultural and other interests of various stakeholders, local and foreign, contributes to a zero-sum approach and constantly strained relationships at all levels and in all sectors of society. Generations of war and conflict have also meant the breakdown of community structures, relationships and trust at the grass roots and national levels. The Pol Pot regime destroyed wat-centred community life, replacing it with a

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246 See the discussion on conflict dynamics in Chapter I; see also Appendix V.
centralized focus on the state. Local institutions destroyed during the 1970s, such as pagodas, schools and health centres do not exist near to many villages, particularly in the recently integrated former Khmer Rouge zones.\textsuperscript{247} The regime's purges fostered intense fear and mistrust which residue lingers today. Areas that were until recently in Khmer Rouge zones have not seen integration of Khmer Rouge people with other villagers; building of trust has been slow.\textsuperscript{248} There is no more armed insurgency in Cambodia, but deep divisions, violence, mistrust and trauma maintain a profound grip on people's morale.

Buddhist theory sees the sources of conflict in greed (lobha), delusion (moha), and hatred (dosa). The remedies are transformation of the parties toward detachment and generosity, right mindfulness, and compassion and loving-kindness.\textsuperscript{249} Also applicable to conflict resolution in Buddhist theory are the ethical precepts against killing, stealing, lying, sexual immorality and being intoxicated. Buddhist approaches to conflict resolution might look at the specific ways in which greed, delusion (ignorance) and hatred are involved in the issues and work toward transformative education of individuals. In Cambodia, religion and religious approaches should not be discounted or marginalized in analysis or intervention strategies.

\textbf{2.7.3 Structures: Systems and subsystems}

Human rights conflicts and the human relationships in which they manifest themselves, cannot be seen as separate from the structures within which they are nested and nourished. Structural sources of human rights conflicts include Cambodia's poverty and dependence on foreign aid and investment within an overall system of world capitalism. This means the government and NGOs must juggle the sometimes contradictory development policies of international financial institutions and other donors. The transition from a socialist centrally-planned economy to a

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\textsuperscript{247} S.S. Ok, "Toward True Reconciliation in Cambodia" Cambodia Development Review 3: Issue 1999). This article was based on a report of a fact-finding mission in November, 1999, commissioned by UNDP/CAREERE.
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\begin{flushright}
\textsuperscript{248} \textit{Ibid.}
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\begin{flushright}
\textsuperscript{249} Mindful Mediation, supra note 113 at 41-66 & 183-223.
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free market has been involved in a growing gap between rich and poor – within this gap many conflicts abide. Interventions that fail to recognize and address structural sources of conflicts may only be temporary pacifiers.

The current hegemonic structure of the world’s dominant economic system must not be underestimated in the analysis. There are disjunctions between the international rhetoric of participatory development, international human rights and poverty alleviation, and the actual practices of international economic organizations such as the IMF, the World Bank and other international actors and donors. The fact of these disjunctions must realistically be taken into account by those who are serious in their aim to work with Cambodians to improve human rights, including people's economic rights. Continued foreign pressure seems crucially important in Cambodia given the apparent lack of local leaders' capacity or commitment to reforms that are clearly needed and wanted by the Cambodian public. But foreign interventions need to be wise and knowledgeable. Foreign pressure may not be productive in the long run if it is conducted without consulting deeply with local people, and personally disrespectful to power-holders and fickle or arbitrary in commitment and scope. “Carrot and stick” realist approaches aimed mainly at top political leaders and framed as judgements about “high level corruption,” face threats and insults about “violence” genes, and threats to “pull up your human rights socks or else” may be less productive than contemplated. These approaches may be based on too-narrow realist assumptions about the roots of issues in conflict.²⁵⁰

Another structural source of conflict is the centralization of personalized power that continues

²⁵⁰ “Realism” has been the dominant paradigm for understanding international conflict since after World War II. Early leading theorists on realism include E.H. Carr, The Twenty Year Crisis, 1919-1939, 2d ed. (New York: Harper and Row, 1964); H.J. Morgenthau & K.W. Thompson, Politics among Nations: The Struggle for Power and Peace, 6th ed. (New York: Alfred A. Knopf, 1985). Realism has been quite roundly critiqued. First, realist theory has tended to see the modern nation-state, including state legal and institutional frameworks, as central in analysis of conflict. This approach is not adequate to understand or address internecine conflicts which often do not cooperate by staying within marked state boundaries or within the intellectual or normative frameworks of international law. Second, realist theories see competitive, rational self-interest as a chief motivator; this view is not considered adequate to explain all that motivates parties in conflict. Third, in realism, power is the central explanatory tool. While questions about power are important, they consider only part of the picture. Also, realist theories of power tend to be undeveloped, as discussed in Chapter Four. However, it is important not to move too far away from the realists’ important insights about some dominant ways in which power continues to be conceived and used in political spheres.
to pervade virtually all national political culture and institutions. Related to this is the fact that disputants appear jealously to stockpile and garrison their influence as though it were scarce and threatened property needed for zero-sum contests. These power struggles thus take on characteristics of disputes over competing interests when part of the source is deeply entrenched ways of thinking that form part of the social structure.

Appropriate long-range interventions might include canvassing with Cambodians some appropriate grass-roots empowerment strategies and education of youth and future leaders in ethical governance principles, ethical uses of power, non-violence and effective cooperation, all aimed at structural and cultural transformation in the long term. Just as sustained instigation from grass-roots leadership built up and enabled the armed revolution during the late 1960s and early 1970s, it is proposed that sustained peacework together with human rights education aimed at the grass roots is the most likely to bring about long term, peacefully achieved diffusion of the currently centralized and top-down structures of power. Support for this proposition includes long-time Cambodia-watcher David Chandler's observations about the seeming shift in power that may be occurring as a result of new wide-spread human rights knowledge among youth.251

One might also consider the stereotypical "volcano" conflict style as a systemic issue. If indeed it is a wide-spread and long-standing pattern in the population, which the presence of related proverbs and social-psychological analysis might indicate, conflict intervention would need to identify ways to illuminate and address sources of public conflict before they reach an explosive stage, and ideally before they reach the stage of complaints or public demonstrations. Long term measures might also include conflict resolution and negotiation education suited to Cambodian customs and ways and aimed at youth. Education would be aimed at helping to learn how to identify sources of structural injustice and to address them effectively and peacefully. Thus, to be effective to change social structures, conflict education would not be aimed at pacification techniques, but at enabling youth to learn ways to understand structural

251 "Asian Millenium," supra note 16.
conflicts and learn about ways to address them non-violently, for example, through coalition building, awareness raising, and advocacy.

Many human rights issues arise from factional politics which have impeded economic and institutional development in Cambodia. Factions may be based as much on personal loyalties as on political values. Loyalties or obligations to current patrons or friends militate against taking differing views or even impartial stances. But it is inadequate analysis to see factional disputes as arising merely from interpersonal “score settling” or individual relationship conflicts. These disputes and dynamics are nested within current social structures. From a structural perspective, within a polarized dynamic, the central “pole of neutrality” has been missing in Cambodia. Practices of non-partisanship and impartiality are undeveloped and ill defined. There is frustration about the difficulty of implementing independent and impartial complaint and decision making processes including an independent judiciary and human rights bodies. A direct result of the systemic lack of impartiality is the difficulty of identifying people seen as impartial in the sense of being respected and trusted by the parties in nearly any dispute, particularly at the national level. This is related to systemic polarization entrenched in Cambodia. If conceived as structural in nature, interventions aimed at polarization might start with participatory, exploratory research and theory building among academics, government officials, NGO leaders, community leaders, students, and international bodies. Such intervention would aim to discern and develop local concepts of impartiality and independence.

Buddhist theory should not be neglected in discussion of structural sources of conflict. Buddhist teaching is often believed to be exclusively actor-oriented, but those from Engaged Buddhist perspectives also aim to transform societal structures largely through educational approaches aimed at building up a critical mass of peaceful individuals as well non-violent activism aimed at unjust social structures.

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252 I heard this term in September 1998 and June 2000 from Dr. Kao Kim Hourn, Director of CICP.


254 S. Sivaraksa, “How Societies Can Practice the Precepts” in T. N. Hanh, ed., For a Future to Be Possible:
2.7.4 Dynamics and levels of escalation

While Cambodian politics have been relatively calm for the past couple of years, the commune elections planned for early 2002 provide opportunities for escalation of various issues, given the tensions within relationships and the severe and persistent structural sources of conflict. Already there have been several deaths and incidents of violence that have been attributed to political conflicts and power-plays.255 These incidents have already triggered increased tension, suspicion and antagonism between ruling and opposition parties and NGOs.

The potential role of Buddhist leaders in promoting calm and preventing escalation should not be forgotten as witnessed in pre-election peace activities in 1993 and 1998. Buddhist clergy interventions, such as participation in demonstrations can also escalate conflicts if perceived as partisan, as witnessed in post-election conflicts in 1998. At the present time, there is significant polarization and segregation among ruling and opposition parties and their respective supporters. The upcoming elections provide significant opportunities for triggering further deterioration of already very poor relationships between ruling and opposition parties.

2.7.5 Conclusion

The above analysis is far from complete, but provides some examples of ways of seeing Cambodia's human rights problems and possible ways to address them based on their sources. The issues are – at the same time – individual, relational and systemic, aggravated by larger world system issues impacting Cambodia. Moore's and Dugan's analysis tools help us to see that actor-oriented approaches to human rights conflicts are, in themselves, inadequate. Interventions must be multi-faceted to address structural impediments to improve the


relationships in which conflict issues are lodged. Because of the multiple and nested sources of
human rights conflicts, approaches to resolving them need to address all these sources in
sustained and coordinated ways in order to build lasting positive peace in Cambodia.
Appropriate interventions would foster structural, institutional and cultural transformation, as
well as relationship building.

As Lederach suggests, peacebuilding efforts need to attend to relational and structural factors at
top, middle and grassroots levels of society. This analysis points to the need for
peacebuilding approaches to be interdisciplinary, coordinated and properly equipped to address
structural and institutional problems, cultural attitudes, and individual actors and their
relationships in sustained ways at all levels of society and in the long term.

In closing this chapter, it seems important to remind readers that the level of trauma among
Cambodians is such that it might usefully be seen not just as intra-personal psychological
issues affecting many individuals, but as relational and structural issues that require intelligent,
broad-based and kindly interventions at all levels of society. If one considers that top leaders
are as personally affected as rural women farmers, the fact of pervasive trauma may need to
frame the international human rights discussion more than it currently does. In the short term
the most practically satisfactory interventions might be at the grass-roots level with small-scale
peacemaking and reconciliation endeavours including individual and community trauma
therapy, and support of education for Cambodians to do this work among their peers.

External pressure on power-holders should also be maintained, but should broaden out from
narrow actor-oriented punishment approaches and top-down foreign prescriptions for
institutional reform. There is need for more facilitation of participatory local development of
appropriate and sensitive ways to understand and address the past and the present.

256 J.P. Lederach, Building Peace: Sustainable Reconciliation in Divided Societies (Washington, DC: United
States Institute of Peace Press, 1997).

257 Ibid.
Chapter III

3 The Actors: A stakeholder analysis

Accession to and retention of supreme political power is awarded to the man who is the most accomplished thespian of them all.\(^1\)

In keeping with Galtung's approach to balance considerations of structures, culture and actors, this chapter discusses the chief players or groups of players in Cambodian human rights conflicts. While the previous chapter placed the emphasis more on structures and culture, this chapter moves toward a processual focus, particularly considering the choices available to stakeholders in the context of the social interactions that are taking place.\(^2\) A process of "stakeholder analysis"\(^3\) is used to sketch the issues, interests, values, world views and other

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factors I have perceived to be important to the key actors and others affected. Also considered are the sources of power, interdependencies and relationships among the various stakeholders.

What is the purpose of stakeholder analysis? In his literature review, Ramirez\(^4\) identifies several possible purposes for stakeholder analysis. One might be to learn about existing patterns of interaction so as to plan or improve interventions. Another might be for management purposes in policy-making. Stakeholder analysis might also be used as a tool for predicting conflict. My own overall purpose is to understand how the interactions of stakeholders might affect a processes of deliberation about the design of human rights domestic legislation, mechanisms and institutions in Cambodia. Thus, the task of this chapter is intensely practical. It is aimed at an audience of those currently considering the design of human rights processes, mechanisms and institutions for Cambodia, including Cambodian stakeholders and international actors and donors. Since stakeholder analysis is only one part of a comprehensive conflict analysis, it is intended that this chapter be read together with Chapter Two.

My own perspective is that of an interested observer, and from time to time a very minor "intervener" by way of participation in development and research initiatives concerning conflict resolution in human rights and other public policy issues in Cambodia. The development role is by its nature that of change agent. Therefore, this stakeholder analysis also serves as part of a foundation for Chapter Four's examination of foreign development "interveners" in peacebuilding initiatives.

In keeping with a processual focus, this chapter attempts to illuminate some interactions among

\(^4\) "Stakeholder Analysis," supra note 3 at 102.
the stakeholders, including the potential conflict “pressure points” and possibilities for future interactions regarding human rights policies, practices and institutions. There is an attempt to shed light on the viability of public participation, public consultation, negotiated approaches, advocacy, coalition building, or other approaches for stakeholders to engage in public policy-making processes in Cambodia. These remain open questions to be discussed further in Chapters Four and Five.

3.1 Methodology: Identifying “Stakeholders,” Their Characteristics and Relationships

This section discusses some theory concerning stakeholder analysis, including the meaning of “stakeholders” and methodology for identifying them.

3.1.1 Who are “stakeholders”?

The term “stakeholder” has become jargon in several fields including business, resource management, public policy planning, and public dispute resolution. The term is generally used to connote anyone who has an interest in or a concern about whatever is under discussion.5

Susskind and Cruikshank suggest that for analytical purposes, stakeholders should be divided into four groups: those with legal standing to make claims for protection; those who can block implementation of decisions; those with enough political “clout” to draw elected leaders or appointed officials into a dispute; and those whose moral claims can generate public sympathy.6 It is interesting to note that Susskind and Cruikshank’s list does not include those who, for one reason or another, are affected but who may not be “parties” with legal standing or remedies. Nor does their list include those who are not sufficiently organized or powerful to garner public attention or sympathy. Thus, even though Susskind and Cruikshank’s book is devoted to increased public participation in public decision making, their own list of

5 Ibid. at 101. Ramirez notes that the term appears to have been first recorded in the early 1700s and referred to someone who held a stake in a bet.

6 Breaking the Impasse, supra note 3 at 103.
stakeholders remains largely a "typology of the powerful." Their approach to defining stakeholders is utilitarian.

Groups most affected by public policy are often those who are most voiceless, resourceless, and vulnerable (although human rights groups have raised international awareness of some of the poorest and most oppressed groups in Cambodia.) Therefore, I prefer a more inclusive typology of "stakeholders" as persons or groups who can make, affect, block or sabotage decision-making or implementation, as well as those affected directly or indirectly by decisions-making or implementation (whether or not they command public attention.) Thus, there is no assumption in this chapter that "stakeholders" have functionally equal power, equal capacity, equal participation in decision making, equal voice or equal social legitimacy. However, even giving a group the name of "stakeholder" can in itself enhance the legitimacy and voice of the group, giving it a kind of "standing." This analysis attempts to take note of relative legitimacy, power and voice.

This last statement begs questions about groups with illegitimate interests or behaviours. Should they be named as "stakeholders" and thus be given undeserved legitimacy and voice? In this analysis, I do not exclude illegitimate stakeholders from consideration for two reasons. First, "legitimacy" is generally claimed by all people and groups affected, whether or not their interests or behaviours or even their very existence is seen as legitimate in the eyes of others. The same group may be "terrorists," "freedom fighters," or "the legitimate rulers" depending on ideological and other perspectives. Women, children and slaves have not (and are not)

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7 I am indebted to my colleague, Dr. Yvonne Martin-Newcombe, Faculty of Education, University of Victoria, for suggesting this phrase.

8 C. Darling, ed., Working Together: Designing Shared Decision-Making Processes, 4 vols., vol. 3, Dispute Resolution Series (Vancouver, BC: Continuing Legal Education Society of B.C. and Dispute Resolution Office, B.C. Ministry of Attorney General, 1998). Darling was one of the associates of CORE who designed CORE's stakeholder negotiation processes. Darling defines a "stakeholder" as "... a person, group or organization representing a section of the public having a particular interest in the issue. Stakeholders include those directly affected, those who can block a decision and those who it is important not to surprise in the outcome."

9 Even though slavery is now universally condemned in international law, there are several forms of slavery practised today in several parts of the world, not excluding Western countries, that involve exploitation of people including female and male children for labour, sex-trade and military purposes. Cambodia has a serious problem
universally seen as having "legitimate" interests. Social norms about legitimacy change through time and interaction. Second, sometimes actors that are universally seen as illegitimate are nevertheless powerful. Even if morality may warrant exclusion of their voices from decision making processes, their interests must be contemplated by those who seek to make policy that affects their (illegitimate) interests. This is particularly true in Cambodia where the interests of very powerful political, military or business figures may be illegitimate from the perspectives of all international and local norms. It is not useful to pretend that powerful illegitimate interests do not exist, or that they do not have substantial power to affect both outcomes and processes. Therefore, this stakeholder analysis does not intentionally exclude any one with a significant interest, legitimate or otherwise. This does not mean I take a relativist view – I do make normative judgements, about right and wrong, legitimate or illegitimate. Labelling a particular group as “stakeholder” does not necessarily imply that it is appropriate to give illegitimate interests the status of “parties” with formal representation or voice in decision making. While one might decide not to give certain illegitimate groups standing as “parties,” it is unrealistic to refuse to call them “stakeholders” if they effectively control the stakes.

3.1.2 Conducting conflict analysis: Sources of information

Carpenter and Kennedy indicate that formal conflict analysis relies on direct observation, secondary sources and interviews, with all three being used in major conflicts. This chapter does not represent such a formal conflict analysis, which in the complicated human rights context of Cambodia would require more interview research than has been possible for this


One might propose that certain internationally recognized leaders are “illegitimate,” e.g. in Burma. During the 1980s, the PRK was seen by the UN as “illegitimate.”

Managing Public Disputes, supra note 3 at 71-91.
study. In this preliminary conflict analysis, secondary sources are largely relied on, particularly newspaper sources, supplemented with some first hand observation of and information from members of some of the stakeholder groups and secondary information from people knowledgeable about Cambodia. No conflict analysis assessment interviews were conducted *per se*; this was beyond the scope of research possible for this project. Also, it may be more important for the stakeholders themselves to go through a process of describing and analysing their conflicts jointly in some form of “controlled communication” activities. More on-site research and stakeholder assessment would be essential if consensus-based approaches were to be considered as a possible process for policy creation for Cambodian human rights conflicts. While this sketch has these acknowledged limitations, it might form a possible framework for developing an interview plan or conducting interviews for in depth stakeholder analysis of the human rights arena.

3.1.3 The human rights stakeholder groups in Cambodia: The cast of characters

In Cambodian theatrical tradition, characters are categorized into six main types: gods, nobility, ascetics, clown servants, middle-class urbanites, peasants and labourers. Characters are sharply defined as good or evil, and good must triumph over evil. The binary polarization of good and evil is played out in Cambodian politics today with many individuals and groups labelling their opponents as evil and wishing to triumph over them. In traditional Cambodian theatre, violence is brutally dramatic and explicit, and this too seems to play out on the real life stage in Cambodia.

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13 F. Smith, “Cultural Consumption: Cambodian Peasant Refugees and Television in the ‘First World’” in M. Ebihara, C. A. Mortland, & J. Ledgerwood, eds., Cambodian Culture since 1975: Homeland and Exile (Ithaca, NY and London, UK: Cornell University Press, 1994) at 147. Smith describes the didactic role of theatre and dramatic art imparting cultural morality and linking the supernatural with everyday life. According to Smith, in Khmer traditional drama, there are panoramic views of larger than life events. A single performance may contain comedy, religious epic, romantic drama, etc. Drama serves a teaching purposes with good and evil sharply defined. Good must triumph over evil. Violence is brutally dramatic and explicit.
This chapter outlines the “characters” and their characteristics using frameworks for conflict analysis developed by a variety of practitioners and theorists, largely drawing on frameworks used in public policy conflict analysis in North America.\textsuperscript{14} A liberal typology of stakeholders might classify them into the categories of government, civil society at the domestic level and international organizations and international civil society organizations at the international level. This liberal typology is not suitable to Cambodia, which retains the non-liberal maxim of “Nation, Religion, King.”

In keeping with the theatre metaphor, many of the Cambodian actors are classified here as gods, nobility, ascetics, etc. I do not use this method of categorizing the actors as a typology but as a literary device and as a way of organizing a long list of stakeholders in way that calls attention to the non-liberal character of Cambodia.

In doing this, I acknowledge the constructive power of literary devices. My use of these metaphors draws attention to the fact that Cambodia has ancient traditions that are still evocative in the twenty-first century, including hierarchical class structures that were not eliminated during communist rule, and have not been equalized with a written liberal constitution and two elections. It is acknowledged that the list of gods, nobility, ascetics, and others may be inadequate to Cambodia today, and leaves out twentieth century characters such as international organizations (IOs), international non-governmental organizations (INGOs) and NGOs. The non-Cambodian stakeholders are classified separately in Western terms; I have not tried to squeeze the UN into one of the Cambodian traditional character types. Western stakeholders may not fit into ancient Cambodian metaphoric categories. While no doubt my Western approach does impose itself on my description of Cambodian “stakeholders,” my use of the Cambodian theatrical character types is a way of trying to call attention to the fact that Cambodian stakeholders do not necessarily think or act in Western ways. Similarly, the lack of fit by international actors and their norms draws attention to the dynamic changes that have taken place and are still occurring in Cambodian culture in the intersections of traditional,

\textsuperscript{14} Supra note 3.
modern and postmodern ideologies and structures, and in the social interactions among those emerging from traditional backgrounds and those with foreign or new ideas.

Cambodia has a history of personalist rule; therefore, there are certain key persons who must be considered individually. Other stakeholders are institutions or groups, particularly international organizations and international and local civil society organizations. Nevertheless, in Cambodia the personality of leaders is always important to consider. Some stakeholders are more inchoate and are either without identifiable leaders, or their leaders are not generally named in news reports about their activities.

3.1.4 The cast’s attributes: Questions for stakeholder analysis

Using a synthesis of conflict analysis frameworks referenced above, the list of characters is created and the identified characters are considered according to attributes elicited by the following questions:

• Who are the parties? Who are the other affected people and groups? Whose presence and views are dominant? Whose presence, views and needs are marginalised, forgotten or excluded, and why?
• What issues are important to each stakeholder?
• How important are human rights issues to each stakeholder?
• What are the articulated preferences\(^\text{15}\) of each stakeholder concerning how the issues should be resolved? Have any stakeholders made claims? How urgent are the claims?
• What are the stakeholders’ interests? What are their needs, desires, concerns and fears?\(^\text{16}\)

\(^\text{15}\) “Analyzing Conflict and Violence,” *supra* note 12 at 389.

How are emotions affecting the dynamics (including fear/anxiety, anger, sadness, happiness, boredom). How are emotions being expressed? How are issues of face-loss and face-saving affecting the situation? What group identity issues or needs are evident?

What are the stakeholders’ world views, values and political ideologies? What are their approaches to peace, conflict and conflict resolution? What are their conceptions

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17 “Analyzing Conflict and Violence,” supra note 12 at 395, points out that joint “emotion-finding” is important along with joint fact finding “so that the work of resolution can be conducted on firm grounds.”


19 Face issues are complex and intertwined with power, dignity, embarrassment, shame and other social-psychological and cultural factors, including important gender issues. The importance of face cannot be underestimated, but this topic is one of the many that cannot be addressed fully in these chapters, and indeed is one of the many topics in the field of conflict studies and practice that needs more attention. See for example, B.R. Brown, “Face-Saving and Face-Restoration in Negotiation” in D. Druckman, ed., Negotiations: Social-Psychological Perspectives (Beverly Hills, CA: Sage, 1977); S. Ting-Toomey & M. Cole, “Intergroup Diplomatic Communication: A Face-Negotiation Perspective” in F. Korsenny & S. Ting-Toomey, eds., Communicating for Peace: Diplomacy and Negotiation (Newbury Park: Sage, 1990).


21 For a thoughtful “taxonomy” of several possible social goals for dispute resolution, including settlement, party satisfaction, party autonomy, social control, social solidarity, social justice, or transformation, see R.A.B. Bush, “Defining Quality in Dispute Resolution: Taxonomies and Anti-Taxonomies of Quality Arguments” (1989) 66 Denver University Law Review 335. For critique of structural functionalist approaches see Law in Ten Societies, supra note 2; L. Nader, “Coercive Harmony: The Political Economy of Legal Models” in L. Nader, ed,
of “human rights”? What are their conflict styles? What values or ideologies around conflict and conflict resolution do they demonstrate? Is conflict manifested and claims made as a route to justice? Alternatively, in the case of harmony ideology, is the manifestation of conflict seen negatively as a breach of harmony or a hindrance to social control?

- What are the approaches of the stakeholders to “development?” Do stakeholders centre around liberal economic development? Human development? Do they focus on participatory development or local knowledge approaches? Do they emphasise economic, legal, environmental, religious or other issues?
- What knowledge do the stakeholders have about relevant issues, laws and policies?
- How well informed are they about the other stakeholders’ views, interests and resources?
- What options do the stakeholders have for getting what they want: joint decision making, third party decision making, separate action? What are their most feasible options?
- What are the mandates of the stakeholders? Are their mandates and responsibilities clear? What are the sources of their mandates (constitution, laws, international instruments, religious authority, tradition or other)?
- Do the stakeholders have organized constituencies? Are the constituencies coherent? Are they unified?
- How legitimate are the stakeholders’ interests? How legitimate are the ways in which stakeholders are asserting their interests? What “voice” does each stakeholder have in the situation?

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• What are the power23 relationships among the stakeholders? What are the stakeholders’ capacities?24 What are their sources of power and influence?25 How are they exercising their capacities and power? What cultural, ideological or other differences seem relevant?

• What are the relationships with other stakeholders? How much and what kind of communication has been happening among the stakeholders? How much trust is there? What networks and interdependencies are there among the stakeholders and their constituencies, including overlapping networks? Are there actual or potential areas of common ground? Are there any complementary interests?

For this project, answers to these questions are necessarily sketchy. The rest of this chapter discusses stakeholders I have identified. For reasons of length, it is not possible to discuss all the stakeholders in terms of all of the questions asked above.26

3.2 The Cast

3.2.1 Gods

Spirits, gods and omens retain their power among many Cambodians.27 For the purposes of this


26 Such analysis has been conducted for most stakeholder groups, and is on file with the author.

analysis, “gods” include the god-king, and the ghosts and spirits of the Pol Pot time.

3.2.1.1 Sihanouk the “god king”

The people’s perception of Sihanouk as a “god king” and *dhammaraja* has been discussed in Chapter two. In this chapter, it is important to emphasize the supernatural nature of the king’s power and Cambodian people’s sense of cosmic integrity when the king is present. Sihanouk’s ouster in 1970 was

... felt by many people as a cosmic upheaval. The day after, some farmers, asked ... ‘How can we cultivate the paddy-fields this year, because we do not have the king to bring the rain down any more?’ In April 1980, a farmer to whom I [Ponchaud] pointed out that the rain was delayed that year, reacted immediately: ‘Since the day they overthrew the King, the sky has been upside down.’ Some others, reckoning the number of bad years from the year Sihanouk was overthrown in 1970, expressed the hope that ‘when the king comes, the soil will start again giving its fruits.’ In February 1990, some unusually heavy rain fell in the north of Cambodia. Several refugees, having been asked, young and old, gave the same explanation: Sihanouk is back in his country?

Cambodia was without the presence of its king for about two decades. Sihanouk continues to portray himself as the “father” of all Cambodians. For the most part he is beloved by the people in spite of his political machinations among various political factions throughout the 1960s,


29 *Cathedral of the Rice Paddy*, supra note 27.
1970s, and 1980s. Given Sihanouk’s age and poor health, it is important not to overlook issues of succession in the political stability of Cambodia. Some debunk the idea of Sihanouk’s continuing power in a “god king” role, saying that these old ideas are dying out, particularly among people born in Cambodia during the king’s roughly twenty year absence.

Based on accumulated general knowledge of Cambodia and the reading of news reports, one might speculate on some of the issues important to King Sihanouk. One issue is the role of the monarch in current Cambodia politics. The King has some constitutional responsibilities including appointment of persons to key bodies. King Sihanouk has also played an important mediating role, including post-election mediation among the coalition parties in late 1998. A key issue is the matter of his succession; he has hinted about this in the context of his poor health and advancing age. On his seventy-eighth birthday in October 2000, he articulated some issues he sees as important including “morality” at all levels, HIV/AIDS issues, and the “scourge” of sexual exploitation. He has not highlighted civil and political rights as an issue. Rather, he has highlighted issues of peace, stability, economic issues and international relations, including relationship with China. He plays a popular role in poverty relief; people


31 His constitutional duties include being Chairman of the supreme council of national defense (1993 Constitution, Article 24); nomination of two senators to the Senate (1993 Constitution, Article 100); responsibility as “guarantor of the independence of the judiciary” with the assistance of the Supreme Council of the Magistracy (1993 Constitution, Article 132); responsibility to chair or appoint a chair of the Supreme Council of the Magistracy which appoints judges (article 134); appoint three of nine members of the Constitutional Council (1993 Constitution, Article 137); Constitution of the Kingdom of Cambodia, as amended March 8, 1999, as promulgated on Cambodia Council of Jurists’, online: Council of Jurists <http://www.bigpond.com.kh/Council_of_Jurists/Constit/KRM19_03_01E.htm> (date accessed 9 November 2000).

32 M. Grainger, “Last Gasp Intervention by Sihanouk” *Phnom Penh Post* (2 October 1998). It should be noted that the parties themselves, including Hun Sen, did wish to settle the matter. Several key members of the foreign diplomatic corps also played important parts in mediating this conflict. Electronic communication from diplomat at the time (24 July 2001).


34 S. Norodom, “Message of His Majesty Norodom Sihanouk, Kingdom of Cambodia to the Phnom Penh Post” *Phnom Penh Post* (27 October 2000).

35 “King Sihanouk Interviewed on Forthcoming Visit of Jiang Zemin” *Xinhua* (8 November 2000). In this
from the countryside petition the King for assistance.36

Sihanouk’s record as ruler in the 1950s and 1960s includes violent repression of political dissidents, and summary executions.37 Sihanouk does not now take positions adverse to the CPP. He tends to remain silent on matters that might inflame polarized factional interests, except to call all parties and political leaders to cooperate for the good of Cambodia. He does speak out on certain social and cultural rights in keeping with CPP interests. He treads carefully regarding the issue of accountability of Khmer Rouge leaders for past atrocities. He has spoken generally in favour of open debate about public issues in the context of the National Assembly.38 He has also spoken out publicly about “...justice for our poor people... who... are miserable because their land has been confiscated” allegedly by local officials and military personnel.39 He has stated that he would intervene to the extent of his constitutional power to grant amnesties to jailed human rights workers arrested in conjunction with toxic waste issues in late 1998.40 He intervened on behalf of six women factory workers allegedly dismissed for leading a strike in April, 1999.41 Thus, he does sometimes intervene in specific cases, or to make general statements encouraging adherence to the Constitution and laws. He also publicly stated displeasure at the welcome given to defecting Khmer Rouge leaders, Khieu Samphan and Nuon Chea, stating that he would not grant them amnesties, that an international tribunal story, Sihanouk is quoted as taking a position on Taiwan by agreeing with a “one China” approach and the “one country, two systems” approach for Hong Kong and Macau.

36 “The Samdech Euv Team, under the Guidance of His Majesty King Norodom Sihanouk, Provides on-Going Assistance to the Kingdom’s Underprivileged” Phnom Penh Post (27 October - 9 November 2000).


38 Letter sent by His Majesty the King of Cambodia to the Prime Minister of Cambodia, on February 4, 1999. Circulated on CamNews electronic news list.

39 His Majesty The King of Cambodia, Norodom Sihanouk, quoted in “Cambodia’s King Seeks Justice for Dispossessed” Reuters (25 February 1999).


41 E-mail communication to CamNews electronic news list from Sam Rainsy Party, “King Intervenes in Favour of Dismissed Workers” (Phnom Penh: Sam Rainsy Party, 1999).
would have to try them for genocide, and that he would leave the matter of handling of 
“forgiveness for the Khmer Rouge” to Prime Minister Hun Sen.42

He demonstrates a Khmer-Buddhist world view in which he participates in Buddhist 
ceremonies and calls the people to Buddhist values. In keeping with popular Khmer-Buddhism, 
he seeks advice from fortune-tellers along with Buddhist theory.43 He is Western educated, and 
has aligned himself politically with liberal democratic views, as evident in his role in the Paris 
Peace Accords. Regarding his values about conflict, in the past he has fought to win, 
eliminating enemies and aligning himself with those he believed would advance his interests. 
Examples include his violent repression of communists in the late 1960s and his alliances of 
various kinds with the Khmer Rouge in the 1970s and 1980s. In his neutralist positions of the 
1950s and 1950s, he appeared to foster harmony as a means of self-protection. He tried to 
pacify communists in the 1950s and 1960s by developing his own “socialist” policies and by 
placing communists in key positions. He fostered an image as peacemaker among the factions 
during the 1980s, and continues to have an image as a mediator among the current political 
factions. He has fostered this image by publicly supporting peacemaking activities of clergy 
and laity, including the dhammayietra movement. Thus, he appears to foster “harmony 
ideology” when possible, but competes fiercely when his interests call for it.

Despite his age and frequent illnesses and absences, he keeps well-informed about all policies 
and issues regarding economic development and human rights. He maintains communication 
with all political parties and relevant stakeholder groups, including the poor. Considering 
Sihanouk’s process options, he is most likely to continue to promote harmony and stability and 
to mediate among political factions. He may also negotiate and manipulate and try subtle “log-
rolling” to try to ensure his preferred royal succession scenario. While he is shrewd, one could 
speculate that his interests in the succession may leave him vulnerable to manipulation by 
various parties. It is likely that he will continue to cooperate with the ruling party and play a


mediating role whenever there are political logjams.

King Sihanouk enjoys high public legitimacy, even though many have criticized his past "mistakes." Cambodians are emotionally attached to royalty and personally attachment to Sihanouk. The moral authority of the FUNCINPEC party and its leader, Norodom Ranariddh, is undoubtedly due to its identification as "the king's party." One must not underestimate Sihanouk's influence or the impact of his lack of independent leadership. Sihanouk uses his power by making public statements that are aimed and timed skilfully to maintain public popularity and his own position of strength and moral authority. He also frequently uses mediation strategies among factions, urging them to agree in the national interest. While he exercises his mediation capabilities in areas he sees as important, he keeps an eye to pragmatics, avoiding open conflict with any of the political parties, particularly the CPP.

Sihanouk appears able to work with all the political factions. While his past human rights record and his reputation for wily power mongering reduces his credibility among human rights advocates, his popularity is utilized by many groups to legitimize politically safe causes they know he will support, such as the pre- and post-election peace walks in 1998, poverty-relief, anti-corruption, sexual morality and related issues of health and child-protection. His history suggests that he will not hesitate to align himself with a winner while trying to be seen as "neutral.” While he cannot be counted on to champion human rights, he may be able to facilitate useful dialogue to nudge parties toward agreement on projects that have international legitimacy.

3.2.1.2 Ghosts and spirits of the Pol Pot time

The Pol Pot period and former Khmer Rouge leaders continue to haunt Cambodians. Frightening and dangerous ghosts and spirits are evoked by dead and living former leaders of the DK regime. While "Pol Pot quit the world on April 15, 1998... his demise does not bring

44 This term was used by a Cambodian civil society leader in discussion (24 May 2000) [Notes on file].
closure to a history of horrors during which over a million lives were taken.”\textsuperscript{45} Cambodia is “a country haunted by 1.7 million unavenged ghosts.”\textsuperscript{46} Many Cambodians do not see these “ghosts” just as metaphors. The ghosts are both metaphorical and real. Until they are laid to rest, it may not be possible to “bury the past.”\textsuperscript{47}

The government has stated it wishes to try selected leaders of the Pol Pot regime, and there is a good deal of public support for accountability. While enabling legislation has now been passed to create a Khmer Rouge tribunal, the government does not appear to have much appetite to take on any but tame ghosts at the present time. It appears that former Khmer Rouge leaders, except those who have been arrested, have some sort of power to maintain their impunity in spite of evidence of their involvement in atrocities during the 1970s. The delays in implementing agreements concerning a tribunal for Khmer Rouge leaders have led to opinions on the part of many that the Khmer Rouge still hold considerable sway with the government regarding any policies or processes that might hold the Khmer Rouge accountable.\textsuperscript{48} While the Khmer Rouge are not likely to be parties at any public policy negotiations, their power still needs to be considered, including their power to frighten Cambodian people in shadowy ways.

3.2.2 “Nobility”

In the category of nobility I include royalty, government leaders and formal party structures.

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\textsuperscript{46} T. McCarthy, “Survival of the Paranoid: Cambodia’s Leader Talks to Time About Power” \textit{TIME} (22 March 1999) [hereinafter “Survival of the Paranoid”].

\textsuperscript{47} Please refer to Chapter Two, text accompanying notes 179 & 180.

\textsuperscript{48} Interview with civil society leader, May 30, 2000, notes on file with the author. See also “Cambodia Inaction Delays Khmer Rouge Trial” \textit{Reuters} (27 July 2000).
3.2.2.1 Hun Sen\textsuperscript{49} and the Cambodia People's Party (CPP)

Cambodia’s Prime Minister, Hun Sen, known as Cambodia’s “strong man,” is viewed as the central hub of Cambodia’s complex power and patronage networks. It is widely believed that policy reforms are unlikely to be made or seriously implemented without Hun Sen’s personal support, consent or acquiescence.

Born in 1952 in a rural Cambodian village, Hun Sen was sent to a pagoda school in Phnom Penh when he was twelve, where he became involved with the Cambodian Communist Party through a cousin living in the same pagoda. He maintained his affiliations with communists throughout the 1960s and joined the resistance to the Lon Nol regime during the early 1970s. By 1973 he was aware that the insurgent National United Front of Kampuchea (NUFK) was not under just one chain of command. It was the Pol Pot clique that took over Cambodia in 1975. He was wounded five times before 1975 including the loss of his left eye just before the final assault of Phnom Penh, “which put him out of commission during the traumatic evacuation of Phnom Penh”\textsuperscript{50} in April 1975. It has never been convincingly suggested that Hun Sen was part of genocidal activities of the DK regime. Disenchanted with the Pot Pot regime and fearing for his safety, in 1977 he escaped to Vietnam with some others “just days ahead of his executioners.”\textsuperscript{51} In 1979, the Vietnamese chose Hun Sen to be the Cambodian foreign minister. He served the regime along with other defectors, Heng Samrin,\textsuperscript{52} Chea Sim\textsuperscript{53} and Pen Sovann.\textsuperscript{54}


\textsuperscript{50} When the War Was Over, supra note 27 at 441.

\textsuperscript{51} Ibid. at 441.

\textsuperscript{52} Heng Samrin was Prime Minister from 1979 to 1981. He was replaced as Prime Minister in 1981 by Pen Sovann. Chan Sy was Prime Minister from 1982 to 1984. In early 1985 Hun Sen became Prime Minister. Hen
In 1979, he was recognized as having “the ruthless practicality of a talented survivor. . . “ He quickly became known as an “outstanding politician.” In the 1980s, Hun Sen was noted for his “agile intellect and even more openly large ambition for himself and the country.” He became Prime Minister in the PRK regime in 1985. Hun Sen has never lived outside Cambodia except for his stay in Vietnam during the 1970s. Because he grew up during the war and the Khmer Rouge period, he has been described as being “not restrained by the morals or the pretense of morals that affected his elders.”

Thus, Hun Sen has now been formally in power in Cambodia for over sixteen years, maintaining power throughout the PRK and SoC years. After the 1993 UNTAC election he held onto power which he solidified during the violent ouster of Ranariddh in 1997. He secured his government’s international legitimacy through the 1998 elections.

The issues important to him are the economic security of Cambodia, including poverty relief. Issues also include political stability and the balancing of Cambodian sovereignty with international legitimacy and economic support. ASEAN regional economic strength and stability are also important. While economic and social rights may have some priority for Hun

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53 Chea Sim was appointed Minister of Interior in the Heng Samrin government. He became President of the CPP in 1991. He was chair of the National Assembly during the 1993-1998 government. He was reelected to the National Assembly in 1998 from which he resigned in December 1998. He was appointed President of the Senate.

54 Pen Sovann served as Prime Minister in the PRK regime in 1981. He was imprisoned by the Vietnamese between 1982 and 1992. He has no involvement or affiliation with the CPP. While he heads a small political party, it has no seats in the National Assembly, online: Cambodian National Sustaining Party Website <http://www.pensovann.com/biography.html> (date accessed: 16 August 2001).

55 When the War Was Over, supra note 27, at 442-43.

56 Ibid. at 441.

57 Ibid. at 465.

58 Ibid. at 465.

59 “Hun Sen's Biographers,” supra note 49.
Sen, civil and political rights are not an apparent priority, nor is the establishment of the Constitution’s liberal democratic principles such as rule of law, independent judiciary and independent civil service. Hun Sen has acknowledged many times that corruption is an important issue.⁶⁰

Hun Sen’s positions regarding civil and political human rights have centred mainly on the issues regarding the Khmer Rouge. His positions have been articulated mainly in reaction to international pressure to improve human rights and to call human rights violators to account. His consistently expressed position has been that accountability of the Khmer Rouge is an internal matter. He invokes Cambodian sovereignty, and has criticized the UN and some other countries for meddling in Cambodia’s internal affairs. Nevertheless, for about two years he negotiated with the UN over a tribunal with mixed Cambodian and international participation to try former senior leaders of the Pol Pot regime. The implementation of this agreement is subject to a law’s being passed by the National Assembly and the Senate, which finally occurred in January, 2001 after much delay, during which he cited more pressing issues of economic growth and political stability. The plan for trials has again been stalled after rejection by the Constitutional Council.⁶¹ Also, the UN objected to the wording of the legislation.⁶²

In 1998, reacting to international pressure over events during and after the CPP’s July 1997 takeover, Hun Sen established a National Human Rights Committee headed by CPP official, Om Yientieng. There has been no CPP support for development of any independent human rights body. Hun Sen took positions on corruption in the courts including an incident in December 1999 in which he ordered the rearrest of persons released by courts under a cloud of

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⁶⁰ "Survival of the Paranoid," supra note 46; “Cambodia’s Prime Minister Vows to Stamp out Corruption” Australian Broadcasting Corporation (28 February 1999).


corruption, followed by a suspension of two senior court officials by the Minister of Justice. However, apart from this, Hun Sen has not made serious movement toward measures that would help to create an independent judiciary.

Hun Sen's behaviour suggests that his primary interest is maintenance of his central power in Cambodia, including maintenance of CPP networks that emanate down through the communes and into the villages. This could be expressed as an interest in political stability. He also needs to maintain sufficient international legitimacy to draw economic aid from IOs and Asian, Western and ASEAN donors. He fears loss of his own life if he does not maintain firm control.

Apart from his stated views about power and survival, it is difficult to ascertain Hun Sen's world view, values and political ideology. Although Buddhist practice was partially suppressed during the early 1980s, in 1989 Hun Sen apologized for "mistakes" toward religion and lifted most restrictions. He and other government leaders became "conspicuous for their public piety." More recently, he has invoked Buddhist values of forgiveness and non-revenge regarding the amnesty of former Khmer Rouge members. He has publicly articulated Buddhist views that peace should be built in the mind through education of people and leaders. He has stated support for the Ten Royal Virtues. But Hun Sen is not viewed as an ardent adherent to


65 There have been several incidents in which Hun Sen appears to have been personally attacked, including a grenade attack on his personal residence in September, 1998. See K. Phelim & P. Chuon, "Rainsy Activists Framed for Rocket Attack, Says SRP" Phnom Penh Post (17 September 1999); "Survival of the Paranoid," supra note 46.


68 H.E. Samdech Hun Sen, "Address of H.E. Samdech Hun Sen, Second Prime Minister of the Royal
Buddhist ethical precepts in his personal or political life.⁶⁹

Hun Sen, is recorded as equating “peace” and “reconciliation” with the absence of armed insurgency and the reintegration of the armed forces in late 1998. He has also publicly defined peace more broadly as a process with cooperation as its foundation: “... peace is not just the absence of war or the absence of violence. It is also about development and social justice that, in turn, are the results of peacemaking, peacebuilding, and peace maintenance.”⁷⁰ However, Hun Sen’s actions indicate he is not averse to using violence to maintain social control. To make sense of these apparent contradictions, one might suggest that Hun Sen sees “peace” as an absence of expressed conflict and compliance with centrally exercised authority,⁷¹ more in the nature of a Pax Romana. To illustrate, he says the peace process in Cambodia has worked hard on reconciliation through a policy of

...‘tolerance’ in order to appeal to military leaders and soldiers of the Khmer Rouge so that they consciously realize the futility of violence and abandon the senseless fighting, the fighting between the Khmers, the meaningless struggle in the jungle and return to the mainstream of the society which is rapidly progressing and rebuilding. Even though there is a law outlawing the Khmer Rouge, the Royal Government still keeps the door open to welcome back those who have realized the folly of their cause.⁷²

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⁶⁹ Buddhist precepts include no killing, no stealing, no false speech, no adultery, no intoxicants. See also Chapter Two, for Buddhist precepts for good governance.

⁷⁰ “Peace from the Heart,” supra note 67 at 205-06.


⁷² “Peace from the Heart,” supra note 67 at 205-06.
A few months later, in July 1997, Hun Sen was less gracious to political opponents who refused to cooperate and challenged his power. Hun Sen’s mindset about the connection between power and conflict appear firmly entrenched in “zero-sum” beliefs about power: “For Hun Sen, power means survival, and it has only two settings: all or nothing.”\(^7^3\)

Hun Sen’s apparent lack of practical interest in implementing the rule of law and liberal democratic reforms to the legal system, may also be better understood in the light of his communist political training from an early age. Communist systems do not have judicial institutions independent of the executive. Rather, courts are supervised by the executive to ensure they fulfill party policy. Hun Sen has been described as a “sugar-coated communist”\(^7^4\) with little interest in liberal ideals of civil society. While it is difficult to find any evidence that Hun Sen now subscribes to socialist ideology, it should not be surprising that he does not exhibit the same zeal for liberal democratic legal institutions as do foreigners long trained under the hegemony of liberal democratic ideals.

In the human rights arena, several process choices are available to him. One choice might be to move strongly into collaboration with international organizations, foreign governments, international and local NGOs toward policies and spending to legislate and implement anti-corruption, judicial reforms, military, police and civil service reforms, human rights, public consultation and other processes of liberal democracy. This currently seems unlikely to observers and civil society activists who note the uneven progress in some areas and intransigence in others. Nevertheless, some believe that Hun Sen’s intelligence and capacity for growth and change are such that he may be prepared to initiate substantial reforms provided they do not undermine his power.\(^7^5\) A more likely process choice for Hun Sen is to ignore

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\(^{73}\) “Survival of the Paranoid,” *supra* note 46 at 56-57.


\(^{75}\) Citing Lao Mong Hay in *Cambodian Leader: Hun Sen Says He’s a Savior, Critics Say He’s Just Ruthless* (GoCambodia.com, 2000), online: GoCambodia <http://gocambodia.com/leaders/hun_sen.asp> (date accessed: November 2000).
pressures toward liberal democratic and human rights policies, while seeking relationships and aid from countries less concerned with civil and political rights, such as China. Hun Sen appears to be doing this. A third process choice might be to continue to engage with discussions on liberal democracy and human rights to the extent that aid monies are kept flowing. Hun Sen seems to be doing this, too. The Western international community does not appear likely to press sufficiently hard to engage Hun Sen in serious creation or implementation of international human rights policies or liberal democratic reforms. Hun Sen seems to feel no need to negotiate with political opposition, NGOs or other Cambodian bodies, except at the instance of foreign governments and international bodies who can affect aid or other CPP interests.

CPP authority extends throughout Cambodia to rural areas, where the civil authorities are CPP loyalists. There are plans for commune elections in early 2002, but opposition leaders have alleged intimidation through apparently politically motivated killings. This has been denied and those making the allegations threatened with prosecution. While the CPP have defacto "voice" and formal legitimacy, CPP human rights policies, practices, and mechanisms are not universally supported within or outside Cambodia. The CPP position and policies do not have hegemonic strength among the population. Hun Sen’s sources of power stem from his official position for the past two decades, together with the strong CPP networks extending from the top to the grass roots. He is now in command of all of Cambodia’s military power. Also, Cambodia’s partisan civil service is largely composed of CPP members. Hun Sen “presides over a patronage network, makes key decisions out of his residence and runs cabinet meetings at which nobody dares challenge his authority.” Thus, he uses patronage to inspire loyalty.

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76 Western nations (including Canada) and international organizations have not put much pressure on China to make changes in its human rights policies.

77 A. Marcher, "Rights Groups Face Prosecution" Phnom Penh Post (1 September 2000).

78 See the comments of Lao Mong Hay quoted in Cambodian Leader: Hun Sen Says He’s a Savior, Critics Say He’s Just Ruthless (GoCambodia.com, 2000), online: GoCambodia <http://gocambodia.com/leaders/hun_sen.asp> (date accessed: November 2000).

79 “Complex Pragmatist,” supra note 49.
He is also able to instil fear in those who might challenge him. He appears willing to use individuals in instrumental ways to eliminate enemies and survive in power. "In order to kill your enemies you should know how to move your pawns," said Hun Sen, using a chess analogy. "If you lead with your big pieces, you put them in danger." The CPP also controls a great deal of property in Cambodia.

Hun Sen and the CPP maintain working relationships with some NGOs, including some that attempt to maintain a non-partisan stance. Hun Sen has a poor relationship with Sam Rainsy, but maintains cordiality with Norodom Ranariddh. Hun Sen maintains a working relationship with King Sihanouk. Hun Sen and the CPP have poor relationships with most human rights groups that criticize his policies. He is likely to be willing to work with other stakeholders to the extent necessary to maintain his own interests.

While Hun Sen remains the most important political figure in Cambodia, it is important to mention continual rumours about fissures within the CPP. Some officials, like Sar Kheng, the Deputy Prime Minister and Minister of Interior, are viewed by people in the foreign community as reform-minded, while others take more hard-line, authoritarian approaches. Hun Sen lives in a fortified compound outside Phnom Penh. It is believed that Hun Sen's failure to press for a Khmer Rouge trial is connected to fears for his own life and that of his family members.

3.2.2.2 Prince Norodom Ranariddh and FUNCINPEC

Prince Norodom Ranariddh is the second eldest son of King Sihanouk. In 1970, when Ranariddh was in his twenties, he was given asylum in France. From 1976 to 1983, he taught

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80 "Survival of the Paranoid," supra note 46.

81 S. Williams, Where Has All the Land Gone? Land Rights and Access in Cambodia (Phnom Penh: Oxfam, 1999) at 13 [hereinafter Where Has All the Land Gone?].

82 Electronic communication from key informant (24 July 2001); "Complex Pragmatist," supra note 49.

83 Detailed biography on Prince Ranariddh is not readily accessible.
law and international relations in France. He maintains his connection with the University of Provence and returns to lecture there. In 1986, while still in exile, he was named Chief of General Staff of FUNCINPEC. He became FUNCINPEC’s chairman in 1991. During the 1993 election, Sihanouk decided not to run against Hun Sen’s CPP, so Ranariddh led FUNCINPEC in the election. Ranariddh, then forty-seven, “looked more like the Sihanouk the people remembered than Sihanouk himself.” He won a majority in the election. When Hun Sen refused to give up power, Sihanouk “moved against his son” in negotiations with Hun Sen. The result was a coalition in which Hun Sen and Ranariddh became co-prime ministers and Sihanouk was crowned as constitutional monarch. Between 1993 and 1997, Ranariddh and Hun Sen developed a rivalry that included attempts by both of them to secure the loyalty of top Khmer Rouge leaders. Finally, in July 1997, Hun Sen accused Ranariddh of plotting a coup. Ranariddh left the country, and a military battle erupted in Phnom Penh between Ranariddh’s and Hun Sen’s forces. Hun Sen effectively seized all power.

Through an internationally brokered political accommodation, Ranariddh returned to contest the 1998 election. Again he shares in a coalition government with Hun Sen. However, since after the 1998 election, Ranariddh has avoided taking positions at variance from those of Hun Sen. Rumours abound concerning the succession to the throne. Ranariddh is not the favourite contender. Nevertheless, Ranariddh’s political career likely remains hinged on royal power and popularity.

For Ranariddh, the main issues are Cambodia’s political stability, economic growth, and participation in regional arrangements. While international legitimacy and respect are important to Ranariddh, human rights are not generally articulated as issues of high importance. Ranariddh’s positions are most likely to follow the CPP as long as Hun Sen’s power remains unquestioned. Ranariddh does not appear to have made public claims about human rights since his return to Phnom Penh in 1998. Ranariddh’s interests may be primarily face maintenance

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84 *When the War Was Over*, supra note 27 at 513.

and power, or at least the appearance of power. He might also fear loss of his existing power.

Little is written about Ranariddh, so his world view is difficult to ascertain. He is Buddhist, but not reputed to be deeply religious. He is not known for taking courageous, principled positions. His world view may be influenced largely by Western points of view about democracy and law. Ranariddh is not likely to advocate or negotiate about human rights in ways other than mandated by the CPP. There are FUNCINPEC members who have a sincere interest in human rights, such as Mu Sochua and Kem Sokha, to name two (both discussed later.) Their best process option may be to align their interests with foreign interests supportive of international human rights.

Ranariddh has an official mandate as head of FUNCINPEC, currently a coalition party in government. He is also speaker of the National Assembly. Because of his royal and official positions, if he spoke out on matters of public policy in a principled way he might be listened to by the public. FUNCINPEC has members on National Assembly and Senate human rights commissions, but the party’s real independence from CPP at the present time is doubtful. The current cohesiveness of the FUNCINPEC party was not researched for this chapter. FUNCINPEC party members, while likely loyal to Sihanouk, may not be loyal to Ranariddh. This research did not uncover information about how the interests of Ranariddh and “rank and file” FUNCINPEC members and supporters are currently aligned.

Ranariddh’s power resides in his legitimate authority as head of a government coalition partner, and speaker of the National Assembly, as well as his royal family connection. One can speculate that Ranariddh would be interested in working with CPP or others who hold power or who can prop up his power. He may have positive relationships with FUNCINPEC-oriented NGOs, however, as a leader he is not a particularly powerful individual in his own right. Likely he is not personally a strong factor in the political equation, although the FUNCINPEC party may be important because of its royalist alignment. FUNCINPEC also owns a good deal of
3.2.2.3 Sam Rainsy Party

The Sam Rainsy Party (SRP) supports the political perspective of Sam Rainsy and his followers. Sam Rainsy was born in 1949. His father was Sam Sary, Deputy Prime Minister in Prince Sihanouk’s government. His family left Cambodia in 1965 when he was about sixteen, and he did not return until 1992 when he was in his early forties. Therefore, he was not in Cambodia during the war, the Khmer Rouge period or during the PRK regime of 1980s. He is a French-educated accountant with a graduate degree in economics and training in political science. He is also a lawyer and a member of the Bar Association of the Kingdom of Cambodia (BAKC). Sam Rainsy became a member of FUNCINPEC in 1981, the year it was founded, and was a member of its steering committee between 1992 and 1995. He was the FUNCINPEC Minister of Finance in the coalition government after the 1993 election. He was dismissed from FUNCINPEC amid acrimonious controversy in 1995, and thus lost his seat in the National Assembly. In 1995 he formed his own political party. Since then he has campaigned against the CPP government in Europe and North America. He has also been outspoken in Cambodia, complaining of intimidation of his party by the ruling CPP. In March, 1997, a grenade was thrown into the midst of a public demonstration he was leading against corruption and for independent courts (and against the government).

The 1998 election resulted in the Sam Rainsy Party becoming the official opposition party. After the election, he and Ranariddh joined forces to protest election results. A number of public demonstrations were launched at the instance of Sam Rainsy, which were largely supported by students and some monks.

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86 Where Has All the Land Gone?, supra note 81 at 13.

87 Detailed biography on Sam Rainsy is difficult to find. See the brief biographical sketch on the Sam Rainsy Party website, online: SRP <http://www.samrainsyparty.org/about_sam_rainsy.htm> (date accessed: 24 October 2000).

88 Cambodia has a proportional representation electoral system.
As opposition leader, he has called attention to particular cases of impunity. He has launched demonstrations and led or supported factory worker strikes. Sam Rainsy appears to have a good deal of urban legitimacy and popular support, including students. However, it is important to remember that in rural areas there is long-standing grassroots penetration by the CPP dating back to the communist years, as well as historic popular support for the King (and thus the “King's Party,” FUNCINPEC). Sam Rainsy says that in rural areas support for the SRP is hampered by intimidation which he blames on the ruling party. During 2000, Sam Rainsy complained of politically motivated killings and intimidation of SRP party members during preparations for the upcoming commune elections.

For Sam Rainsy and his supporters the chief issues are democracy, accountability and the rule of law in Cambodia. He has said that the priority issues for the SRP are land reform, commune elections, illegal logging, ending impunity, and the Khmer Rouge tribunal. Sam Rainsy has taken stands in favour of a liberal economy and international human rights. He regularly takes public positions and holds demonstrations concerning various causes related to democracy, human rights and workers' rights. Given Sam Rainsy’s loss of power and position during 1995 when he was dismissed from FUNCINPEC and the National Assembly, one can speculate that among his interests may be face saving. One can also speculate that among his interests are a desire for power and maintenance of existing power. Attacks on his life in 1997 together with incidents of intimidation of party members suggest he may have legitimate fear of loss of life or injury for his party members and himself.

While Sam Rainsy is a Buddhist and spent a period of time as a monk during 1996, it is difficult to speculate about the decree to which Buddhism affects his world view and manner of

\[\text{Footnotes:}\]

89 “Fed-up Garment Workers Hit the Streets Again in Cambodia” Agence France-Presse (18 June 2000).


91 Ibid.

92 It is common for Buddhist men to spend one or more periods of time as a monk on spiritual retreat. Sam Rainsy did a retreat at Wat Botum around November 21, 1996.
operation. He appeals to “the aspects of Buddhism which are positive” but publicly decries a fatalistic approach that blames current troubles on previous lives.\textsuperscript{93} \text{His world view is likely heavily influenced by his lengthy residence in France beginning in his mid-teens. He has also been educated at the graduate level in Western politics, law and economics. It is clear that he has been steeped in Western concepts of liberal democracy. His ideology around conflict is suggestive of Western adversarial argumentation. His argumentation style is abrasive, critical, and often inflammatory. His approach is deliberately provocative in order to “shake people up...”}\textsuperscript{94} \text{He states he is non-violent: “The only weapon I have used is my pen whereas my supporters and myself have been victims of bullets and grenades.”}\textsuperscript{95} While referring to another Asian politician “known for his honey-coated razor tongue” Sam Rainsy acknowledged: “Maybe I have to put more honey on my razor.”\textsuperscript{96}

He is the leader of a formal opposition party. This gives the SRP a formal mandate to appoint people to certain positions in various commissions and the Senate. It also provides him with the right to pose formal questions to the government and the right to receive answers (most of which answers have been neither timely nor forthcoming). Sam Rainsy appears to be knowledgeable about international and local human rights issues as well as the various activities of parties and NGOs.

Sam Rainsy’s favoured process options in the area of human rights included aligning with foreign interests, speaking out, leading public demonstrations, going on hunger strikes, and going into self-exile when necessary. He has also chosen to decentralize his party’s decision making, which may strengthen the party but leaves it more open to internal division. He has generally not used negotiation or persuasion; rather he uses confrontational (though non-violent) power approaches. He has generally not condoned violence, but prefers to claim the

\begin{footnotes}
\item[93] ‘I Can Only Speak out,’ supra note 90.
\item[94] Ibid.
\item[95] Ibid.
\item[96] Ibid.
\end{footnotes}
moral high road, blaming and denouncing his adversaries for any and all ills within Cambodian society and government. It is important to note that he has rather often tried to defend himself from accusations of racism against the Vietnamese minority in Cambodia, including accusations that he fomented Cambodians' notorious and wide-spread anti-Vietnamese feeling during the 1998 election and post-election demonstrations. Indeed, audiences have been known to applaud “yuon-bashing” statements in his speeches (yuon is the Cambodian term for Vietnamese). Published English language versions of some of his statements can be ambiguously taken to refer to Vietnam's historic domination, or to the Vietnamese minority in Cambodia, or both.97

Sam Rainsy's sources of power or perceived power include his alignments with certain people in foreign governments including members of the United States Congress and the European Union. He is also aligned with certain local unions.98 Sources and degree of financial support of SRP were not uncovered in research. He has the ability to command a good deal of public attention in the media and appears to have a following among some foreign journalists. His party is adept at using the internet internationally, compared to the CPP and FUNCINPEC. This international network may provide some protection from the results of his aggressive opposition speeches and demonstrations.

At the beginning of 2000 he claimed between four and five hundred thousand members for the SRP. There have been rumours about friction within the party but this is discounted by Sam Rainsy.99 His credibility is not high with the government coalition parties nor with much of the foreign community. He is widely seen as lacking appropriate moderation, and consistently chooses confrontation over negotiation.

Sam Rainsy does not appear to have visibly close associations with human rights or other


98 Sam Rainsy is advisor to the Free Trade Union of the Workers of the Kingdom of Cambodia. (FTUWKC).

99 'I Can Only Speak out,' supra note 90.
NGOs. It is possible that groups who hope to remain non-partisan would fear association with him because of his inflammatory and adversarial positions and style. On occasion he has demonstrated willingness to work with others, including his work with Ranariddh after the 1998 election in opposing election results. However, his relationship with Ranariddh has been adversarial. Sam Rainsy’s vituperative rhetoric suggests outright loathing of the CPP; this sentiment appears to be reciprocated.

3.2.2.4 State-sponsored human rights bodies

There are three state human rights bodies. The National Assembly Commission on Human Rights and Reception of Complaints is headed by Chhour Leang Huot, a CPP appointed member of the National Assembly. The Senate Commission on Human Rights and Reception of Complaints is headed by FUNCINPEC appointee, Senator Kem Sokha. The ineffectual National Committee on Human Rights is headed by CPP appointee, Om Yientieng.

The National Assembly Commission on Human Rights and Reception of Complaints was very active prior to the CPP takeover of 1997, particularly between 1994 and 1996. Its first Chair, Kem Sokha was appointed in 1994 when the Commission was formed. He was a member of the Buddhist Liberal Democratic Party (BLDP) the smallest minority party in the National Assembly. Its vice-chair was Ms. Nin Saphon, a CPP appointee, and its Secretary was a FUNCINPEC appointee. Between 1994 and 1996 the Commission received numerous complaints but had few resources to address them. Land disputes were then (and remain) the cause of many human rights complaints. Under his leadership, foreign sponsorship was secured to hire ten human rights officers who were hand picked with assistance from the UN from a large number of applicants. A number of training programs were held, of which one was a Canadian conflict resolution project. In 1995 and 1996, the Commission came under increasing pressure. There was considerable internal tension among the members of the commission which hampered its work. Despite this, the Chair, the CPP-appointed Vice Chair and some other parliamentary members of the commission were active in encouraging and participating in
foreign sponsored training and conferences.\textsuperscript{100}

The Commission ceased its public activism after the July 1997 CPP takeover after which it lost its foreign funding and support. Kem Sokha lost his parliamentary immunity after he lost his seat in the July 1998 election. He went into hiding in September, 1998, after Hun Sen stated he might face arrest for involvement in the opposition’s election protests.\textsuperscript{101} A new chair of the National Assembly Commission was appointed by the CPP in late 1998 after the new coalition government was formed. Since then the Parliamentary Commission has not been active.

There was considerable international pressure for the Hun Sen government to deal with the human rights complaints arising out of the July 1997 events. The CPP responded in June 1998, just before the election, with a joint directive by the two Prime Ministers creating a Committee on Human Rights headed by his appointee, Om Yientieng. The National Committee is not considered to be effective.\textsuperscript{102} In fact, it has been suggested that the Committee was intentionally designed to be ineffective.\textsuperscript{103}

The Senate Commission on Human Rights, appointed after formation of the Senate in early 1999, is headed by Kem Sokha, now a FUNCINPEC appointee. The multi-party Senate Commission is active, but as of mid-2000 had few resources for monitoring and no resources

\textsuperscript{100}These training events and conferences included the conferences recorded in E. Mysliwiec & C. Morris, eds., Dispute Resolution in Cambodia: A Road to Peace and Reconciliation, Proceedings of a Workshop Held November 28-30, 1995, Phnom Penh, Cambodia (Victoria, BC: UVic Institute for Dispute Resolution and Cambodia Development Resource Institute, 1997) [hereinafter Dispute Resolution in Cambodia]; Building Democratic Institutions, supra note 3.


\textsuperscript{102}Kassie Neou speaks more positively about Om Yientieng, saying that while the National Human Rights Committee is seen as “too closely connected to government” the Committee has cooperated with the UN Center for Human Rights. K. Neou, Human Rights in Action – Developing Partnerships between Government and Civil Society – Our Unique Non-Confrontational Approach in Cambodia, online: United Nations Development Program (UNDP) <http://www.undp.org/hdro/oc35.html> (date accessed: 19 November 2000) [hereinafter Human Rights in Action].

\textsuperscript{103}Electronic communication from key informant (24 July 2001) [on file].
for complaint investigation. Kem Sokha, in his capacity as Senator, has been spearheading discussion about the need for an independent National Human Rights Commission.

No information is available concerning the current human rights positions of the National Assembly Commission. The Senate Commission has been concerned about the lack of adequate independent complaint mechanisms in Cambodia. Kem Sokha has called for a tribunal concerning the Khmer Rouge.104

The National Human Rights Committee, according to Chairman Om Yientieng, has resolved “numerous complaints and co-operates with the UN Center for Human rights in visiting prisons,” but the committee remains non-neutral and identified with the CPP.105 Om Yientieng, who is Special Advisor to the Prime Minister as well as Chairman of the Human Rights Committee, has been quoted as saying: “The government is committed to four main reforms – of the military, the police, the judiciary, and the administration” and also recognizes a need to improve penal institutions, as well as decentralization of government toward grassroots administration.106

Among the state human rights bodies, the chair of the Senate Commission on Human Rights is the only person to have taken public human rights positions, and these statements are often made in his capacity as “senator” rather than as “chair” of the multi-party Commission. He has also indicated that international involvement is necessary for a tribunal to be effective. “Cambodian courts are very politicized and the judges lack experience,” he has stated. “Therefore it is very important that the prosecutor and the majority of judges are non-


105 Human Rights in Action, supra note 102.

106 Ibid.
Cambodian. . . If not, the trial will be controlled by the government. . . "107 He has also personally aligned himself with efforts to create an independent national human rights commission.108

The stance and world view of members of the Parliamentary human rights commission and the CPP appointed National Human Rights Committee is not known. The Senate Committee members all profess Buddhism with the exception of the CPP appointee who is an evangelical Christian pastor. Kem Sokha is committed to international human rights standards, the rule of law and liberal constitutional democracy. Kem Sokha championed conflict resolution training projects of the pre-1998 National Assembly Commission on Human Rights, and in his capacity as chair of the National Assembly Commission he had a reputation as a gifted mediator of a number of high profile land disputes.

The National Assembly Commission appears not to be currently active. The Senate Commission, while active, has few resources and little power, but a respected chair and in 2000 an apparently cohesive membership. Its process options include speaking out in favour of the constitution, laws and international human rights standards and processes to implement them. Another process option the Senate Commission is considering is seeking funding to increase resources for investigation, monitoring and public education. Strongly positional stands are unlikely; Kem Sokha has already experienced the political consequences of taking a high profile stand on human rights. Om Yientieng’s National Human Rights Committee is extremely unlikely to take any stand or action at adverse interests to the CPP.

The parliamentary Commission and the Senate Commission are both appointed from the

107 A. Marcher & P. Sainsbury, “UN Seen Softening on Trial for Khmer Rouge” Phnom Penh Post (20 August 1999).

various parties. Their mandates\(^\text{109}\) are virtually the same and include monitoring of the government’s implementation of laws and policies on human rights, consultation on draft laws that concern human rights, proposing human rights legislation, receive citizen complaints regarding violation of human rights by authorities, publication education, and a number of other functions. The Commissions have no authority to make binding decisions concerning complaints, but only recommendatory powers. Both the National Assembly and the Senate Commissions on Human Rights have advisory and recommendatory powers only. The Senate itself is a recommendatory body. However, despite their weakness, all three bodies would be important to include as “stakeholders” in any public dialogue processes about human rights, the Senate commission because of its mandate and its knowledgeable and internationally respected chair, the National Commission because of its formal mandate, and the National Human Rights Committee because of its formal position (and possibly the power of its chair) within the CPP.

3.2.2.5 Ministry of Interior

The Ministry of Interior is a very large ministry with many responsibilities, summed up as a “mandate to guide and control all levels of provincial administrative authorities, supervise the national police, protect social order and security, and provide safety to the people of the Kingdom of Cambodia.\(^\text{110}\) Thus, it is responsible for municipal and provincial administration, including the appointment of chiefs of *khums* (communes). It is also responsible for census and statistics, voter registration, identity cards for Cambodians and foreign nationals, weapons control and permits, the national, provincial and municipal budgets, land titles, commercial and business licenses, protection of culture and environment. It is responsible for supervision of

\(^{109}\) For the mandate of the Senate’s Human Rights Commission see Kingdom of Cambodia Senate, “Roles and Duties of Committee for Human Rights and Complaints,” online: Senate of Cambodia <http://khmersenate.org/seroles1.htm> (date accessed: 28 November 2000). I was not able to obtain public documents on the mandate of the National Human Rights Commission other than a 1995 draft document which I understand to have been in effect since then. I was not able to obtain the mandate of the National Committee on Human Rights.

police and prisons. Thus its mandate is powerful and sweeps many facets of national, provincial and local governance. It is a key stakeholder in issues regarding human rights.

The Ministry is headed by Sar Kheng, who is also the Deputy Prime Minister. He is a powerful member of the CPP but tensions with Hun Sen are rumoured. He is respected by many members of the foreign community who see him as reform minded. He has a stated interest in collaborative, constructive efforts among the executive, legislative and judiciary together with NGOs and the media to find joint solutions for land disputes.

In the area of conflict resolution, the Department of Political, Administration and Police Affairs has been involved in various conflict resolution initiatives in Cambodia. Mr. Pol Lim, the First Deputy Inspector General, Political, Administration and Police Affairs, is a Ministry of Interior official, trained as a lawyer, who has been personally interested in conflict resolution, including participation in the development of the Cambodian Centre for Conflict Resolution (now the Centre for Peace and Development). He has also visited Canada to participate in a study tour of court-related conflict resolution initiatives, land use planning processes, Aboriginal treaty negotiations, police services, and corrections services in British Columbia. Mr. Pol Lim’s articulated approach to conflict resolution appears to view resolution in terms of understanding and compliance with existing authority. He has consistently demonstrated interest and cooperation with projects related to dispute resolution including educational efforts of the

111 Electronic communication from key informant (24 July 2001).


113 For details of Pol Lim’s visit to Canada, see Building Democratic Institutions, supra note 3 at 71-74; see also Pol Lim’s workshop presentation, L. Pol, “Non-Violence and Dispute Resolution in Cambodia” in Building Democratic Institutions, supra note 3; L. Pol, “The Legal and Justice Framework” in E. Mysliwiec & C. Morris, eds., Dispute Resolution in Cambodia: A Road to Peace and Reconciliation, Proceedings of a Workshop Held November 28-30, 1993, Phnom Penh, Cambodia (Victoria, BC: UVic Institute for Dispute Resolution and Cambodia Development Resource Institute, 1997) at 42-45 [hereinafter “The Legal and Justice Framework”].

114 See, for example, “The Legal and Justice Framework,” supra note 113.
National Commission on Human Rights. He gave a good deal of moral support and personal assistance to the Canadian projects in 1995 and 1996.

Land disputes are a serious problem in Cambodia. Part of the problem is active involvement of government officials in illegal expropriations. Another problem is the considerable tension between central and local levels of government which pass responsibility for land disputes back and forth. The Ministry of Interior has also been involved in development of the National Land Dispute Settlement Commission (NLDSC) which commenced operations in 1999. The dispute resolution processes within this Commission have not been positively evaluated. A study in 2000 documented coerced, unstable settlements and low public confidence in the processes of the Commission. The Ministry of Interior participated in this evaluation that was conducted in cooperation with several NGOs including a human rights organization, ADHOC and Legal Aid Cambodia (LAC). Recommendations have included more resources for the Commission which is “seriously overwhelmed.” Also recommended is capacity development including training in land law, dispute resolution and human rights, along with better coordination among levels of government, and prevention of land disputes through building up of the land registration and administration capacity.

Civil society organizations have not been included in the provincial processes of the Land Dispute Settlement Commission. However, as the OXFAM study indicates, in the area of land disputes, the Ministry of Interior has demonstrated cooperation with civil society organizations in evaluation and other general policy discussions. There has also been significant stakeholder involvement in policy discussions for development of new draft land legislation.

115 S. Williams, Land Ownership Disputes in Cambodia: A Study of the Capacity of Five Provinces to Resolve Conflicts over Land (Phnom Penh: OXFAM GB, 2000) at 4 [hereinafter Land Ownership Disputes].

116 Ibid. at 4.

117 Key informant interview, Phnom Penh (31 May 2000) [notes on file]. See also the presentations of three workshops on land issues held by the Cambodia Land Study Project, reported in Oxfam Great Britain, “Workshop Reports: Revised Land Law, Approaches to Reducing Landlessness, Institutional Cooperation About Resolving Land Disputes in Cambodia, Volume 3” (Phnom Penh: Cambodia Land Study Project, OXFAM (Great Britain), 1999).
While land issues are within the jurisdiction of the Ministry of Interior, the draft land law is at the time of writing with the Council of Ministers. In March, 1999, a network of civil society organizations, organized by the OXFAM (GB) Cambodia Land Study Project, made a presentation concerning the land law, the tone of which was designed not to criticize, but to offer expertise, knowledge and technical assistance. The government is said to have found this exercise useful and welcomed another submission on a subsequent draft, saying that this process of public consultation should be "a model." \(^{118}\)

The Ministry of Interior also has serious challenges regarding policing, discussed briefly later, and prisons, not discussed here. Detailed research on policing and prisons was not conducted for this project. While a complete analysis of this stakeholder is not conducted for reasons of space, the Ministry is a key stakeholder regarding many human rights issues in Cambodia, and under present leadership may be interested in genuine cooperation with other stakeholders in many areas of concern, subject to the overall interests of the CPP party.

### 3.2.2.6 Ministry of Justice

The Ministry of Justice is mandated to administer and regulate the judiciary \(^ {119}\) including the protection of independence of judges during the course of their duties, organizing and monitoring of court administration and prosecutors, management of Ministry of Justice civil servants, execution of judgements and orders of judges and prosecutors, and inspection of prisons. It is responsible for the administration of both civil and criminal courts. \(^ {120}\) This section draws on Dr. Edwin Tollefson's research conducted in Cambodia in 1999 and 2000. \(^ {121}\)

\(^{118}\) Key informant interview, *supra* note 103.


The Ministry currently faces major challenges in shifting the country from a Soviet-style justice system to a system supportive of a liberal constitution and market economy. There is a shortage of financial resources for justice system reform. Government priorities have been focussed more directly on economic reforms. While the Constitution and the Ministry’s own mandate require protection of judicial independence, in practice the Ministry largely maintains control over prosecutors and the judiciary.

The Ministry of Justice has a FUNCINPEC Minister, Mr. Ouk Vithun; therefore, its capacity is limited by processes required to seek consent of both coalition parties. This is compounded by lack of Cambodian lawyers within the Ministry for legislative drafting, policy development and institutional reform. Many Ministry officials were trained in socialist law in communist countries. In general, there is a severe shortage in the country of experienced lawyers trained in liberal democratic law. This means the Ministry is almost entirely dependent on foreign experts. When inevitably “the foreign expert departs. . . there is no one locally available who has a sufficient knowledge of foreign or comparative law to be able to suggest alternative proposals for the resolution of problems in Cambodia.”

Legislative drafting is not centralized within the Ministry of Justice. Each Ministry drafts its own legislation. The Ministry of Justice is currently facing the challenge of developing an entire new Civil Code, a Code of Civil Procedure, a Penal Code and a Code of Penal Procedure, all urgently needed. Japanese experts are assisting with the civil codes, of which drafts were expected in December 2000. French experts are drafting the criminal codes, but time lines for completion are uncertain despite urgent problems in the criminal law area. There is no process of public consultation for draft legislation in the Ministry of Justice.

There are major challenges in developing a Law on Judges, A Law on the Organization of the Judiciary, and a sub-decree on the Organization and Functioning of the Ministry of Justice. Key

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of the Kingdom of Cambodia (March 2000) [unpublished, archived at Canadian International Development Agency, Ottawa] [hereinafter Cambodian Justice System].

122 Cambodian Justice System, supra note 121 at 19.
challenges include finding ways to address corruption, including increases in judges’ salaries.\textsuperscript{123} It is an urgent challenge to develop massive programs for judicial training and lawyer training while also doing long-range planning. The relationship between the Ministry of Justice and the judiciary is complex; it is not clear where the appropriate line is between administration of the courts and interference with the judiciary.\textsuperscript{124} There is a Council for Judicial System Reform which has a mandate for judicial reform, but its progress is unclear.

For reasons of space, no complete analysis of this department is included here; similar issues apply as for all government departments. It must be emphasized that despite the Ministry’s being headed by a FUNCINPEC minister, the activities of the Ministry are of significant interest to the CPP because of the potential impact of reforms to the legal system. While the Ministry of Justice is an important stakeholder in human rights issues, it is not a strong Ministry because of the combined effect of conflicting priorities and counterpressures of those who are driving or caught between Constitutional mandates and CPP priorities.

### 3.2.2.7 Legal Profession

The Cambodian legal profession was nearly wiped out during the Pol Pot regime. As recently as 1995, fewer than a dozen lawyers could be identified in Cambodia. The Faculty of Law and Economics at the University of Phnom Penh produced its first class of law graduates in 1997. While there are now about 250 lawyers in Cambodia, all but a handful are inexperienced with few senior lawyers to mentor them. Legislation provides for an independent legal profession and professional body, the Bar Association of the Kingdom of Cambodia (BAKC). The BAKC is a fledgling organization with few resources and large tasks. It is led by Ang Eng Thong, a respected older lawyer. Previously a human rights advocate with ADHOC, a leading human rights organization, Ang Eng Thong has a history of promoting fundamental changes in Cambodia’s legal system. During the SoC regime, he was active in the pro-democracy

\textsuperscript{123} The Ministry of Justice has indicated an intention to increase judges’ salaries in a proposed new Law on Judges that was before the Council of Ministers in early 2000. \textit{Ibid.} at 12.

\textsuperscript{124} \textit{Ibid.} at 31. See also, this chapter’s section on the judiciary.
movement, and was imprisoned by the regime for a year before the signing of the Paris Peace Accords. 125

Many Cambodian lawyers work for the government in non-legal positions. Private practice currently provides little work. Some lawyers work for legal aid organizations such as the Cambodian Defenders Project (CDP) which employs twenty-eight lawyers (including five of Cambodia’s ten women lawyers), and Legal Aid Cambodia (LAC). Lawyers may also work for the Ministry of Justice. Some lawyers are judges.

While the Cambodian legal profession took its traditions from the French, in 1980 the legal system was based on socialist traditions in which law and the justice system carry out the centralized will of the party. 126 The expectation that the Cambodian legal system and lawyers are politically independent dates from 1993 when the liberal constitution was created. The legislation on the Bar, including the formation of the BAKC came into being in 1995, 127 and its Code of Professional Conduct was promulgated only in 1996. 128 The legislation and documents created by the Bar reflect that most of the lawyers at that time were returnees educated in the French legal tradition. 129 A number of Cambodia’s lawyers and judges were trained during the


PRK regime in courses of several months duration. In 1986, a two-year diploma course was available. Legal training during the 1980s was conducted largely by Vietnamese-trained lawyers, and reflected Marxist legal ideology.130

For the bar, major issues of concern are the reestablishment of viable Cambodian legal profession, together with legal education and ongoing legal education to ensure competency. Also of concern are the independence of the legal profession and the judiciary, together with consultation on legislation and other matters affecting the legal system. The Bar has not taken adversarial stands, but has focussed on developing its organizational infrastructure as well as trying to press forward with continuing education programs for lawyers in the area of advocacy.131 The BAKC chair, Mr. Ang Eng Thong has taken positions concerning the independence of the judiciary132 and independent investigations by prosecutors.133 He has also spoken out about the need for better forensic facilities, police education and police interrogation practices which have frequently involved confessions obtained by beatings.134 He has publicly stressed standards of international fairness for any genocide tribunal for Khmer Rouge leaders.135 The chief interest of the Bar at this stage may be its establishment as a

130 “Cambodian Legal System,” supra note 126 at 82-84.

131 The Canadian Bar Association is among the groups working with the BAKC on development of their continuing legal education program, with a planned initiative in basic advocacy training.


133 Ibid.


135 Ang Eng Thong is recorded as believing that an international tribunal like those created for Rwanda and the former Yugoslavia would provide the best solution and questions whether a court including Cambodian jurists would fair,” “Cambodia: UN to Complete Plans for Khmer Rouge Genocide Trial” (United Nations Foundation, 21 July 1999), online: UN Foundation <http://www.unfoundation.org/unwire/archives/UNWIRE990721.asp#25> (date accessed: 11 June 2001).
profession. This includes the ability of individual members to make a living within a profession and legal system that are respected. Corollary interests are that the legal system become useable by members of the public, thus increasing demand for lawyer services other than NGO legal aid services funded by foreign donors.

Lawyers do not currently form a politically or monetarily powerful constituency in Cambodia. The current president, Mr. Ang Eng Thong has appeared to enjoy considerable credibility and respect across a spectrum of society. Legislation provides formal legitimacy to the official positions of the Bar association. However, despite a shortage of lawyers, the number of trained and qualified lawyers admitted to the Bar in Cambodia has been very low compared to number of law graduates from the university who would like to be admitted.\textsuperscript{136} The problem is two-fold. Article 31 of the 1995 Law on the Bar states that qualifications for admission to the Bar including a Bachelor of Law degree or equivalent plus a “certificate of Lawyer's Professional Skill issued by a center for training of the legal profession. The organization and functioning of the center shall be determined by sub-decree.”\textsuperscript{137} The sub-decree has not been passed. The Law also indicates that who have a Law degree and who “have been working in the legal or judiciary field for more than two years” do not require such a certificate. The Bar Council has interpreted this as working in a government ministry or the courts. It has excluded those who work in a legal capacity for NGOs such as Legal Aid Cambodia (LAC) or the Cambodia Defenders Project (CDP).

Coalitions of NGOs in Cambodia have pointed out to international donors that “only 20 of Cambodia's 135 judges reportedly have a bachelor or master's degree. The lack of training and low qualifications severely hampers Cambodia's justice system and contributes to the poor understanding of legal matters in general”


\textsuperscript{137} \textit{Law on the Bar, supra} note 127.
The NGO Statement to the 2001 Consultative Group Meeting on Cambodia says as follows:

NGOs recommend a national program to build capacity of judges and prosecutors be developed and implemented which would greatly contribute to an improved and independent functioning judiciary. . . . Cambodian Bar Association should be empowered to play an important role in strengthening the rule of law by building capacity of lawyers and increasing the numbers of lawyers who can practice law.¹³⁸

The Bar Association is not generally first thought of in discussions about human rights stakeholders, although the legal aid organizations are. It is possible that the Bar Association could work successfully with a variety of other groups.

3.2.2.8 Academics

Academic institutions were singled out for destruction by the Pol Pot regime. The University of Phnom Penh was closed in 1975, and most of its faculty disappeared or were killed between 1975 and 1979. The University reopened as a teacher college in 1981 under the PRK and reopened as the University of Phnom Penh in 1988.¹³⁹ Now renamed the Royal University of Phnom Penh (RUPP) it is the only university in Cambodia with facilities only in Phnom Penh. This impedes access to higher education for people in other parts of Cambodia. The University faculties are scattered over the city, and most buildings are old and inadequate with little funding from the government for staff salaries or facilities. The University is currently a government institution, and its academic and other staff are paid very low government wages. Only twelve of RUPP’s 200 academic staff have doctoral degrees, and twenty have masters’

¹³⁸ NGO Statement to the 2001 Consultative Group, supra note 136.

degrees. The remainder have undergraduate degrees from Phnom Penh University.\textsuperscript{140} There is no post-baccalaureate education available in Cambodia. A number of people who have recently graduated with baccalaureate degrees from the University of Phnom Penh are beginning to undertake graduate studies, including several lawyers.

There are also academics who conduct academic research through NGOs such as the Center for Advanced Study (CAS), the Cambodia Development Resource Institute (CDRI), the Cambodian Institute for Cooperation and Peace. Established Cambodian scholars and academics in all disciplines are few.

Libraries in Cambodia are also important to mention in this context. Libraries were almost completely destroyed during the Pol Pot regime, and current library collections at the University of Phnom Penh are still very weak. There are several other useful libraries in Cambodia including the libraries of the Buddhist Institute, the Cambodia Development Resource Institute (CDRI), the Cooperation Committee for Cambodia (CCC), and the National Assembly. All have severe budget constraints and problems in maintaining and developing collections.\textsuperscript{141}

Neither NGO academics nor university academics seem to be taking visible positions on human rights. Chief interests at the present time are stable salaries and more education. Academics are usually overlooked by foreign experts seeking information from various stakeholders concerning human rights, legal development and other matters. There is little sense of their engagement in these issues except for the cooperation of the Faculty of Business and the Faculty of Law and Economics with the University of San Francisco in its legal training programs. Academics tend not to be considered as stakeholders in human rights issues, but in my view it is a mistake to overlook and fail to engage the university and other academics in public dialogue about human rights, particularly in the light of student interest and activism.

\textsuperscript{140} Ibid.

3.2.2.9 Women’s Ministry

The Ministry of Women’s and Veterans Affairs is headed by a “popular and articulate” FUNCINPEC Minister, H.E. Ms. Mu Sochua.\footnote{142 Human Rights in Action, supra note 102.} Mu Sochua has considerable personal stature in the foreign community as a bright, intelligent, competent administrator committed to women’s interests and interests of democracy in Cambodia. In 1995 she was appointed special adviser on women’s affairs to the Cambodian prime minister.\footnote{143 M.H. Zoll, “Women Start Taking Their Places at the Peace Table” American News Service 2000).} Not new to advocating Cambodian women’s interests, she was the founder of Khemara, one of Cambodia’s first NGOs in 1991. She left Cambodia in 1972, when she was nineteen, and returned in 1989. She holds US degrees in psychology and a graduate degree in social work.\footnote{144 T. Szymanski, “Mu Sochua: Lifting Cambodia’s Women” (August 2000), online: World Press Review <http://www.worldpressreview.com/aug00/people3.htm> (date accessed: 27 October 2000) [hereinafter “Mu Sochua”].} As a senior FUNCINPEC member, Mu Sochua was involved in post-election demonstrations in 1998, and personally took a stand on violence by the CPP against monks.\footnote{145 Mu Sochua, quoted in an interview with Di Martin of the Australian Broadcasting Corporation, D. Martin, Cambodian Monk Killed in Police Crackdown on Pro-Democracy Demonstration (Australian Broadcasting Corporation, 10 September 1998), online: ABC <http://www.abc.net.au/ra/asiapac/archive/1998/sep/raap-10sep1998-1.htm> (date accessed: 23 November 2000).}

Until 1996 women’s issues were addressed by a Secretariat of State for Women’s Affairs,\footnote{146 Nevertheless, the Secretariat did important work. See the still-useful report prepared by Chantou Boua, Secretariat of State for Women’s Affairs, “Women: Key to National Reconstruction. Cambodia’s Country Report,” (Phnom Penh: Secretariat of State for Women’s Affairs, Kingdom of Cambodia, 1995).} The Secretariat was upgraded to the status of a Ministry in 1996 following the Women’s Beijing conference in 1995.\footnote{147 The United Nations Fourth World Conference on Women, Beijing, China, September, 1995.} The government also adopted the entire 1995 Beijing Platform for Action, and promised sufficient resources.\footnote{148 Monitoring Un Conference Agreement: First Steps Country Reports (Women’s Environment and Development Organization (WEDO), circa 1996), online: WEDO <http://www.wedo.org/monitor/steps2.htm> (date accessed: 22 November 2000).} Despite these promises, the Ministry has few
resources for programs. There has been little enabling legislation.

Issues that are part of the Women’s Ministry’s purview include domestic violence, sexual exploitation, abortion safety, women’s participation in government, including local government, public education concerning women’s issues including health, education and violence and the general status of women.\textsuperscript{149} Thus, human rights is a high priority issue for this Ministry. The Ministry has developed a position paper focussing on Education, Health, Legal Protection and Economic Development. Mu Sochua has taken stands to promote access to safe abortion,\textsuperscript{150} alleviation of women's poverty, women’s participation, women’s rights and protection of prostitutes.\textsuperscript{151} After her election but prior to her appointment as Minister, Mu Sochua is recorded as filing a complaint against an American involved in child pornography.\textsuperscript{152} She has defended a September 2000 government decision to establish a visa “blacklist” of suspected foreign rapists and child-sex predators as “a necessity to protect Cambodian women and children.”\textsuperscript{153} She has also taken active stands on corruption and maladministration within her ministry.\textsuperscript{154}

She has not taken a stand concerning a tribunal for former Khmer Rouge leaders. Instead she has stated: “Peace and national reconciliation can be sustained when the whole nation is engaged in the process of rebuilding a justice system that is based on human rights.”\textsuperscript{155} This

\begin{itemize}
\item \textsuperscript{149} “Mu Sochua,” \textit{supra} note 144.
\item \textsuperscript{150} S. Vong, “Back Alley Abortions Killing Cambodian Women” \textit{Phnom Penh Post} (27 October 2000).
\item \textsuperscript{151} “Cambodia-Sex: Cambodian Government Rules out Legalisation of Prostitution” \textit{Agence Press-France} (19 November 1999).
\item \textsuperscript{152} A. Marcher, “Deported American Slings Crud Via E-Mail” \textit{Phnom Penh Post} (24 December 1999).
\item \textsuperscript{153} K. Phelim, “Foreigner Blacklist Defended” \textit{Phnom Penh Post} (15 September 2000). This is a list that includes persons acquitted by Cambodian courts. Mu Sochua is quoted as stating: “If courts don’t provide protection, who will? . . . [The] Justice [system] doesn’t give women and children the right protection, so an administrative measure should.”
\item \textsuperscript{154} S. O’Connell & L. Nara, “Mother Yearns for Contact with Daughters.” \textit{Phnom Penh Post} (13 October 2000).
\item \textsuperscript{155} L. McGrew, “Cambodians Talk About the Khmer Rouge Trial” \textit{Phnom Penh Post} (4 February 2000).
\end{itemize}
research did not uncover her position on human rights mechanisms more generally. Her longstanding work indicates that Mu Sochua has genuine interests in furthering democracy and enhancing the rights and status of women in Cambodia.

Mu Sochua’s statements suggest alignment with liberal democratic ideology, and her conceptions of human rights appear to be in keeping with Western liberal values. Her best process options may be to secure foreign assistance for independent actions concerning public education, and to negotiate with other ministries to accomplish the Ministry’s objectives.156

The Ministry’s mandate includes social services for women, women’s rights, promotion of women’s participation in politics and other spheres, facilitation of the work of women’s non-governmental organisations, prevention of prostitution, sexual exploitation and violence against women and other mandates.157 Since it covers virtually all of the issues of particular importance to more than half of Cambodia’s population, its mandate is huge. It is important to note that this Ministry is also responsible for Veterans’ Affairs, a high profile concern for Cambodia, deeply entwined with issues concerning women and children. The mandate of this ministry is also interconnected with the mandates of most other ministries, for example, health and justice. The Ministry is a FUNCINPEC ministry, and therefore the dynamics of relationships among FUNCINPEC and CPP Secretaries of State within Ministries are always a factor.

Because of Mu Sochua’s personal reputation and dynamism, the work of this Ministry has credibility with foreign community. The ministry is also able to command sympathetic foreign and local attention in the news media. Mu Sochua’s power resources stem largely from her personality, education and intelligence, as well as her affiliation with the foreign community.

156 Kassie Neou has noted that Mu Sochua’s style is to “influence” other ministries. Human Rights in Action, supra note 102.

Her style is to use a public education approach. Since she has become Minister of Women’s and Veterans Affairs, she has tended to avoid making public statements opposing the CPP. She has tended to network across ministries, and it is possible that she has reasonable cross-party communication. She is reputed to have developed a constructive relationship with Prime Minister Hun Sen. This Ministry is a key stakeholder in human rights issues.

3.2.2.10 Ministry of Social Affairs, Labour, Vocational Training & Youth Rehabilitation

The Ministry of Social Affairs, Labour, Vocational Training & Youth Rehabilitation ("Ministry of Labour") is vested with the responsibility of administering the 1997 Labour Law. The Labour Code is internationally viewed as comprehensive and fairly favourable to workers. Enforcement is weak. The Bureau of Labour Inspection within the Ministry of Labour has insufficient resources. Because of inadequate government salaries, "gifts" are often accepted in return for overlooking violations. As Hall points out, "[t]hose labour inspectors who may wish to act honestly find themselves in a difficult position." Also, the culture of impunity means that the Ministry of Labour staff may not enforce violations against factories with political, military or police connections. Junior civil servants who report serious violations or refuse bribes could end up in trouble with their superiors. "I am one small man... Factory owners are very wealthy. Powerful friends. I am scared," said a former Ministry of Labour inspector.

158 Electronic communication with key informant (24 July 2001).


Also, factory owners are said not to always cooperate with the Ministry of Labour, even refusing to appear at mediation sessions to resolve strikes.\textsuperscript{162}

3.2.3 Ascetics

The category of “ascetics” includes monks and lay devotees. As discussed in Chapter Two, religion and religious leaders are powerful social forces in Cambodia.

3.2.3.1 The Monkhood\textsuperscript{163}

Cambodian monks have become politically active at certain points in history, particularly after 1945 in nationalist communist movements, but there is no longstanding pattern of social engagement. Conservatism, non-engaged passive neutrality and cooperation with the state has been more the norm. The traditional focus of monks has been more on moral education, spiritual practice, and community preaching and conflict resolution. In recent years, the most senior monks have taken little leadership in Cambodia, although the activism of prominent monks facilitated by the lay Buddhist movements in the dharmayietra movement made significant contributions to peaceful election turnout in 1993 and 1998. It must be recalled that organized Buddhism was at the brink of extinction in Cambodia only a few years ago. Rebuilding is occurring, but levels of knowledge and practice of Buddhist ethical and spiritual precepts are low.\textsuperscript{164} Monks and nuns have responded positively to human rights education.

There are considerable controversies concerning monk roles in society on issues that range from the prevention of AIDS/HIV to political activism. There are also controversies about

\begin{footnotes}
\item[162] Ibid. at 127, citing Seng Phally, Executive Director, Cambodian Labor Organization (CLO) in an interview in Phnom Penh, December 24, 1998.
\item[164] Interviews with senior monks, lay leaders, and NGO leaders conducted by the author, Phnom Penh (May-June, 2000) [Notes on file].
\end{footnotes}
**sangha-state relations in a state where Buddhism is the state religion. Buddhism is regulated by the Ministry of Religious Affairs, currently a FUNCINPEC ministry.**¹⁶⁵ Senior clergy are publicly viewed as politically polarized, with the Mohanikay denomination associated with the CPP and the small Thommayut denomination associated with FUNCINPEC.

Monks command enormous public respect and have potential to mobilize the Cambodian population. To exercise power, monks need do very little. Even their presence legitimates whatever is going on, including public demonstrations. Buddhist wats are major landowners in Cambodia.¹⁶⁶ Therefore, the monkhood is important to consider in any stakeholder analysis, although their tradition of political neutrality may constrain the types of public participation they undertake. The monkhood has well-established traditions of community conflict resolution, but currently most monks have insufficient education and training to take strong leadership in this area. Exceptional examples are Ven. Maha Ghosananda, Ven Yos Hut, and former monk Heng Monychenda whose work is mentioned or cited in several other places in these chapters.

It is also important to mention the work of Cambodian nuns.¹⁶⁷ Cambodia’s estimated 20,000 nuns (donchees) have lower status and prominence than monks, partly because nuns are unordained (as in all Theravada traditions since the sixth century). Nuns are usually disciplined, responsible older women with no family responsibilities. Usually uneducated, nuns traditionally work in pagodas as housekeepers. The Association of Nuns and Lay Women of Cambodia (ANLWC) has been training nuns in Buddhist concepts of human rights, and skills for conflict resolution, leadership, trauma counseling and social work for street children. Nuns

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¹⁶⁶ *Where Has All the Land Gone?*, supra note 81 at 13.

sometimes now serve on pagoda committees which are influential in village decision making.\textsuperscript{168} Nuns and lay Buddhist women have been visible and courageous in sometimes dangerous peace walks. They are driving, organizing and coordinating forces for much of Cambodia's peacework.

For reasons of space, a full stakeholder analysis for clergy is not developed here.

\textbf{3.2.3.2 Lay Religious leaders}

Without lay religious leadership, such as those active in the Dhammayietra Center, the Center for Peace and Reconciliation (CPR), SILAKA, the Association of Nuns and Laywomen of Cambodia (ANLWC), Youth for Peace, and a number of others, the work of charismatic leaders such as Maha Ghosananda would probably not have been able to garner support and attention for the famous peace walks that have captured the popular imagination and hope of Cambodians and many in the international community. Other lay Buddhists are active in conflict resolution initiatives of local organizations such as the Cambodian Center for Conflict Resolution (CCCR) and the Cambodian Institute for Human Rights (CIHR),\textsuperscript{169} and international initiatives such as the peacebuilding program of the American Friends Service Committee (AFSC). The importance of Buddhist organizations, to the extent they engage substantial members of the \textit{sangha}, must not be underestimated.

Lay temple committees at the grass-roots level throughout Cambodia should not be overlooked. Likely these are very diverse in their orientations, and as a whole it is not known to what extent they may be influential in grassroots human rights issues, or even teaching on issues of personal piety or peace.\textsuperscript{170} For reasons of space, no further analysis is conducted here. When

\begin{enumerate}
\item \textsuperscript{168} \textit{Human Rights in Action}, supra note 102.
\item \textsuperscript{169} Cambodian Institute of Human Rights (CIHR), "Final Report: Culture of Peace in Pailin," (Phnom Penh: CIHR, 1999).
\item \textsuperscript{170} For a discussion, see W. Collins, \textit{Grassroots Civil Society in Cambodia: A Discussion Paper Prepared for a Workshop Organized by Forum Syd and Diakonia in September, 1998, Final Report} (Phnom Penh: Center for
\end{enumerate}
considering public dialogue, lay Buddhist organizations should not be overlooked. Their contributions include highly developed organizational skill, political knowledge, commitment to sustainable peace and human rights and insights into wise public policy in keeping with Buddhist tradition. Also important is their access to charismatic leader monks.

3.2.4 Clown servants

In Southeast Asian theatre,

... [g]ods, demigods, kings descended from the gods, and princes and princesses are the heroes and heroines of traditional drama and dance. Powerful religious seers advise them, allies and ministers serve them, crude foreign ogres oppose them, and grotesque, slapstick clown-servants are their attendants. The clowns have been the subject of much speculation. Like the vidusaka clown of Indian Sanskrit drama, they are gluttons, practical and even cynical, and confidants to their masters' passions and weaknesses. In the midst of mythological plays, the clowns comment irreverently on political or social issues of the day, seemingly as spokesmen for the common man in an otherwise aristocratic world.171

While likely not properly in keeping with tradition, for the purpose of stakeholder analysis, I have taken editorial license in placing several groups in the category of "clown-servants" including the military, the police and the media. While not discussed here, one could also possibly include in "clown-servants" demonstrators that are allegedly "hired" by government and opposition parties at various times. I am hesitant to place the judiciary in this category because there are respected and independent judges. However, as an editorial comment about

the judiciary at a whole, I do place them here because they appear to be at the beck and call of their political masters (or whoever pays them or intimidates them). As a whole, the current judiciary is not taken seriously, except by those who can (or think they can) intimidate them or buy them. The courts are avoided by people who lack power or resources to pay or intimidate. The media may more appropriately fit into the clown-servant category because of their commentary on political and social issues of the day in various ways, and with some apparent exceptions, as servants of various government or opposition political parties.

3.2.4.1 Judiciary

There are three levels of courts in Cambodia. Courts of first instance include twenty provincial courts (seventy-nine judges including one woman) and the Phnom Penh municipal court (eleven judges including one woman). Appeals are usually heard by three of the nine-member Court of Appeal in Phnom Penh. One member of the Court of Appeal is a woman. The nine members of the court of last resort, the Supreme Court, are all male as are the members of the Constitutional Council which has jurisdiction in constitutional matters and election controversies.

Most judges in Cambodia were appointed during the PRK regime. Many have minimal legal training in socialist principles of law. Most have minimal knowledge of the current laws and few or no library resources. They are unable to count on adequate submissions from well-trained counsel. A Judicial Mentor program has been initiated by the UN Cambodia Office of the High Commissioner for Human Rights (COHCHR). While the mentor program is viewed as effective, mentors are available only in a limited number of courts. Socialist traditions and lack of training in civil law or common law traditions means the liberal constitutional guarantees of an independent judiciary have not become rooted.

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172 This section draws on a number of sources, including "Cambodian Legal System," supra note 126; M.V.J. Kran & P.M. Rawkins, Good Governance and Rule of Law Program Development and Scoping Mission to Cambodia, June 5-26, 1999 (Ottawa, ON: Asia Branch, Canadian International Development Agency, 1999); Cambodian Justice System, supra note 121 [hereinafter Good Governance].
There are a few respected and independent judges. However, effectiveness of the judiciary is diminished by executive interference of the Ministry of Justice as well as wide-spread corruption. Judges are paid a maximum salary of twenty US dollars per month. Even if current proposals to increase salaries to US$200 to $600 are implemented, corruption is likely to continue, since judges are estimated to receive up to $3,000 a month in bribes.\textsuperscript{173} The issues of adequate payment, education, and judiciary relationship with the Ministry of Justice are seen as urgent by local human rights organizations and foreign donors, but the government has not moved quickly to address them. Some judges, such as Say Bory, a member of the Constitutional Council, are vocal about judicial independence, but as a whole, the judiciary has been silent. Judges may not necessarily be supportive of increased salaries if this also comes with strictly enforced anti-corruption measures.\textsuperscript{174} Thus, the forces against practical implementation of judicial reform in Cambodia are formidable. The judiciary are important stakeholders in human rights issues, since ultimately their commitment and fearlessness are essential to uphold human rights policies.

Since most judges are within five years of retirement, Ministry of Justice efforts are aimed at securing donors for training of new judges. It is foreseen that most new appointments will be recent graduates of the University of Phnom Penh Faculty of Law.

\textbf{3.2.4.2 Military}

The current Cambodian military springs from a factionalised political past. During the 1980s, insurgency military forces of the Khmer People's National Liberation Front (KPNLF), the Khmer Rouge and FUNCINPEC battled against the military forces of the ruling Vietnamese-backed communist party, which became the CPP. While the Paris Peace Accords brought nominal reconciliation among the factions, the Khmer Rouge forces continued their insurgency until 1998. After the Paris Peace Agreements, Chinese funding for the Khmer Rouge ceased.

\begin{footnotesize}
\textsuperscript{173} Cambodian Justice System, \textit{supra} note 121 at 12 note 14.
\end{footnotesize}

\begin{footnotesize}
\textsuperscript{174} The Ministry of Justice has indicated an intention to increase judges' salaries in a proposed new Law on Judges that was before the Council of Ministers in early 2000. \textit{Ibid.} at 12.
\end{footnotesize}
The Khmer Rouge became involved in sales of timber, gems, drugs and arms, including sales to the Thai military. In 1993 it was estimated that Khmer Rouge revenues from illegal logging were US$1 million per month. Timber sales to Thailand began to decline after 1994 when the Thai military began to disassociate itself from the Khmer Rouge. The breakdown of the Khmer Rouge leadership is said to have resulted from disputes over distribution of revenue from logging and gem mining in Khmer Rouge controlled territories.

Until 1997, the official Cambodian military forces were divided politically as part of the coalition agreements, with FUNCINPEC forces in some areas and CPP forces in others. The armed clash between the two parties in July 1997 brought decisive victory to the CPP. After the 1998 election, the armed forces were unified. In late 1998, the remainder of the Khmer Rouge forces were brought into the unified forces. This Ministry has CPP and FUNCINPEC co-ministers.

The government worked in 1995 and 1996 to reduce the size of the military establishment through the elimination of “ghost soldiers” on the payroll. In 1999, a further 12,868 ghost soldiers and 105,234 dependents were removed from the military payroll. In 1999 there were 148,000 soldiers. By 2003 the government aims to demobilize 55,000 soldiers no longer needed in the absence of insurgency or security threat. International donor assistance has been sought for this difficult task. Cambodia’s military personnel continue to be associated with illegal logging, land grabs and human rights abuses. Military personnel are paid very


177 Ibid.

low salaries and not always on time. This breeds corruption at all levels.

The issues for the Minister of Defence, Tea Banh (and the FUNCINPEC co-minister HRH Prince Sisowath Sirirath) include demobilization, unity, corruption, illegal activities, and general discipline. Demobilization issues are also relevant to the Ministry of Women’s and Veterans’ Affairs. Issues for high ranking military officers may include job security, pay, personal prestige and personal security in a climate of impunity. Issues for rank and file soldiers include job security, and livelihood now and in the future. These issues are all urgent. It appears that issues of human rights are a low priority at all levels of the military establishment.

No research was conducted for this study concerning the loyalties and cohesiveness of the military. The CPP has strong de facto control at the present time. A number of high ranking FUNCINPEC military officers were extrajudicially executed during and after the fighting in 1997, and no investigations have been conducted. Military courts have jurisdiction only over military personnel and military matters, however, former Khmer Rouge leaders Ta Mok and Duch are being held by the military authorities in a military prison.

The military is clearly very powerful. Its members regularly exceed its mandate with impunity, and are feared and disrespected by the population. The military have de facto power and arms to take land and conduct illegal operations, and they do. They also have coercive power to take bribes. They (or their political masters) also seem to have power to resist effective demobilization efforts to reduce the inflated size of military. It is likely that none of the other stakeholders trust the military, except possibly political leaders who have loyal followers. The military are key stakeholders in human rights issues; they may resist loss of unlawful but lucrative connections and activities.

3.2.4.3 Police

The police are reputed to be almost totally corrupt and unreliable. Police forces are inflated in numbers with over 65,000 police in 1999. Foreign donors make repeated demands for reduction in its size and the government has said it will reduce numbers by 24,000 by 2003. Police have been implicated in arrests contrary to law and torture. Police have also stood by while mobs have killed suspected criminals.179 Officially, police report to Ministry of Interior, but in practice the Chief of Police, Hok Lundy, reports to the Prime Minister rather than to the Minister of Interior Sar Kheng.180 Police training and proper salaries are universally called for. For the sake of brevity no elaboration concerning the police is conducted here. They, too, are key stakeholders in human rights issues.

3.2.4.4 Civil servants

Civil servants are very poorly paid,181 and the civil service is inflated in size. Many civil servants have other jobs but collect their salaries. Corruption is entrenched.182 Civil service reform is a top priority in the minds of foreign observers, but limited resources have impeded progress. In many cases there are no laws, and departments are run by ministry circulars. Many civil servants are not familiar with laws, decrees, or circulars relevant to their responsibilities.

While there are no civil service unions, teachers went on strike for higher wages in January 2000. However, generally civil servants are not organized and may not have coherent views, except concerning the inadequacy of their salaries. No further elaboration is conducted for this study. While “civil servants” do not form a coherent stakeholder group, their own human rights interests and their power to affect public human rights is important to consider.


180 Electronic communication from key informant (24 July 2001).

181 S. Samreth, “Teachers Stay out in 'Hungry' Strike” Phnom Penh Post (5 February 1999).

182 P. Eng, “Amid Progress, Corruption Reign” Los Angeles Times (1 October 2000).
3.2.4.5 Media

Cambodia’s public media have been in varying degrees of conflict with the government for several decades.\(^{183}\) The media have been controlled by governments to greater or lesser degrees since prior to independence in 1950s. During the 1950s and 1960s, under Sihanouk, the media that criticized him was suppressed. During the Lon Nol regime 1970 to 1975, media stories that criticized Lon Nol’s regime were censored. There was no media during the Pol Pot regime; limited print news was distributed to party cadres and state-controlled radio broadcasts were limited to instructions to local authorities and propaganda.\(^{184}\) Under the PRK there were several newspapers, radio and television, all controlled by the state.\(^{185}\) Foreign journalism was very limited.\(^{186}\) UNTAC introduced a liberal media code in 1991.\(^{187}\) After the 1993 election, many independent newspapers and other media sprang up along with a number of new political parties and increased freedom for human rights NGOs.\(^{188}\) Media were ill-trained and politically polarized. There were several arrests of reporters, raids on newspaper offices, and media shutdowns.\(^{189}\) A media law was passed by the National Assembly in September 1995.\(^{190}\)

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\(^{185}\) *Cambodia Silenced*, supra note 183 at 155-56.

\(^{186}\) Ibid. at 162-74.


\(^{189}\) English language newspaper editor, Michael Hayes of the Phnom Penh Post was charged with criminal disinformation in August 1995 after reporting that there were fears for a coup while both Hun Sen and Ranariddh were out of the country in March, 1995. Bernard Krisher of the Cambodia Daily was threatened with shut down in December 1995. While there were no murders of media personnel in 1995, there a number of threats were received, allegedly from government officials.

\(^{190}\) Royal Government of Cambodia, *Kram dated September 1, 1995 on the Regime of the Press*, online:
law is relatively liberal when compared with laws of other ASEAN nations. For example, the law includes a right to maintain confidentiality of sources. However, the law has been criticised for providing fines and jail sentences for ill-defined offences against publication anything that might “affect national security and political stability.” While most broadcast media were in 2000 considered to be effectively controlled by the government, the print media were considered to be relatively free. A recent report indicates many journalists are still “inept and corrupt,” but media professionalism has improved from a habit of “obscenities, libellous invective, calls to violence and rumor-mongering” toward better news coverage that is helping to curb abuses by authorities. Nevertheless, most opposition party requests for TV and radio licences are not granted. Most newspapers must accept subsidies from political parties because Cambodia’s poor economy does not provide a sufficient base to survive on advertising. The English language newspapers, the Cambodia Daily and the Phnom Penh Post are considered the most independent and professional. They are “sheltered and privileged because they are English-language, foreign-owned and foreign-staffed.” In general, the quality of Cambodian journalism is considered to be low as is the quality of journalism education. Some efforts at journalism training are being made with foreign assistance. It is important to mention the work of the highly competent Khmer Women’s Media Center which has as its purpose


194 P. Eng, “Cambodia’s Newspapers Clean up, Start to Make a Difference” Los Angeles Times (10 December 2000).


increasing the number of women journalists and changing the image of Cambodian women from the exploitive ways they are often publicly portrayed by the mainstream Cambodian press. The media are important stakeholders both as a group in need of human rights protection and as a group that has power to sway public opinion. Complete analysis of the media as a stakeholder is not possible here for reasons of space.

3.2.5 “Middle-class urbanites”

About two million Cambodians live in Phnom Penh, nearly twenty per cent of the population. However, comparative few Cambodians fall into a “middle class.” Into the category of middle class urbanites I have placed the NGOs, which for the most part are staffed by well-educated urban Cambodians, albeit many of them originally coming from rural backgrounds. I have also placed university students into this category, since poor and rural people currently have few opportunities for post-secondary education. Also important to consider are the interests of employers. The example of garment manufacturers is considered. There is a distinct urban bias in Cambodia in terms of development resources and human rights advocacy and education, although most NGOs make a good deal of effort to serve communities outside Phnom Penh and Cambodia’s other larger cities. Urban bias in these chapters is acknowledged; gaining even rudimentary understanding of rural Cambodia would require considerable time, financial language resources.

3.2.5.1 NGOs for human rights and democracy

The development of human rights and democracy organizations in Cambodia date to the UNTAC period, during which several human rights groups were founded and provided with a safe environment to develop, including ADHOC (1991), and LICADHO (1992), CIHR (1993), OUTREACH, and Human Rights Vigilance of Cambodia (VIGILANCE). The Khmer Institute for Democracy (KID) was also founded in 1992. These groups conduct most of Cambodia’s human rights monitoring, advocacy and education in Cambodia. Other groups are focussed more on democratic development such as the Center for Social Development (CSD) which has
had major projects on a variety of topics, including voter education and anti-corruption. These NGOs are widely credited with leading the development of civil society in Cambodia. These groups were also instrumental in monitoring the 1998 election. Together they formed two strong coalitions for voter education and monitoring, Committee for Free and Fair Election (COMFREL), and Coalition for Free and Fair Elections (COFFEL), and a smaller group primarily composed of student groups called the Neutral and Independent Committee for Fair Elections in Cambodia (NICFEC). In preparation for the 1998 national election, these groups are said to have held over 10,000 voter awareness sessions in different parts of the country in which they explained and conducted role plays to illustrate the voting process and, and explained the secret ballot. They also have together formed the Cambodian Human Rights Action Committee, an umbrella group of about seventeen human rights groups.

Also important to mention are women’s NGOs such as the Khmer Women’s Voice Center and the Cambodian Women's Crisis Center, who work on issues of women’s poverty, family law

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199 NICFEC was a coalition of four organizations and associations, the Association of Fine Art, the Association of Architectural Students, the Association of Khmer Literature Students and LICADHO.


201 The NGO members of the Human Rights Action Committee include Cambodian Human Rights and Development Association (ADHOC), Cambodia Defenders' Project (CDP), Cambodian Center for the Protection of Children's Rights (CCPCR), Cambodian Health and Human Rights Alliance (CHHRA), Cham Khmer Islam Minority Human Rights and Development Association (CKIMHDRA), Indradevi Association (IDA), Khmer Institute of Democracy (KID), Khmer Students' Association (KSA), Khmer Youth Association (KYA), Khmer Kampuchea Krom Human Rights Association (KKKHRA), Cambodian League for the Promotion and Defence of Human Rights (LICADHO), Legal Aid of Cambodia (LAC), and Human Rights Vigilance of Cambodia (VIGILANCE). Human Rights in Action, supra note 102.
rights, sexual exploitation and violence against women. Organizations like Women for Prosperity have been encouraging and training women for participation in government. There is also the Association of Nuns and Lay Women (ANLWC) which has trained hundreds of women and nuns for work in development of Cambodian society, including conflict resolution principles and skills.

Civil society organizations have been seen as making consistent and courageous calls for the improvement of civil and political rights of Cambodians. Through their many reports, regular newsletters, and public statements in the local and international media, human rights organizations have consistently drawn attention to most of the human rights violations and problems in Cambodia. They have made considerable and effective efforts to promote the rule of law and democratic development, including fair elections. Some have been recently proposing public consultation for a national human rights institution in Cambodia, although the emphasis is on discussion rather than action at the present time. There is concern among many civil society organizations that Cambodia’s government does not have the political will to establish an institution that would be truly independent and effective in establishing and monitoring human rights in Cambodia.

In addition to their substantive concerns for democratization, human rights and equitable economic development in Cambodia, NGOs’ interests include their own political independence. This is a continuing issue in Cambodia’s polarized society. Issues of independence are also linked to NGOs high degree of dependence on funding from foreign donors that are generally focussed on agendas of liberal democratization. The issue of personal


security of some NGO leaders is also a concern. Cooperation among themselves is another important interest, so as to prevent conflicts that would sap energy needed for their difficult work.

There is a polarized diversity of world views, values and political ideology among the civil society organizations. Some are Sihanoukist in origin and have continuing orientations toward FUNCINPEC or the Sam Rainsy Party. Others are more inclined to a centrist positions and have more cooperative relationships with the CPP. It is difficult to find civil society organizations that have a particularly leftist ideology. Most NGO workers are from Buddhist background, and there are varying degrees of devotion to Buddhist values. Some actively promote Buddhist values in conjunction with human rights education. Others do not articulate a Buddhist leaning in their program focus.\(^\text{206}\)

The civil society organizations are truly at the hub of information in Cambodia. They are well informed about what is happening at the grass roots, as well as what is happening in government, and in the international community. Their international networks are generally well developed.

Some human rights organizations, for example, ADHOC and LICADHO, focus on investigation and monitoring and regular reports.\(^\text{207}\) They sometimes run risks of threats from authorities.\(^\text{208}\) Others, such as CIHR emphasize education and training of officials, military and

\(^{206}\) Given the political polarization in Cambodia, I made a decision not to include examples of NGOs with particular political origins or orientations. Most see themselves as trying to be politically “neutral.”

\(^{207}\) One example is the joint report of ADHOC, LICADHO, & H.R. Watch, “Impunity in Cambodia: How Human Rights Offenders Escape Justice” (Phnom Penh: ADHOC, LICADHO, and Human Rights Watch, 1999).

police or, like KID, emphasize dissemination of information about laws and resources. Most of the established human rights organizations are registered with the government as NGOs.

A draft law on NGOs has been debated for some time. A 1996 draft law had received considerable input from NGOs when in 1998 a new draft law was proposed that was widely seen as “draconian” including a prohibition of foreign, or government financial assistance, and prohibition on their causing “trouble to the politics of the Royal Government of Cambodia.” After being roundly criticized locally and internationally, this draft was withdrawn by the government in 1999. While a new draft Law on Associations and Non-Governmental Associations that removes most of the egregious sections is being discussed, as of the time of writing no new law has yet been debated or passed by the legislature. This means NGOs have no specific legal protections, and remain largely dependent, financially and politically, on international support and pressure. The government currently respects the right of association in international law. The civil society organizations, particularly the human rights organizations, are the places of choice for ordinary people to take their complaints. They also are the focus of ongoing funding for many foreign donors. Reliable NGOs have been trusted where bilateral funding to the government has not. Thus, the NGOs are truly strong and well-connected at all levels of society. The NGOs are not immune to the political polarization present in Cambodia. The casual visitor might not be aware of divisions among NGOs, since they seem to maintain public civility about one another. Their cooperation through COMFREL, COFFEL and NICFEC in voter education and election monitoring was impressive.

209 For example, CIHR.

210 For example, KID has made copies of laws more widely available, and has set up citizen’s advice offices which services include assisting people with understanding relevant laws, where to obtain services, and how to write complaint letters.


The civil society organizations have great public and international legitimacy in Cambodia. In terms of voice, some of them are increasingly consulted on draft legislation, although this is still largely because of international pressure. The civil society organizations’ sources of power include their moral authority in upholding the international human rights instruments to which Cambodia is signatory, as well as Buddhist precepts that support human rights principles. They also draw substantial power from the foreign funding they receive, as well as the personal education, leadership abilities, and in some cases charisma of their leaders. It is important to note, however, that not all NGOs are strong or reliable; there have been various reports of corruption.

Civil society organizations generally have good relationships with international stakeholders and local people. For the most part they are publicly treated with guarded respect and distance by the government. The government appears to be openly hostile to some human rights organizations. The NGOs are key stakeholders in public policy dialogue.

3.2.5.2 Conflict resolution NGOs

The history of conflict resolution organizations in Cambodia is brief. There are two organizations that devote their attention to training and research related to conflict resolution. The first to be formed was the Cambodian Institute for Cooperation and Peace (CICP) founded in 1994 by Dr. Kao Kim Hourn whose doctoral degree is in conflict resolution in a global context. The CICP promotes both domestic and regional dialogue between government officials, national and international organizations, scholars, and the private sector on issues of peace, democracy, civil society, security, foreign policy, conflict resolution, economics and national development. Dialogue topics considered by the CICP have ranged from Cambodia’s readiness to enter ASEAN to elections issues to basic theory about Cambodian conflict styles. The Cambodian Centre for Conflict Resolution (CCCR), now the Centre for Peace

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213 See e.g. “Rights Groups Face Prosecution,” supra note 77.

214 See the CICP website, which lists its publications and activities, online: CICP <http://www.cicp.org.kh/> (date accessed: 17 December 2000).
and Development (CPD), was founded in 1995 through the facilitation of the Cambodia Development Resource Institute (CDRI). The CCCR was formed through a steering committee composed of leaders of civil society organizations and government officials including several members of the National Assembly Commission on Human Rights (under Kem Sokha) and Pol Lim of the Ministry of Interior. The CCCR focuses on training of NGO leaders and government officials in non-violent conflict resolution principles and practice. In 1995, CDRI sponsored the first conflict resolution conference in Cambodia in cooperation with Canadian organizations. This conference resulted in a Canadian-sponsored follow-up event hosted by the Cambodian National Assembly Commission on Human Rights (under Kem Sokha) in 1996. The CCCR also conducted some research, including a project to examine the sources of conflict and the reasons for conflict escalation in the 1998 election.

There are also several foreign NGOs involved in peace and conflict resolution initiatives, notably the American Friends Service Committee, the Mennonite Central Committee and the Jesuit Refugee Service.

There has been considerable collaborative effort among peacemakers, for example, Cooperation to Reduce Violence for Peace, an impressive coalition of a number of organizations working on a peaceful election in 1998. There is also an Alliance for Conflict Transformation, a volunteer group composed of government officials and organizations who volunteer their time for peacebuilding work, including working with the CCCR to develop curriculum for conflict transformation training for Phnom Penh municipal officials, chiefs of districts and commune chiefs.

Issues being addressed by conflict resolution NGOs include developing a culture of peace,

\[215\] Dispute Resolution in Cambodia, supra note 100.

\[216\] Building Democratic Institutions, supra note 3.

public dialogue and public participation, conflict resolution education, and conflict resolution research on issues of public policy in Cambodia today. The conflict resolution organizations have so far not been deeply involved in public discussions about the Khmer Rouge trials, human rights issues or land rights issues. An issue identified in Cambodia includes a perceived need for development of an organized network of conflict resolution practitioners and thinkers working in Cambodia.\textsuperscript{218} The current position and goals of CCCR, CICP and other peacemakers appear to be to establish increased capacity for conflict resolution and peaceful modes of resolution of national and grassroots conflict. The CCCR and CICP have sponsored neutral education and research that includes persons from all political persuasions, and considers all points of view. Also they have attempted to maintain (and thus model) political neutrality. However, in Cambodia’s polarized setting this has been seen by some opposition-oriented groups as leaning toward the CPP. The interests of these groups include organizational survival, and survival of peace and conflict resolution concepts and practices in Cambodia. Another very important interest is to be non-partisan and to be seen as non-partisan.

The world views of people working on peace and conflict resolution in Cambodia are varied, and include deeply dedicated Buddhists and Christians. Interviews with peace workers in Cambodia tended to reveal a perspective in which conflict is seen as neither good or bad in itself as long as it is processed in ways that promote non-violence and resolution. Thus, the manifestation of conflict is desirable, and the goal is to analyse it and develop processes to resolve it. There are varied conceptions of “peace” present within the conflict resolution community, although it is fair to say that “peace” would generally not be defined as the mere absence of armed conflict, but as positive peace that includes stability and harmony at least. There are some syncretic views about conflict and conflict resolution which blend Buddhist and Western concepts of conflict resolution or see them as complementary. There is an abandonment of strict harmony ideology – harmony without justice is seen to lead to a fragile or unstable peace.

\textsuperscript{218} Interview with foreign NGO worker, Phnom Penh (5 June 2000) [notes on file].
There is very little focus on ADR in the justice system. There appears to be little foreign interest; no doubt because the justice system is in need of fundamental reform. Thus, most conflict resolution projects are nested not within legal reform projects but within programming on civil society and good governance.

At the present time, the main process roles for conflict resolution organizations may be in training, research, and sponsorship of multi-sectoral dialogue. The principles of conflict resolution may help people to develop attitudes and skills for peaceful resolution at various levels in Cambodian society including the grass roots and government sectors. Organizations with closer connections with government could facilitate more openness to public participation and negotiated approaches to public decision making and national conflicts, and effectiveness of decision making bodies. The conflict resolution community may not be able to mediate in national conflicts in the short term; some may be perceived as too close to government. However, they can play a significant role in fostering the development of relationships and trust for future public policy negotiations, and the development of ADR options within public systems. The process of trust-building poses particular danger in polarized Cambodia because of the likelihood of becoming perceived as politically affiliated.

There is no formal network to foster growth of the field. The Mennonite Central Committee recently embarked on a “mapping” project to identify and describe all the peace projects in Cambodia with a view to developing a network of conflict resolution organizations.

The legitimacy and voice of conflict resolution organizations varies. The power of conflict resolution proponents comes from the attractive power of the idea of peace and resolution of conflicts. The idea of conflict resolution for human rights issues may meet with a higher degree of government approval than human rights advocacy which is often seen as “against” the government. The two main conflict resolution organizations appear to have sufficient resources for the programs they are undertaking. Resources for programming are mainly from foreign donors. The relationship between conflict resolution organizations and other civil society organizations, except for some selected ones, is unclear, and could possibly be better
developed.

The conflict resolution organizations may not be stakeholders, per se. They would likely see themselves as fostering the development of research, training and possibly sponsoring or facilitating of public policy dialogue.

3.2.5.3 Students

Young, energetic students are an important group to consider in the human rights situation in Cambodia. They have been part of pro-democracy demonstrations after the 1998 elections.\textsuperscript{219} It has been suggested that they are easily mobilised by opposition political parties, particularly the Sam Rainsy Party. Student groups include the Khmer Youth Association (KYA), Students Movement for Democracy (SMD), United Neutral Khmer Students (UNKS), and Khmer Democratic Youth Association (KDYA). These groups have opposed laws planned by the government to confine all potential candidates for upcoming commune election to those nominated by the CPP or its coalition partner FUNCINPEC.\textsuperscript{220} “Students,” however, do not necessarily form a disciplined or coherent interest group. Mobs consisting largely of students at the University of Phnom Penh have been witnessed beating alleged criminals to death.\textsuperscript{221} Some have been part of anti-Vietnam demonstrations with racist overtones.\textsuperscript{222} “Students” represent diverse interests, and therefore may form part of other stakeholder groups. However, as youth, they represent important perspectives and have important interests that should not be lost in public policy dialogue.


\textsuperscript{220} S. Vong, “Two-Party Hijack of Commune Elections Feared” \textit{Phnom Penh Post} (1 September 2000).

\textsuperscript{221} S. Vong & A. Marcher, “University Mob Beats Thief to Death” \textit{Phnom Penh Post} (7 July 2000); J. Trezise, “The Brutal Side of Cambodia” \textit{Phnom Penh Post} (17 September 1999).

\textsuperscript{222} S. Samreth, “Right Royal Welcome for Vietnamese” \textit{Phnom Penh Post} (11 June 1999).
3.2.5.4 Employers

Cambodia's employer sector is often neglected in discussions about human rights, which discussions are dominated by concerns about vulnerable groups and individuals. In any discussion of human rights and human rights mechanisms, it is important to consider the interests of groups who may be the targets of human rights complaints. While Cambodia's chief source of human rights complaints is land disputes, many land disputes emerge from acquisitions by land developers for economic purposes. Also, many human rights complaints emerge from employment relationships and workplace issues. Employers in Cambodia's garment industry are discussed in the section below on international business interests. Employers in development and tourist-related industries are also important to consider but have not been researched for this project.

3.2.6 “Peasants and labourers”

Within this category might be included workers, unions, farmers, women's small business. It may also be possible to include grassroots wat committees composed of grass roots lay leaders.223 In this group might also be included most members of minority religious and ethnic groups, except possibly for the Chinese minority, many of whom might better fit with the “urban middle class” because of their business interests.

In 1997, the UN estimated that Cambodia had about 5.5 million people of working age, four million of whom were in the active labour force.224 About 75.1 per cent of the active labour force work in agriculture, 4.5 per cent in industry and 20.4 per cent in the service sector. The

223 Grassroots Civil Society, supra note 170; Human Rights in Action, supra note 102.

service sector consists mainly of small family- or self-employed shop owners and vendors as well as civil servants. There are many children in the labour force. Fewer than ten percent of workers were wage-earners in 1997, but this was expected to increase dramatically with increased foreign investment in labour-intensive industries, such as the garment industry. In 1997, there were about thirty-six new garment factories. Over ninety percent of their employees were women. In 1999 there were about 186 factories in Phnom Penh employing about 87,000 people of whom 78,000 were women. While investment brings jobs and capital to Cambodia’s tiny economy, labour intensive industries leave workers vulnerable to abuse because of power disparity between factory owners and workers. Problems identified include lack of compliance with the 1997 Labour Code, including lack of attention to the forty-eight hour maximum work week and working and safety conditions including poor ventilation, poor bathroom facilities, lack of clean water, poor electrical wiring and inadequate fire exits. There are reports of workers being locked into the factory until work is finished. Salaries in garment factories are about US$40 per month.

Cambodia is a member state of the International Labour Organization (ILO). In July, 1999,


Cambodia ratified all of the International Labour Organization (ILO) fundamental Conventions.

### 3.2.6.1 Unions

While Cambodia's 1993 constitution recognizes the right to be a member of a trade union, the constitution also states that the organization and conduct of trade unions are to be determined by law. While the State of Cambodia had a labour code, passed in 1992, no law was passed under the new constitution until January 1997. The new Labour Law is similar to the 1992 SoC Labour Law but adds the right to form unions, the right to collective bargaining, the right to strike and the right to legal action if an employer refuses to bargain. The Labour Law is seen as part of necessary legislative reform to bring Cambodia into line with a free market economy.

Before the 1997 Labour Law there were no independent labour unions. The only labour organization was the state-controlled Cambodian Federation of Trade Unions (CFTU) established in 1979 under the PRK. In December 1995, the Free Trade Union of the Workers of the Kingdom of Cambodia (FTUWKC), was formed with support of the Khmer Nation Party (now the Sam Rainsy Party). This coincided with a protest of several thousand women factory workers and the signing of an agreement between the workers and one of Phnom Penh's largest garment factories. The spread of protests to other factories led to an agreement to increase wages to US$40, to limit weekly hours to forty-eight and to pay overtime. In January 1997, workers' protests resulted in police actions including use of water cannons, beatings of several protesters and shots fired. In 2000, garment factory workers again staged large protests.

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229 1993 Constitution, Article 36.

230 S. Sok & D. Sarin, *Legal System of Cambodia* (Phnom Penh: Cambodian Legal Resources Development Center, 1998) quoted by Hall in "Human Rights and the Garment Industry," *supra* note 160 at 126. According to Hall's research, this legislation was the product of negotiations among the CPP, employers, the AFL-CIO, representatives of national and international labour organizations, and NGOs. Hall cites a December 25, 1998, interview in Phnom Penh with Noun Rithy, National Project Coordinator of the ILO.

resulting in at least one incident of violence.

There are reports of intimidation of workers attempting to organize unions in factories.\textsuperscript{233} Public sector workers have still not formed unions.\textsuperscript{234} In 1999, teachers, who currently do not belong to a union, went on strike for better wages. So far, unions have not grown in rural areas or in the farm sector, still largely controlled by the CPP. Ruling parties\textsuperscript{235} and some media\textsuperscript{236} have been accused of aligning with employers to discourage with union activities. As Neou points out, the close relationship between unions and the SRP provides for distant relationships with government.

Some unions, such as the Cambodian Union Federation (CUF), are politically aligned with the CPP. Its leader, Chouh Mom Thol, was named head of the Ministry of Labour’s Labour Advisory Council in 1999.\textsuperscript{237} Only one union is politically independent, the NIF-TUC, organised by an NGO, the Cambodian Labour Organization (CLO).\textsuperscript{238}

Most worker demonstrations and strikes are said to have been organized by the SRP.\textsuperscript{239} While the association of unions with the Sam Rainsy Party seemingly encourages mass worker demonstrations and strikes are said to have been organized by the SRP.\textsuperscript{239} While

\textsuperscript{232} “Cambodian Garment Workers Protest” \textit{BBC World Service} (20 December 2000).

\textsuperscript{233} \textit{Using Trade Agreements to Empower Workers, supra} note 227a; “Cambodian Textile Workers Protest over Conditions” \textit{Australian Broadcasting Corporation} (23 February 2000). in which there is recorded an allegation that Cambodian security forces arrested pro-union staff. “One of the protestors, Chorn Sokha, said three workers defending workers rights at the Tact Fat Company, had been arrested and held for two days without food,” this report stated.

\textsuperscript{234} Human Rights in Action, supra note 102.

\textsuperscript{235} “Cambodian Textile Workers Protest over Conditions” \textit{Australian Broadcasting Corporation} (23 February 2000).

\textsuperscript{236} K. Johnson, “TV Skit ‘Stitches up Garment Workers’” \textit{South China Morning Post} (14 March 2000) at.

\textsuperscript{237} \textit{Using Trade Agreements to Empower Workers, supra} note 227.

\textsuperscript{238} \textit{Ibid.}

\textsuperscript{239} K. Johnson, “Emboldened Workers Take to the Streets” \textit{South China Morning Post} (2 May 2000).
activism, SRP affiliation has politicized union images and activities. Neou suggests this affiliation increases opposition to their activities by the ruling parties and limits support from NGOs which generally try to maintain political neutrality.\(^{240}\) Thus, an important issue is the degree of politicization desirable for development of strong and responsible unions. Trade unions are also in need of skill development for negotiation. Issues for union members include worker rights, wages, balanced with continued improvement of the economy. The unions have taken strong positions concerning wages and improved working conditions. Given the number of large demonstrations and strikes, particularly in the garment industry, labour issues are urgently in need of attention.

It can be supposed that the vast majority of union members have a Khmer-Buddhist world view. Union leadership may be influenced largely by international labour standards of the ILO as well as the international union “culture” of adversarial negotiation and strikes. This may increase with international efforts to train Cambodian union members. Interest-based negotiation processes have not deeply penetrated the culture of labour negotiation in Western countries, which still tends to maintain Western adversarial and positional perspectives on conflict and conflict resolution. No research was conducted on the conflict ideologies or styles of Asia-based trade unions such as ICFTU-APRO which conducted training of trade union members in Cambodia in 2000.\(^{241}\)

Now that unions have legal mandates, they have the potential to gain substantial international support and pressure for workers’ rights, development of a trade union movement and worker demonstrations. The current Labour Law is weak in areas of labour union recognition, rights to organize and collective bargaining. For example, the current legislation does not provide for compulsory union dues where unions are in place, thus weakening unions’ ability to maintain

\(^{240}\) *Human Rights in Action*, supra note 102.

control in a given workplace. While there are provisions prohibiting employer discrimination against union members or interference with unions, enforcement of the Labour Law is weak.\footnote{242} Workers in factories, where people work in close proximity, are more easily organized than farm workers or civil servants who work in various locations. Also, while service industry workers are in need of improved working conditions and enforcement of labour standards,\footnote{243} they are more difficult to organize because of the difficult of organizing employees of small employers like hotels and restaurants. Factory workers are more able to muster international support and thus get the attention of large multi-national companies concerned about their image.\footnote{244} Unions appear able to mobilize frequent strikes and demonstrations. The power of unions stems from organization of workers, together with support from the populist SRP party leader Sam Rainsy and the intense scrutiny of the government by international donors, human rights NGOs and INGOs and the UN.

3.2.6.2 Children and youth

Cambodia has one of the youngest populations in the world. In 1995, more than forty-five percent of the population was under fifteen years of age.\footnote{245} This is due to high population growth from 6.5 million at the end of the Pol Pot period to 11.4 million in 1999. The large number of children means more dependents per adult. Rights and needs of children have not been well-respected in Cambodia over the past several decades. The Pol Pot regime thought nothing of killing political enemies including children and babies. Currently children comprise the majority of the population in Cambodia. They are very vulnerable. Children’s rights are still not well respected, including their right to education, health and personal autonomy, the


\footnote{243} This is based on my own observations of hotels and restaurants where staff work shifts of over twelve hours, seven days a week.

\footnote{244} "Nike Meets Cambodia Factory Reps to Verify Underage Claim" \textit{Associated Press} (5 October 2000).

\footnote{245} S. Chan \textit{et al.}, \textit{Cambodia: The Challenge of Productive Employment Creation} (Phnom Penh: Cambodia Development Resource Institute, 1999) at 42 [hereinafter \textit{Challenge of Productive Employment}].

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government has recently expressed concern and commitment to make improvements to children’s well being and future.\textsuperscript{246}

Child labour is a serious problem; Cambodia has the worst record in Southeast Asia. An estimated forty-two per cent of children aged fourteen to seventeen – over 600,000 children – are working in some capacity. Child workers average 44.2 hours of work per week.\textsuperscript{247}

Children’s labour is seen as essential to supplement the meagre incomes of parents, particularly in women-headed single parent families. Children’s education is not being given priority in terms of government spending. Girls are particularly vulnerable to being removed from school at early ages. Family farms are the usual venue for child labour, but there are children employed in “begging, scavenging for recyclables, baggage-carrying (porters), rickshaw driving, garment manufacture, carpet weaving, mining, commercial sex, fishing, brick-making, and construction work.”\textsuperscript{248} About ten percent of child workers are involved in manufacturing and trade.\textsuperscript{249} About a third of Cambodia’s estimated 80,000 to 100,000 commercial sex workers are under eighteen. This means an estimated 27,000 and 33,000 child sex workers in the country with about 5,000 in Phnom Penh.\textsuperscript{250} Some are very young and have been sold into sexual slavery by parents who are either tricked or desperately poor.

Issues for children include day to day survival of their families and themselves, as well as longer term issues such as education, health, sexual well-being, and economic well-being. Girl


\textsuperscript{248} \textit{Cambodia, Human Development Report 2000, supra} note 246 at vii.

\textsuperscript{249} K. Johnson, “Child Workers Doomed to Life of Poverty” \textit{South China Morning Post} (17 October 2000).

\textsuperscript{250} \textit{Cambodia, Human Development Report 2000, supra} note 246 at xi.
children are more at risk than boys. Human rights issues regarding children are directly linked to poverty. Cambodia currently provides very poor access to schooling, particularly schooling beyond primary education. There are also considerable health issues related to child labour including work-place injuries, chemical hazards, HIV/AIDS and land mines injuries.\textsuperscript{251}

In most societies children’s voices are generally unheard. Children need strong, articulate, committed advocates. In Cambodia, parents and teachers are generally not in strong positions to advocate for their children’s rights. Children’s claims are made through groups working on their behalf, largely international organizations, INGOs and local NGOs. Currently, advocates for children’s rights are targeting the worst forms of child exploitation and neglect by emphasising issues such as education, sexual exploitation of children and street children. Also important for child advocacy is coordination of the work of all sectors including government, donors and civil society efforts.

Children and youth are rarely given a place at negotiating tables anywhere in the world, although in British Columbia youth delegates were members of stakeholder negotiation over environmental issues in the processes of CORE. The interests of young children, including girl children and children of minority groups should be represented specifically in negotiations concerning human rights policies or the shape of human rights institutions or complaint processes.

\textbf{3.2.6.3 Women}

The decades of war and privation mean that there are a hundred females for every sixty-six males in the age group forty to forty-four.\textsuperscript{285} More than a quarter of Cambodian households are

\begin{footnotes}
\item\textsuperscript{251} Cambodia, Human Development Report 2000, supra note 246 at 53-55. An estimated one in 235 Cambodians have lost limbs or parts of limbs.
\item\textsuperscript{285} Challenge of Productive Employment, supra note 245 at 31.
\end{footnotes}
woman-headed with a third of these living below the poverty line. In many sectors of Cambodian society women and girls are considered as less important than men and boys. This attitude has fostered violence, infidelity in marriage, unequal access to education and economic opportunity and many other inequalities. Cambodian women suffer from high maternal mortality rates and high infant mortality rates of up to ninety per 1000 live births. In addition, it is important to remember that because of inequalities and the traumas of the past, many women suffer from depression attributed to trauma. Women are poorly represented in public decision making and the professions. The study of women’s roles and issues in Cambodia is important. Unfortunately, it is not possible in this chapter to give this topic the detailed analysis deserved.

Issues for women include economic and food security, violence, health, reproductive health and choice, and workplace equity and safety. Since women are primarily concerned with the care of children, the issues of children are also their issues. Most Cambodian women are poor and live in rural areas.

The positions of the Ministry of Women’s and Veterans Affairs and women’s organizations are referred to above. Therefore, this brief section emphasises what individual women do on their own. Some women try to start small businesses such as noodle stands. Others seek jobs as domestic workers, factory workers or in the service industries such as hotels. It is difficult for

286 Ibid. at 3-4.

287 Ibid. at 37. It is interesting to note that thirty-seven percent of male headed households in 1997 were living below the poverty line. The relatively better off position of female headed households is attributed to the fact that female headed households tend to have fewer dependents. However, children are also more likely to be working in female headed households. Cambodia, Human Development Report 2000, supra note 246 at xiv.


women to seek assistance in cases of domestic violence or sexual assaults. In case of unwanted pregnancies, many girls and women seek help from unqualified abortionists. Educational opportunities are slim for rural girls and women. Some end up in the sex trade, including by being sold by their parents.

Regarding women’s world views, it is probable that most poor rural women have not had opportunities to question cultural perspectives concerning women’s roles and the subordination of women. This study did not look at the question of whether there are distinct women’s approaches to conflict. One might speculate about whether Carol Gilligan’s findings about women’s “ethic of care” have application to Cambodian women. It is likely that the harmony ideology prevalent in Cambodia also applies to women.

Unless they belong to a union or other group, women are unorganized. Women’s groups and human rights groups have made some urgent claims concerning issues of violence, sexual exploitation, health issues, and other matters that particularly affect women. Cambodia is a signatory to international instruments including the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), although they are not signatories of the CEDAW Optional Protocol. However, women’s issues, organizations and the women’s Ministry are marginalised in Cambodia politics. Research for this project did not include learning to what extent women, particularly ordinary women are included in consultation for development projects or the level of their participation in decision making, although anecdotal evidence suggests that women are often excluded or marginalised in development projects despite Gender and Development protocols. The government SEILA development projects of the UNDP require women’s inclusion on women’s committees. Nuns are now sometimes included on pagoda committees. Nuns with higher education are beginning to participate in human rights, conflict resolution and education projects. A number of highly educated, talented and hard working women are in significant leadership roles with NGOs.

Women as a group have little power in Cambodia, however there is a handful of women who have considerable power. These women, primarily from the NGO sector, tend to use facilitative forms of network power to coordinate or organize conferences, educational events and development programs of many kinds. Women have also been the driving and organizing force in many human rights organizations. To use an expression found in some parts of Asia, “women are the hind legs of the elephant.” Women are almost always in interdependent relationships in all sectors and at all levels of society. While women may be willing to work together on issues that do not threaten primary family relationships, political polarization impedes women’s cooperation as much as it does in all sectors in Cambodia.

3.2.6.4 Unorganized poor people

All human development indicators in Cambodia are among the lowest in Asia. Most of Cambodia’s population consists of unorganized poor people. Eighty percent of the population live in rural areas that are significantly poorer than urban centres. There are few organized groups among poor people. Therefore, the interests of poor people are generally represented not by poor people themselves but by organizations on their behalf, including NGOs, INGOs, and international organizations like the UN and the World Bank. Indeed, it is often just assumed that poor people cannot represent their own interests. However, experiments in public participation in environmental impact assessment in Cambodia indicate that poverty and illiteracy are not a barrier to effective local public participation. There is no valid reason to hinder poor people from providing input and information toward public decision making in the area of human rights, whether civil and political or economic, social and cultural rights. Of

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292 The role of the World Bank in Cambodia as it relates to human rights is briefly discussed in Chapter Four.


course, it does take will, effort and time to design and conduct consultation suited to the particular needs and interests of poor people. Without such efforts, the people most affected by human rights policies or practices may not have a voice, possibly resulting in loss of valuable local knowledge, together with the risk of design of institutions that are unsuited or inaccessible to those who most need them.

3.2.6.5 Minority ethnic groups

There are several minority groups in Cambodia that should be considered, such as the Muslim Cham, Vietnamese and indigenous people who are at considerable risk in Cambodia.\textsuperscript{295} There is also a sizeable Chinese minority including many business people. No detailed research was conducted for reasons of sheer scope of this project. They need to be considered in any practical stakeholder analysis.

3.2.7 International actors

There are many international actors present in Cambodia. In such a tiny country with little economic importance, it is surprising to find such a large and diverse expatriate community. The variety of organizations involved in issues related to human rights is so large that it is very difficult to list them let alone to do them justice in this stakeholder analysis, which is already long. Therefore, just a few will be briefly mentioned to set the stage for fuller discussion about international development in Chapter Four.

3.2.7.1 International Organizations (IOs)

The United Nations has played important roles in Cambodian human rights, particularly since its involvement in the negotiations for the Paris Peace Accords and the UNTAC presence

during 1992 and 1993. Since then, the UN has continued to have a significant presence in
Cambodia through its various agencies including the UNDP, UNICEF, UNESCO. While they
are important, as are other international stakeholders primarily concerned with economic and
social rights, such as the WHO, the ILO, FAO and others, they are not discussed here.\footnote{296}
Human rights in Cambodia are largely taken up by the UN through the Special Representative
of the UN Secretary-General for Human Rights in Cambodia and the COHCHR.\footnote{297} The
COHCHR has an office in Phnom Penh and six provincial offices. The COHCHR has been
most vocal in reporting human rights problems and the Special Representative makes regular
reports to the UN. The UN has also been vocal in pressing for a tribunal to try past leaders of
the Pol Pot regime. The rationale is that Cambodia must face the past and call perpetrators to
account if they are to face the present situation of impunity. Unfortunately, some UN
COHCHR staff have not enjoyed good relationships with the Cambodian government.

Also important is the role (and potential role) of the UN High Commissioner on Human Right’s
Special Advisor on National Institutions, Brian Burdekin, and the UNHCHR’s National
Institutions Team.\footnote{298} In 2000, Burdekin, met with NGO representatives and officials from
Cambodia’s three main political parties to encourage consensus in the formation of an impartial
human rights commission.\footnote{299} Several human rights organizations in Cambodia, including

\footnote{296} There are important stakeholders who are primarily concerned with economic and social rights, such as the
UNDP, WHO, ILO, FAO and others. The scope of this project does not allow in depth consideration of these
stakeholders.

\footnote{297} For the mandate of the Cambodia Office of the UN High Commissioner for Human Rights (COHCHR), see
the web page of the COHCHR online: COHCHR <http://www.unhchr.ch/html/menu2/5/cambodia.htm> (date

\footnote{298} This office offers technical assistance to countries in trying to establish national human rights institutions.
There are preliminary moves to assist Cambodia in assessing whether or not there is an appropriate environment
for a national human rights commission that would fit international standards. In this regard, a commitment to
independence of the institution, together with strong commitment for funding, is considered important At the
present time the office is encouraging public consultation at the national level to ensure that when an national
institution is established it will have been planned in an open, transparent manner. The office also provides
technical assistance for drafting appropriate legislation, and for implementation according to international
standards (including the “Paris Principles.”) discussed in Chapter Five and annexed as Appendix X.) Electronic
mail communication from Orest Nowosad, National Institutions Team, Office of High Commissioner for Human

\footnote{299} K. Phelim, “Momentum for HR Body” Phnom Penh Post (21 July 2000).
LICADHO and the Senate Commission on Human Rights have been spearheading an increase in consultation toward this end.

For the dominant international organizations, the issues include liberal democratic reforms including the enforcement of international human rights instruments. Liberal conceptions such as the rule of law, an independent judiciary and strong civil society organizations are continually advocated. For the UN and for some donor countries, notably the United States, the issue of accountability for past human rights violations during the Pol Pot period is a high priority. The Western international community, including the UN, has been trying to emphasize the indivisibility and interdependence of civil and political rights and economic and social rights. The Cambodian government, by contrast, along with China, has emphasized economic, social and cultural rights, supported by the UN, and many donors that are focusing on agricultural development, health care and poverty relief.

The UN world views appears to centre on Western liberal ideology concerning democracy, governance, and human rights. These have been accompanied by a Western-style advocacy oriented approach to human rights. There has been a very small amount of training on alternative dispute resolution (ADR) approaches to addressing human rights complaints.

Foreign missions in Cambodia have a high degree of knowledge about international human rights. However, except for long-term staff, there tends to be a low degree of knowledge about Cambodian history and culture, and little knowledge about Khmer-Buddhist ideas related to governance and human rights. While coordination among the efforts of various foreign missions has improved over the past five years thanks to the work of the NGO Forum and the Cambodian Cooperation Committee (CCC) and other umbrella groups including the Human Rights Action Committee, there are still considerable gaps in coordination of knowledge and effort.

The current process options for the UN include arousing international support for international human rights through investigation and public reports, and trying to gain support at highest
levels of UN to pressure the government. The government of Cambodia often seems inclined to wish foreign human rights agencies, particularly the UN, to leave. But it is widely believed that the ongoing UN presence has been the significant moderating force keeping the Cambodian government from becoming even more authoritarian, and keeping Cambodian human rights NGOs relatively safe and free to pursue monitoring, education and lobbying. It seems likely that foreign Western donors and development agencies will continue to foster the current program of investigation, publicity, persuasion, support of NGO activities, and above all, continued presence. International human rights proponents, including the UN, seem reasonably trusted by human rights NGOs. However, there appears to be very low trust between the UN and the CPP, which has seen the UN human rights office and several international and local human rights organizations as hawkish in their advocacy.

3.2.7.2 International Monetary Fund, World Bank, Asia Development Bank

The International Monetary Fund IMF has no mandate to intrude into domestic human rights matters, but in fact does get involved in internal political and legal matters that involve economic stability and reforms. IMF policies in Cambodia have included pressures toward structural adjustment and continued movement toward a market economy, reduction in military spending, transparency of banks and the civil service and other anti-corruption measures. Similarly, the World Bank been concerned with liberal development and economic reforms while trying to ensure respect for the environment and human rights in an overall stated goal of poverty alleviation.

3.2.7.3 Association of South East Asian Nations (ASEAN)

The Working Group for an ASEAN Human Rights Mechanism has been working slowly toward the development of a sub-regional human rights mechanism within Southeast Asia. The Working Group is composed of human rights advocates from the national working groups of the various member countries. A current emphasis is the strengthening of national human rights institutions in the region. For approximately the past year, Cambodia has been in the formation
stage of a National Working Group, chaired by Kem Sokha, the current chair of the Senate Commission on Human Rights and Reception of Complaints (discussed above).\textsuperscript{300} However, human rights is not is not a high priority for ASEAN.\textsuperscript{301} ASEAN has focussed more strongly on economic stability and growth, security in the region, and on creating friendly consensual relationships among member states. ASEAN members wish to building regional strength as a balance to US and North East Asian regional economic hegemonies. ASEAN has been working on the development of an ASEAN Free Trade Area (AFTA). It must be recalled that several ASEAN nations have proposed "Asian Values" arguments to counter emphasis on individual civil and political rights. ASEAN’s policy has been one of non-interference in the affairs of member states, or at most constructive engagement, although this may be changing, particularly in cases where internal issues affect the stability of the region or when "bad governance causes cross-border flow of refugees, arms, and drugs, as well as third party concerns."\textsuperscript{302}

3.2.7.4 Foreign donors

The role of various other foreign donors is also important, including Japan, China, the European Union, and the United States. Canada has been a relatively minor player in Cambodia. While the role of these donors is important, it is beyond the scope of this discussion to further elaborate the complex interplay of various players within the international community. With the exception of China and ASEAN members, the foreign community and international organizations promote liberal democratic thinking. China has consistently emphasised economic stability and growth and emphasises sovereignty of Cambodia in human rights issues. China has placed a low priority on issues of impunity and a Khmer Rouge tribunal. By contrast, the United States has stressed civil and political human rights and played

\textsuperscript{300} See the information on the website of the Working Group for an ASEAN Human Rights Mechanism, online: Working Group for ASEAN <http://www.rwgmechanism.com/contactinfo.html> (Date accessed 18 November 2000).


a significant role in brokering the agreement with the UN concerning the Khmer Rouge tribunal. Both China and the US have consistently acted so as to prevent discussion of their own involvements in the region relevant to any comprehensive discussion of the Khmer Rouge period. While there are many foreign diplomats workers who have become passionately dedicated to the Cambodian people, it seems doubtful that powerful foreign governments have a true appreciation of the history, values and cultural traditions of Cambodians. Rather, they have seemed to stress economic and political stability that can foster international trade and investment in the region. Neoliberal economic theories have been influential with the government, but there has been less success in inspiring the legal and human rights reforms that are supposed to go along with them.

The US and the EU withdrew bilateral funding from Cambodia after the July 1997 events that toppled the CPP-FUNCINPEC coalition. Canada's position was to maintain funding in specified areas, including human rights organizations, conflict resolution organizations, and the National Assembly Secretariat and electoral processes which it was recommended be “tied to clear benchmarks or performance and commitment by the Government of Cambodia.” Canada made a significant contribution to Cambodia's 1998 electoral processes.

Cambodia’s extreme economic dependency on foreign aid means the agendas of the IMF, the World Bank, other international financial institutions (IFIs) and trade organizations are particularly potent. More is said in Chapter Four about foreign development paradigms.

3.2.7.5 International business interests

A stakeholder analysis would be incomplete without mention of international business interests. Cambodia's fledgling industries, including the garment industry are largely fuelled by international interests. The importance of stable investment climate to the Cambodian economy and to factory workers means business interests are important human rights stakeholders.

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The political stability of the past two years has created a more hospitable climate for service industries related to tourism and manufacturing, particularly the garment industry. Urban areas and major tourist destinations such as Siem Reap are the major venues for growth of both these industries. The IMF and World Bank program of structural adjustment for Cambodia beginning in 1993 led the Cambodian government to offer substantial tax incentives to foreign investors, including low corporate tax rates of nine percent, duty-free imports of raw materials and tax “holidays” of up to eight years depending on the project. The membership list of the Garment Manufacturers’ Association of Cambodia (GMAC) members indicates that factories are owned and operated mainly by non-Cambodian companies from Taiwan, Singapore, Thailand and other Southeast Asian companies. Multinational companies such as The Gap, Polo, Ralph Lauren, and Nike have had contracts to produce clothing in Phnom Penh factories. GMAC has close connections with the CPP. Influential politicians, high ranking military officials and police officers sometimes have direct financial interests in garment factories. Exports have grown from US$26.5 million in 1995 to US$360 million in 1998, almost all to the US, EU countries and Japan. Investors and factory owners see Cambodia as hospitable. One Chinese factory owner is quoted as saying: “Hun Sen is good for me. Hun Sen not allow union.” The government has also supported the garment industry by defending it against recent accusations that child labour is prevalent. This accusation resulted in withdrawal from Cambodia of two multi-national firms, Nike and The Gap. International business do wish to avoid scandal.


305 Using Trade Agreements to Empower Workers, supra note 227.

306 See “Human Rights and the Garment Industry,” supra note 160 at page 131. See also Using Trade Agreements to Empower Workers, supra note 227, citing his own experience in being referred to a Cambodian army general when trying to get in touch with the owner of a factory in which union leaders had been fired.


310 “US Gives Cambodian Textiles Helping Hand in Child Labour Row” Agence France-Presse (24 October
Many international garment companies now subscribe to international codes of conduct which include adherence with domestic labour laws and employment standards, although there may be no commitment to go beyond these minimum standards. However, it would be a mistake to assume that international business interests were driven by interests other than capitalism. And government and local businesses do care whether or not large multinationals stay in Cambodia, since industrialization and job creation are seen as priorities.

### 3.3 Analysis and Conclusions

The purpose of this chapter is to give a partial demonstration of the type of analysis necessary in considering the prospects and type of public participation possible in the development of human rights policy in Cambodia. Together with the contextual analysis in Chapter Two, this stakeholder analysis provides insights into a number of dynamics noticed in Cambodia. In particular it highlights some possible reasons for the dynamics of foot-dragging by Hun Sen on the variety of issues pressed by the UN and by local and international human rights organizations. Pressure has been sufficient to cause negotiations in many areas, but has not secured whole-hearted implementation. So far the CPP has not seen the necessity of becoming seriously engaged in human rights reforms. Indeed, the run up to the commune elections seems to be indicating an intensification of the current patterns of polarization and intimidation.

This pattern of backtracking appears to illustrate suggestions in the literature on public negotiation that agreements and decisions are less likely to be successfully implemented if key stakeholders' interests are threatened to the point that they have reason to sabotage them. If so, perhaps different approaches are needed. In considering what different strategies may be possible, a key question arises from the conflict analysis undertaken in Chapters Two and Three. What kind of dialogue is possible among the human rights stakeholders in Cambodia? What is

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311 E-mail communication from The Gap Online Customer Service (13 July 2000).

312 *Breaking the Impasse, supra* note 3.
the likelihood of successful negotiation or transformative dialogue on human rights issues?

Literature on negotiation and public policy dispute resolution has identify several prerequisites for negotiability. First, Susskind and Cruikshank consider that trust, per se, may not be necessary to begin negotiations, but must be built during negotiations. However, where conflict has escalated to the point of demonization or contempt among parties, successful negotiations are unlikely without considerable relationship building, either among key leaders if they are strong, or among their constituencies if leaders are malleable to constituency pressures. Thus, and second, a key factor in negotiability is the attributes of leaders, particularly their capacity for openness, change and moderate expression.

In Cambodia, key stakeholders, including Hun Sen and Sam Rainsy, have developed an entrenched confrontative and adversarial communication style. They appear to hate and mistrust one another. This dynamic is not hopeful. In particular, the power of “strong man” Hun Sen means other stakeholders fear going so far as to challenge his power outright. Hun Sen, Sam Rainsy and the human rights advocacy stakeholders have strong constituencies. Hun Sen has the support of armed forces and powerful government officials, and he may hesitate to interfere too strongly with their interests. Sam Rainsy has strong worker support and considerable foreign support from the US, but not sufficient to provide a power balance to motivate effective sustained negotiations concerning public policy. The UN has continuously struggled with Hun Sen on civil and political human rights issues. Ranariddh, the leader of FUNCINPEC, does not currently seem to have a strong constituency since Hun Sen’s decisive victory in July 1997 consolidated the legitimacy garnered through the foreign supported election and by Khmer Rouge capitulation in 1998. It is important not to forget the role of King Sihanouk, who continues to provide needed legitimacy to Hun Sen's government.

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313 Ibid. at 188-89.

Third, it must be possible to identify the key stakeholders,\textsuperscript{315} and to identify issues clearly. While the stakeholders in human rights conflict in Cambodia are many, interconnected and overlapping, they are relatively clearly identifiable and the human rights issues are also fairly clear. Most human rights issues have been heavily documented and analysed, although not much from a conflict analysis and resolution perspective.

Fourth, it must be possible to find a legitimate spokesperson to speak for (but not necessarily bind) each stakeholder group.\textsuperscript{316} In complex matters where the stakeholders are not individuals but groups, the groups need to be sufficiently organized to identify representatives, or in the case of a group that is insufficiently organized, “a stand-in, or surrogate.”\textsuperscript{317} Civil society organizations are sufficiently developed that some could act as surrogates to represent the interests of inchoate stakeholders like poor people, women and children. There are leaders and advocacy groups available to represent the interests of ethnic minority groups.

Fifth, negotiation can only take place if the issue can be framed in such a way as not to violate the parties’ “sacrosanct values”\textsuperscript{318} or in the case of public officials without violating terms of their office.\textsuperscript{319} This does not seem to be a barrier regarding human rights issues in Cambodia.

Sixth, according to Susskind and Cruikshank, practical deadlines must be sufficient to allow consensus building.\textsuperscript{320} One possibly relevant deadline is the upcoming commune elections. Another is the length of tenure of the UN’s COHCHR in Cambodia which is currently on borrowed time. A third is the uncertain life spans of elderly Khmer Rouge leaders. The latter two may impact on the UN’s feelings of urgency about a UN-sponsored tribunal. The

\textsuperscript{315} Breaking the Impasse, supra note 3 at 188-89.

\textsuperscript{316} Ibid. at 191.

\textsuperscript{317} Ibid. at 104.

\textsuperscript{318} Ibid. at 192.

\textsuperscript{319} Ibid. at 193-95.

\textsuperscript{320} Ibid. at 191.
international principle of sovereignty gives the Cambodian government the clout on all of these deadlines, and provides considerable uncertainty about how international pressure will be maintained in this tiny, internationally economically insignificant country nestled within a region that does not place a strong priority on civil and political human rights. On the other hand, Cambodia’s dependency on foreign aid means that it must sufficiently meet foreign expectations and deadlines for reforms in order to ensure decisions to continue aid monies.

Seventh, the stakeholders must have a reason to sit down and talk. In realist perspective, the key question becomes: Do the stakeholders have sufficient ability to pursue their interests without the consent of the other stakeholders? What can they accomplish on their own? It may be possible for negotiations to proceed without some secondary players, but not without the key players – which Susskind and Cruikshank identify as those whose consent is essential for implementation. There must be interdependence in their relationship for the purposes of implementation, not just talk. If one party can get all it wants without coming to the table at all, there is no incentive even to negotiate.

Eighth, and related to interdependence, is power. Power, which resides and moves within social relationships, must be sufficiently balanced to allow fair representation and negotiation of interests. In Cambodia, the CPP still holds sway, directly or indirectly supporting (or at least not hindering) the interests of senior government officials, military officials, and foreign business interests. On the other hand, increasing public demonstrations suggest that the government may wish to consider more public participation in public policy decision making merely for utilitarian reasons. Increasing popular demonstrations, worker pressures and “self-help” forms of mob justice are examples of the need in Cambodia for increased public legitimacy of government, law and policy.

Local civil society leaders, including religious leaders are important, but not key (in terms of

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321 Ibid. at 189-90.

322 Ibid. at 190-91.

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power) unless their positions are supported by strong international actors. The civil society sector itself, while visible and apparently strong, is heavily dependent on international funding. Civil society organizations have not been seen to play a significant role in effecting change in government policies or attitudes on the government's willingness to shift from authoritarian policies toward power sharing. With the exception of the dhammayietra movement, civil society organizations have had difficulty maintaining independence from government pressures, and generally their advocacy has been effective only in areas where the government does not see their interests threatened. Religious leaders could be more influential than they currently seem prepared to be. However, to date the major influences on government have been the advocacy of international organizations and foreign governments.

Also related to power is the important issue of face, which is generally either neglected or poorly nuanced in Western analyses. If parties fear losing face by negotiating, they are unlikely to do so. Face issues can also lead parties to negotiate if it seems face saving or face restoring to do so. It should be noted that foreign styles of intervention have sometimes been face-threatening and insulting to Hun Sen, providing disincentives to cooperation.

This stakeholder analysis indicates that while human rights policy matters are complex and contentious – often to the point of violence – all the conditions necessary for negotiation are present to some degree in Cambodia today. However, in the absence of moral conversion of key players, there may be insufficient "mutually hurting stalemate" among the key

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324 "Peter Leuprecht, the special representative of UN Secretary-General Kofi Annan for human rights in Cambodia, said he would raise the issue with the United Nations Human Rights Commission in Geneva in April if it is not resolved. 'If it is not done, it will reflect badly on Cambodia and the government,' Leuprecht said..." "UN Wants Cambodian Human Rights Office Formalised" Voice of Cambodia Radio International (VOCRI) (27 February 2001). Also note the comments of Rita Reddy, R. Reddy, "Rita Reddy Comments" Phnom Penh Post (31 March 2000); P. Sainsbury, "UN Human Rights Center Gets New Chief" Phnom Penh Post (17 March 2000).

stakeholders to cause Hun Sen to sit down and seriously negotiate about human rights to the
point of serious implementation. The government demonstrates little political will to move
toward serious changes in human rights policies or practices, and does not appear to consider
that it must in order to meet its interests. The presence of widespread corruption, continued
power mongering, and the absence of political will to implement changes in the legal system,
means that the time is not ripe to press forward rapidly toward negotiations for a permanent
national human rights institution. A dramatic change in the CPP’s demonstrated willingness to
implement the 1993 constitution is necessary before moving ahead too rapidly with ambitious
plans for an independent human rights body. There are significant risks in developing a
national human rights commission that is incapable of working independently and fearlessly for
the good of society and within international norms and Cambodia’s currently rather empty
constitutional framework.

Nevertheless, the fact that an agreement exists on a Khmer Rouge tribunal is evidence that the
CPP is prepared to discuss, consult, and perhaps even negotiate, human rights issues if
persuaded that it is in their interests to do so. At the present time, however, caution must be
exercised before expressing too much hope for implementation of these agreements, which
have been reached under considerable international pressure and without apparent deep
conviction on the part of the government that tribunals are in the best interests of the
Cambodian people or government.

This stakeholder analysis of Cambodian leaders, people and the international players reveals an
convoluted labyrinth that presents huge challenges to those trying to facilitate development of
human rights policies for Cambodians – the context includes strong international influence,
incommensurable world views, different conflict styles, different governance modes and
competing interests. These complexities are at play within a country that has a long history of
polarization, hatred and pain, together with lack of resources, and physical, institutional, social
and religious infrastructures that are severely damaged, strained or dysfunctional.

Internal Conflicts” in I. W. Zartman, ed., Elusive Peace: Negotiating an End to Civil Wars (Washington, DC:
Brookings Institution Press, 1995) at 8-9

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This analysis also illuminates a dearth of individuals perceived to be independent or impartial. This is a challenge both in the creation of trust in state institutions, and in the design of stakeholder consultation or negotiation processes, which require impartial conveners and facilitators, and, in the case of contentious issues, mediator-facilitators. Chapter Five discusses some Cambodian initiatives that give rise to hope for building concepts and practices of non-partisanship and overall negotiating skill – and will – at the middle levels and the grass roots.

A reminder is in order that approaches that are exclusively actor-oriented are too thin and can easily lead to blame-oriented modes of analysis. This can lead to further polarization.

This discussion of the stakeholders brings into sharper relief that Cambodian human rights issues involve a tangled network of conflicts involving multiple sources. Using Christopher Moore’s typology, we are reminded that human rights conflicts involve conflicts about facts (particularly issues of who did what during the Pol Pot period), interests (particularly around political power; political and cultural values); values; relationships; and structural issues including economic, legal, social and cultural matters. Maire Dugan’s theory of “nested conflict” is also recalled, reminding us to look at stakeholders in the context of complex intertwined historical relationships, nested within several levels of sub-systemic and systemic conflicts that involve not just Cambodia but also the dominant world economic, social and legal systems. We also need to be reminded that severe structural inequities, a high degree of polarization and mistrustful relationships at all levels mean that conflicts could easily be triggered into escalation during times of uncertainty, such as exists now in the run up to the commune elections.

Consideration of the diverse world views of the major stakeholders, including their differing ideologies about conflict and human rights, necessitates yet another type of analysis that tries to make sense of the fact that international moral persuasion to implement the liberal constitution and international human rights has been largely ineffective. Conflicting cultural and moral values about human rights are expressed in contradictory messages and pressures on Cambodia from Asian and Western leaders. This theme is addressed further in Chapters Four and Five.
The conflict analysis undertaken in this chapter and Chapter Two leads to the conclusion that “negotiations” aimed at “getting to yes” about human rights policies, practices and institutions may be premature. However, it may be time to begin systematic informal discussions among the stakeholders with emphasis on raising public awareness of the needs and options, gaining dialogue expertise by practising with informal round-table dialogues and in the meantime continuing to place controlled and consistent pressure on the government with international assistance.

This approach has its focus less on “quick fixes” than on long term goals of breaking down monopolies on power in Cambodia. Therefore, a key element in making such informal discussions productive would be the strengthening of currently subjugated local groups to participate effectively in public policy discussions. This might involve goals of coalition building among some groups. It might also involve finding ways of assisting groups who currently need surrogate representation to be able to represent themselves. In power-shifting agendas, however, attention to goals of peacefulness remains crucial in order to prevent power shifts that reproduce existing forms of violence and end up just replacing one repressive elite group with another.
Chapter IV

4 Foreign Actors on Stage: International Peacebuilding Work in Cambodia

Since 1991 over 5 billion dollars has been spent on foreign assistance to Cambodia. No country in the world receives a higher per capita rate of foreign aid. Over 200 NGOs are presently working in Cambodia. Every area of human need is being addressed. And to what good? – Bert Hoak, Bert’s Books, Phnom Penh.¹

... I would not be doing my job if I ever allowed myself to forget that, in this and other deep rooted human conflicts, I was constantly dealing with people in pain. – Harold H. Saunders.²

4.1 Introduction

This chapter examines foreign peacebuilding work in Cambodia, with a primary focus on several projects undertaken by Canadian conflict resolution practitioners and academics in 1995 and 1996. Peacebuilding work by foreigners is examined through the lens of dominant theories in alternative dispute resolution (ADR) and conflict resolution, and through the lens of development theory. First, the Canadian projects are described. Second, the projects are situated within the various stances taken in peacebuilding development work in Cambodia. Third, there is a critical examination of the conflict resolution approaches taken in the Canadian projects. Finally, there is an examination of the work in the light of critiques discovered in the literature on law and development.


4.1.1 Preamble

In June 1995, British Columbia practitioners and academics from the Commission on Resources and Environment (CORE) and the University of Victoria Institute for Dispute Resolution (UVic IDR) were invited to visit Cambodia on an assessment mission to consider a conflict resolution education project there. Included were Stephen Owen, then the Commissioner of CORE, Alex Grzybowski, a CORE Associate, Andrew Pirie, then Executive Director of the UVic IDR, Catherine Morris, then UVic IDR's Director of Programs, and Prof. Wongsaa Kongdee of Khon Kaen University in Thailand. We had been working on conflict resolution projects in Thailand, and there was thought of extending the work into Cambodia and possibly other parts of Southeast Asia. One of the objects was to introduce concepts about public policy conflict resolution using the examples of CORE and the UVic IDR which had both been involved in pioneering conflict resolution work in Canada.

Our assessment visit to Cambodia was tacked on to the end of a mission to Thailand, where we had first met several Cambodian Members of Parliament, government officials and NGO leaders who attended our conference in Northeastern Thailand. The Cambodian delegates said they liked what they had learned in Thailand.

At that time, none of the members of our team knew much if any of what has been discussed in the preceding chapters. The frisson of danger posed by Cambodia's reputation and its then significant political instability conjured up imaginary scenarios that made some of us slightly apprehensive even though we were not planning to visit any zones prone to insurgency activities. Any uneasiness virtually dissolved as soon as we landed in Phnom Penh. While we felt in no danger at all and saw no evidence of armed struggle, our visit to the Cambodian Mine

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3. This work involved consultation and a workshop to launch the work of the Khon Kaen University Institute for Dispute Resolution. This work was led in Thailand by Dr. Vanchai Vatanasap, then President of KKU, Dr. Suwit Laohasiriwong, Vice President of KKU, and Prof. Wongsaa Kongdee.

Action Committee (CMAC) headquarters and the skull-and-crossbones land mine warning signs in rural tourist areas made it clear that in some areas Cambodia still had an active insurgency presence. The sound of an occasional gunshot in Phnom Penh recalled comments about Cambodia's "culture of violence." Banditry was (and still is) common, particularly at night, and as a rule of thumb military and police were (and are) not to be relied on.

We were overwhelmed by the graciousness of our Cambodian hosts and the eagerness with which government officials from each of the political parties seemed interested to hear about how we might help them resolve conflicts better. We responded to these invitations. With a knowledgeable and committed NGO, the Cambodia Development Resource Institute (CDRI), which was already committed to developing conflict resolution programming, we waded in.

Apparently, as foreign academics and consultants we were not unique in our inexperience and lack of knowledge of Cambodia. The comments of historian David Chandler are still relevant. He notes that expertise on Cambodia was rare in the 1992-1993 UNTAC peacebuilding efforts:

Very few people associated with UNTAC had any prior experience in Cambodia, linguistic expertise, or an abiding interest in the country . . .
Throughout 1991 . . . many UNTAC officials paid a price for this shortcoming. They spend several months on a learning curve that could have been smoothed out by asking a few questions, hiring some knowledgeable people, and reading a few books.  

I was deeply interested, moved and troubled by all that we saw and learned during that first visit. Upon landing at the airport on the outskirts of Phnom Penh we were driven into the

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5 At that time the political parties in Parliament included the CPP, FUNCINPEC and a few members of the Buddhist Liberal Democratic Party (BLDP). At that time, Sam Rainsy was just being removed from FUNCINPEC and threatened with removal from the National Assembly, along with some other vocal FUNCINPEC MPs.

dilapidated city on one its few good roads, and then through the centre of the city over many potholes amid overwhelming sights of damaged infrastructure and grinding poverty everywhere. Paradoxically, what still takes my breath away is the recollection of the first sights of Cambodia's beautiful lush greenery, its riotous magenta bougainvillea and the sedate frangipani that grace the senses of poor and rich alike along Phnom Penh's decayed colonial boulevards and streets.

After stowing our luggage in our (thankfully) modest hotel, our CIDA consultant and advisor whisked us without notice in air-conditioned cars to the Tuol Sleng Museum, on the site of the Khmer Rouge infamous S-21 prison. It had been a school but between April 1975 and January 1979 it became “the place where people went in but never came out.” There were only seven survivors. At least 14,000 people were interrogated and tortured and then executed and buried in a makeshift graveyard near the school, and when that was full, in the killing field a few miles away at Choeung Ek. The silence and suffocating heat in the decaying school buildings were broken only by visitors' slow footsteps in the echoing rooms that are still haunted by the anguish and evil experienced there. Some rooms bore evidence of their use for torture. Several rooms on first and second floors still remain chopped up into makeshift brick or wooden cells not quite big enough to stretch out. Peeling walls in other rooms were covered with dozens of written “confessions” and thousands of pre-execution snapshot portraits of the prison's inmates from 1975 to 1979 – men, women, children and infants – who had been subsequently executed, tortured to death or otherwise died there in the continuous political purges. Their eyes followed me impassively as I began painfully to face my own ignorant complicity in the world's wilful blindness about the events of the Pol Pot regime and the events that led up to it. To neglect to look at any one of these silenced witnesses might disrespect them and their memories. We did not weep, not there and then, or at least not in front of our colleagues. We did not talk about it.


8 This is the description of S-21 prison by a factory worker who had worked nearby. *Ibid.* at 7.

9 *Ibid.* at 139.
afterward. Some things are unspeakable. This experience moved to the forefront of our minds what remains a constant backdrop for Cambodian adults' thoughts and nightmares at all levels of society.

The Cambodian government officials and NGO leaders we visited said they wanted us to work with them. We said yes to these requests and joined the thousands of people who have been on short-term missions to Cambodia. We had believed our team was among the first visitors from the field of conflict resolution. We learned that some conflict resolution practitioners were already doing considerable grass roots training among monks and nuns as part of the dhammayietra movement and other peacework, including American Liz Bernstein, later known for her considerable work on landmines issues in Cambodia and elsewhere. John McConnell, a scholar and trainer from the UK with considerable experience in Sri Lanka and Southeast Asia, had also done conflict resolution training work in Cambodia from a Buddhist perspective. Later, I learned that John Paul Lederach had been in Cambodia on a short training mission a year or so earlier. We worked largely without the benefit of learning about their experiences and, in the case of Liz Bernstein, her considerable knowledge of Cambodia. We also worked

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10 One must be grateful to the many researchers and writers who have carefully researched, recorded and written what must be told and in doing so have personally examined mass graves, confessions, photographs and other records of many atrocities in considerable detail. My personal thanks are owed to a number of women and men who during discussions on other subjects honoured me by telling me stories of some of their personal experiences during or immediately after the Pol Pot Regime.

11 While life was very grim for all Cambodians during the Pol Pot time, the collectives in some rural areas of Cambodia were run more humanely than others.

12 J.A. McConnell, Mindful Mediation: A Handbook for Buddhist Mediators (Bangkok: Buddhist Research Institute and others, 1995) [hereinafter Mindful Mediation].

without the benefit of what some Cambodians were trying to learn as they worked to recover some of Cambodia's traditional conflict resolution processes.14

4.1.2 The Canadian projects described

The Canadian team was involved in two CIDA-funded conflict resolution initiatives.15 After the assessment mission in June 1995, the first project planned was a late-1995 conference in Phnom Penh for government officials and NGO leaders focussing on public policy conflict resolution, using the research and training experience of UVic IDR and the work of CORE as a case example.16 The second project included two back-to-back seminars in late 1996: One was a training seminar on mediation and ombudsman principles for the staff of the National Assembly Commission on Human Rights, and the other a seminar on public participation and public policy conflict resolution for members of the National Assembly.17

Taken together, these two projects, along with some other related projects in Thailand, were

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14 E.g., Venerable Maha Ghosananda's work on non-violence, discussed in Chapters Two and Three, had been going on since 1992. Also, the work of members of the Buddhist sangha in several places had been ongoing, including the Heng Mony Chenda, then a Buddhist monk and director of Buddhism for Development, who had been working on Buddhist concepts and practices for conflict resolution. See some of his thoughts translated in Ven. M. Heng, “Non-Violence and Conflict Resolution: Buddhism and Conflict Resolution in the Community” in E. Mysliwiec & C. Morris, eds., Dispute Resolution in Cambodia: A Road to Peace and Reconciliation, Proceedings of a Workshop Held November 28-30, 1995, Phnom Penh, Cambodia (Victoria, BC: UVic Institute for Dispute Resolution and Cambodia Development Resource Institute, 1997) at 46-52.

15 In addition to CORE and the UVic IDR, the Canadian partners later included the BC Ministry of the Attorney General after Stephen Owen became BC's Deputy Attorney General. The 1995 project was formally sponsored by the International Ombudsman Institute (IOI), and the second by a small Canadian non-profit corporation, Pacific Resolutions, the directors of which were Owen, Grzybowski, Morris and then IOI board member Prof. Tim Christian, Dean of the Faculty of Law at the University of Alberta.

16 See E. Mysliwiec & C. Morris, eds., Dispute Resolution in Cambodia: A Road to Peace and Reconciliation, Proceedings of a Workshop Held November 28-30, 1995, Phnom Penh, Cambodia (Victoria, BC: UVic Institute for Dispute Resolution and Cambodia Development Resource Institute, 1997) [hereinafter Dispute Resolution in Cambodia].

acclaimed by CIDA as examples of “what works.” These initiatives were seen as the catalysts for launching two organizations, the Institute for Dispute Resolution at Khon Kaen University in Thailand, and the Cambodian Center for Conflict Resolution (CCCR) in Phnom Penh. These first initiatives helped host partner organizations to mobilize non-Canadian funds to develop their programs. Initiatives of the Thai and Cambodian centres since then have been responsible for the training of many more than a thousand people in Thailand and Cambodia, as well as the creation of a Regional Forum on Conflict Resolution hosted by Khon Kaen University in Thailand. 

Follow-up research in Thailand and Cambodia by Greg Armstrong, a Canadian development specialist, elicited the following reasons for the success of these initiatives:

- selection of Canadian and Cambodian partners with capacity to deliver programs;
- program design based on needs expressed in Cambodia;
- decentralized program management, with Cambodian partners responsible for local logistics and project administration;
- flexibility of program design to suit local needs; and
- participatory decision-making emphasizing Cambodian leadership.

CIDA and others have said that the project “worked” in the sense that the concept of conflict resolution “took” and has been further developed in both Thailand and Cambodia. However, several aspects of these initiatives are worth critiquing. Funding limitations of these short-term CIDA projects meant lack of opportunity for research to develop knowledge of Cambodian and Thai history, legal system, social institutions, and political culture. While our strong local partner had this knowledge in many areas, there was (and still is) little knowledge in Cambodia.

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19 See the website of the Southeast Asia Regional Forum, online: Khon Kaen University Institute for Dispute Resolution, online: KKU <http://idr.kku.ac.th/> (date accessed: 28 February 2001).

20 What Works?, supra note 18 at 1.
about conflict resolution. Limited funding and time constraints meant planning was done largely at long-distance. There was very little opportunity for research or extensive preparation by Canadian participants. Canadian participants had no opportunities for learning from other conflict resolution projects that had already taken place, or were taking place in Cambodia. Nor were there sufficient resources or time to conduct a literature review on the history, culture or religious traditions in Cambodia. It is fair to say that in 1995 conflict resolution literature in (or about) Cambodia was virtually nonexistent. Even now, literature on conflict resolution and peacebuilding pertaining to Cambodia is very sparse except for numerous political science critiques related to UNTAC. These tend to feature explanations and approaches from international relations theory but rarely invoke theory from the field of conflict resolution.

There are also numerous reports on human rights, largely from monitoring or legal perspectives.

The short time frames and lack of opportunity for research meant project methodology had to be squeezed toward the primary use of workshop methodology that had been used many times

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21 For example, we knew nothing of fact that previous training had been conducted by John Paul Lederach in Phnom Penh, for which (to the best of my knowledge) no proceedings were developed for future reference, although subsequently some videorecordings have been located. We had only cursory information about the work of Maha Ghosananda, the Coalition for Peace and Reconciliation, or the Dhammayietra Center in Cambodia and the significant successful training that had been conducted through those programs. See Y. Moser-Puangsuwan & M. Maure, One Million Kilometres for Peace: Five Years of Peace Action Walks in Cambodia (Nonviolence International South East Asia Program, 1996), online: NISEA <http://www.igc.apc.org/nonviolence/niseasia/dymwalk/dy1.htm> (date accessed: 13 January 2000) [hereinafter One Million Kilometres for Peace]; Maha Ghosananda, Step by Step: Meditations on Wisdom and Compassion, ed. J. S. Mahoney & P. Edmonds (Berkeley, CA: Parallax Press, 1992).

22 The literature on peacebuilding in Cambodia is extraordinarily thin regarding conflict and conflict resolution theory, and usually focuses on conventional peacekeeping or institutional development approaches. Exceptions are the work of P.P. Lizee, Peace, Power and Resistance in Cambodia: Global Governance and the Failure of International Conflict Resolution (Chippenham, UK: MacMillan Press Ltd & New York: St. Martin's Press, 2000) [hereinafter Peace, Power and Resistance]; S. Peou, Conflict Neutralization in the Cambodia War: From Battlefield to Ballot-Box (Kuala Lumpur: Oxford University Press, 1997) [hereinafter Conflict Neutralization]. Even these works focus primarily on political science explanations with low emphasis on conflict theory. Also, see the work of the Cambodia Institute for Cooperation and Peace which is headed by conflict resolution specialist Dr. Kao Kim Hourn. Some of the CICP's work is not translated into English. The CICP takes a broad, multidisciplinary approach to peacebuilding. Its publications list is available online: CICP <http://www.cicp.org.kh/public.htm> (date accessed: 12 June 2001).
and was familiar in North American contexts. This meant we relied on the Harvard approach,\textsuperscript{23} supplemented with work of Christopher Moore\textsuperscript{24} and undergirded by learnings by some team members from critical literature on the field of ADR and literature from Michelle LeBaron's preliminary research on conflict and culture conducted in 1992 at the University of Victoria,\textsuperscript{25} the work of John Paul Lederach,\textsuperscript{26} and the combination of research, policy development, educational and practice experience of the Canadian team members in land-use planning, public policy dispute resolution, public participation, administrative tribunal adjudication, commercial mediation and community mediation. Of particular importance in this mix was the practice experience that team-members Stephen Owen and Alex Grzybowski gained from the work of CORE.\textsuperscript{27} Themes from these various theoretical and practice approaches are discussed in more detail later in this chapter.

For the 1995 and 1996 projects there was no time or money for elicitive research on the conflict styles and preferences of Cambodians, or the styles of dispute resolution and mediation

\begin{itemize}
  \item \textsuperscript{26} “Of Nets, Nails and Problems”; \textit{Preparing for Peace}; “Mediating Conflict in Central America,” \textit{supra} note 13. Since then, Lederach has published further works (cited elsewhere) that have also informed the writing of this thesis.
  \item \textsuperscript{27} B.C Commission on Resources and Environment (CORE), \textit{The Provincial Land Use Strategy}, Vols. 1-4 (Victoria, BC: CORE, 1995).
\end{itemize}
customarily practised within Cambodian communities and court system. In the 1996 project we were unable to learn what kind of mediation the Human Rights Commission staff hoped to practice, nor were our efforts successful in finding out much by way of their specific needs in the area of conciliatory resolution of human rights complaints. While we attempted to gain access to the syllabi and content of previous trainings of the Commission’s human rights staff, we received little by way of information from the Commission or their UN advisors. There was only brief opportunity for face-to-face planning, and there was no opportunity for in-person planning that involved all the team members from Canada and Cambodia. While participatory planning was part of the philosophy and practice of all the Canadian team members, the distance and lack of funding meant that participation in planning was limited to one planning visit by one member of the Canadian team for each of the 1995 and 1996 projects, plus some e-mail exchanges and telephone calls which frequency was extremely hampered by unreliable and expensive telecommunications. Planning for the projects was also heavily reliant on some Canadian team members' willingness to work long hours and contribute substantial amounts of volunteer time. In early-1996, for reasons of funding cutbacks, CIDA ended the projects rather than extending them as had been contemplated. This caused disappointment to Thai, Cambodian and Canadian partners. The Cambodian partner moved to a British partner for further development of its training program. The work of Thai partners received some assistance from some other Canadian sources including funding from another CIDA project, the South East Asia Fund for International Legal Development (SEAFILD) which also funded the 1996 project in Cambodia.

Funders and project implementation teams would not disagree that sufficient funding and time should be built in, when possible, for relevant literature review and other research and planning. Funding and time also needs to be built in for basic literature review about the history and politics of the host country. This is because it is rare to find Canadian consultants with expertise of the relevant subject matter and existing knowledge of Cambodia.

Unfortunately, many development projects in Cambodia are conducted in this uncertain manner. This is not to say that underfunded or otherwise uncertain projects should not be
undertaken. Where there are dedicated host partners with felt needs, it may be worthwhile to do something rather than nothing, trusting in the intelligence, innovation and hard work of host partners to “leapfrog” on what is learned during the project, to discard what is not useful, and to develop their own networks, funding and future programs. This is what happened in Thailand and Cambodia.

Methodological recommendations for those undertaking underfunded and “one-off” projects include consultation with scholars or practitioners in other disciplines who have substantial involvements in the host country, and who can recommend key literature and key informants and stakeholders within the country. Consultation with external cultural informants with current knowledge of the country is also very useful, although the caveats later in this chapter apply. Participatory planning with host country partners is essential at all levels of planning and implementation. This ensures that the project is as suitable as possible to the local context and audience.

4.2 The range of approaches to peacebuilding and development: Situating the Canadian projects

As outlined in Chapter One, “peacebuilding” and “conflict resolution” are not synonymous and there are diverse views about what these terms connote. Peacebuilding comprises a full range of approaches from military peacekeeping to structural change, institutional reform, cultural change, and individual skill and knowledge building at multiple levels of society. The field of conflict resolution provides just some of the tools and frameworks for peacebuilding. Also, “conflict resolution” means different things in different contexts. There is a significant diversity in the range of theoretical, philosophical and ideological approaches taken to peacebuilding and conflict resolution in Cambodia. Cambodia is impacted strongly by foreign influence, which means that emerging patterns for peacebuilding in Cambodia are being created from reciprocal interactions among the diverse threads within Western and Cambodian approaches. This section situates the Canadian conflict resolution development projects, first within the diverse range of peacebuilding and development approaches, and second within the range of
approaches to conflict resolution.

4.2.1 Lessons (UN)learned from UNTAC

First, I examine very briefly some of the critiques of UNTAC's major peacebuilding pursuant to the Paris Peace Agreements of 1991. This was in large part a military peacekeeping mission, although its main success was in running the 1993 election and developing a safe environment for the emergence of civil society organizations focussing on democracy and human rights. Most concerns about UNTAC focus on the lack of cooperation of the Cambodian factions with UNTAC's mandate to disarm them pursuant to the Accords. Khmer Rouge refusal to allow UNTAC forces into its controlled territories made general disarmament of the factions impossible. Other criticisms include poor UN coordination, poor discipline of UN personnel and lack of political will of the UN to implement the Accords. These criticisms are not reviewed here; however, several other important critiques of the UNTAC effort are relevant to the subject of this chapter.

One critique notes that the UNTAC efforts were based on the Paris Peace Agreements which themselves were unsuited to the political culture of Cambodia. The Agreements were developed primarily by Western advisors based on classical liberal democratic theory. This was, of course, deliberately at odds with Cambodia's then Soviet-style governance. However, the UNTAC process and the development of the Cambodian constitution in 1993, which was also advised by Western experts, are both criticized for failing to take into account Cambodian historical patterns and ways of thinking about peace, violence and power relationships. As

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29 Peace, Power and Resistance, supra note 22.
discussed in Chapter Two, the drafting of a liberal democratic constitution does not automatically create a liberal democratic state and political culture. Second, UNTAC is criticized for leaving in place structures that fostered continuation of factional power struggle and left Cambodia prone to violence and coups.\textsuperscript{30} UNTAC’s inability to disarm the factions meant there was little opportunity for significant structural change during the UNTAC mission. UNTAC left in place the existing power structures including a CPP dominated government and civil service, which is still entrenched. Third, in its implementation processes UNTAC placed little emphasis on learning about the national culture, or designing a culturally-appropriate peacebuilding model.\textsuperscript{31} Fourth, UNTAC is often bitterly criticized for taking a top-down technology transfer approach, relegating Cambodians to the status of recipients, marginalizing local knowledge and skills, and failing to involve Cambodians in full participatory partnerships.\textsuperscript{32}

This list of criticisms may look familiar to those within the field of conflict resolution. The field has critiqued top down, non-participatory governance structures and planning approaches which conflict resolution practitioners see to be at the root of many public policy disputes, institutional conflicts, labour and workplace conflicts and community conflicts. Interestingly, these issues also emerge in critiques of some dominant strains within the conflict resolution movement itself.

\subsection{4.2.2 Legalistic approaches: an actor-oriented approach}

Some dominant current peacebuilding efforts in Cambodia take a legalistic approach to the


\textsuperscript{31} See also the comments of Tennant who points to egregious examples of peacekeepers who were perceived as “a horde of drinking, whoring, half-naked drivers who ran over people and couldn’t care less.” While part of the problem relates to poor discipline, this behaviour has also been attributed in part to poor education about Cambodian cultural and politeness norms. “UNTAC's 'Top-Down' Approach,” supra note 28.

\textsuperscript{32} Ibid.
blaming and punishment of individual actors. The leading example is the current intense focus of the United Nations and some other foreign donors on the current plans for a trial of several Khmer Rouge leaders. This actor-oriented approach seems to be based on the theory that if key actors responsible for the genocide are tried and brought to justice, this will somehow work toward ending the climate of impunity in Cambodia. A key problem with the current proposals is that, while supported internally by many, there is little doubt that they have been externally driven, largely by the United Nations, in efforts to encourage Cambodian compliance with norms for holding international criminals accountable. The reluctant negotiation and unenthusiastic implementation process indicates little buy-in to the proposals by the CPP-led government. Also, there has been remarkably little systematic research to discover what Cambodians do want and need, or how criminal-type trials of Khmer Rouge leaders may impact the Cambodian public. Legal approaches that propose a kind of scapegoating of selected individuals can also be critiqued from a structuralist perspective: Apart from some hoped-for institutional learning about international law processes, how will trials of individuals using a special tribunal set up for the purpose, make significant changes to Cambodia's dysfunctional political, legal and societal structures? While there is little opposition to the idea that individual actors should be held accountable through internationally acceptable processes,

33 Sorpong Peou cites Ben Kiernan and Raoul Jennar in this regard. Conflict Neutralization, supra note 22 at 6 & 16, footnotes 27, 28, 29.

34 For exceptions, see the interesting work of the Center Social Development led by Chea Vannath, Center for Social Development, The Khmer Rouge and National Reconciliation - Opinions from the Cambodians (Phnom Penh: Center for Social Development, 2001) [hereinafter Khmer Rouge and National Reconciliation]. See also L. McGrew, “Truth, Justice, Reconciliation and Peace in Cambodia: 20 Years after the Khmer Rouge,” in Canadian Embassy (Phnom Penh: 2000). McGrew's perceptive report documents the results of three months research among key informants and focus groups in Cambodia. In addition to documenting people's opinions about whether there should be a KR trial, it also canvasses concepts of justice, trust, responsibility, amnesty, religion and justice, confession and truth, apology, forgiveness, punish (including vengeance and reparation), memorialization, trauma and healing, the arts and healing, and reconciliation including trust as well as conflict resolution and peacebuilding. There were also some local newspaper polls. However, the UN-led negotiations predated all of these reports. For the UN's report of visiting experts, see N. Stephen, R. Lalah, & S.R. Ratner, Report of the Group of Experts for Cambodia Pursuant to General Assembly Resolution 42/125 (NGO Forum on Cambodia, 18 February 1999 1999), online: <http://www.camnet.com.kh/ngoforum/un-report.htm> (date accessed: 21 April 2001). The methodology disclosed in the report did not include any systematic way of canvassing opinions of ordinary Cambodians in a systematic way, but relied on interviews over several days with a very limited list of key informants.

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there is concern that this may not be enough.\textsuperscript{35}

Before leaving this section on actor-oriented approaches, it is important to emphasize that I do not discount the importance of individuals and individual actions in conflict and peacebuilding.\textsuperscript{36} Individuals do need to be held accountable for wrongdoing. Individual reformers and peacebuilders do influence social practices even when constrained within structural and institutional frameworks. Individuals can and do make a difference.

\subsection*{4.2.3 Institutionalist approaches}

Another dominant school of thought and practice emphasizes institution building. The institutionalist approach appears to be a dominant approach of the United Nations and other liberal democratic donors in both development and peacebuilding. Sorpong Peou\textsuperscript{37} defends an institutionalist approach based on classical liberal democracy. However, he adjusts institutionalism to the Cambodian situation by taking the long view concerning the building and evolution of local institutions, acknowledging that there is no quick institutionalist fix. Some institutionalist approaches concentrate on creating liberal democratic laws, developing the judicial system and building civil society organizations including the Bar Association and legal aid NGOs. Institutionalist approaches are often criticized for taking a structural functionalist approach that does not take sufficient account of entrenched economic and power structures and cultural factors – institutionalist approaches, by themselves, fail to address the real issues. The presence of laws and institutions that on paper have liberal democratic frameworks is no guarantee of social justice.

Many law and development projects take institutionalist approaches through legislative and

\begin{flushright}
\textsuperscript{35} \textit{Khmer Rouge and National Reconciliation}, supra note 34 at 1-2.
\end{flushright}
institutional reform projects, and “capacity development” projects aimed at institutional design or reform. Unfortunately, legislative and institutional reform projects have tended to use a top-down advisory approach with little public participation.\(^{38}\) Foreign expert recommendations for legislation or institutional reform are often developed on the basis of limited numbers of interviews with powerful officials and NGO leaders. Expert drafters and other advisors may also be prone to limitations of time and funding which prevent a full canvassing of all relevant issues, and which rarely involve substantial public participation mechanisms apart from often short research interviews with pre-selected officials and NGO leaders. Also, foreign experts often arrive in Cambodia with little or no background knowledge of the history, culture, politics or current events of the country to guide their understandings and efforts. In some cases, significant draft legislation or policies are drawn up by foreign experts with little direction from the Cambodian government and even less public input. There are some notable exceptions, particularly the work led by OXFAM on land disputes and legislation, discussed in Chapter Five.

4.2.4 Structuralist and post-structuralist views

Political scientist, Pierre Lizée,\(^{39}\) has taken (in part) a structuralist or post-structuralist approach to analysing Cambodian conflicts and peacebuilding interventions, utilizing ideas of Antonio Gramsci and Anthony Giddens. Lizée illuminates the liberal modernist underpinnings of much of the foreign intervention in Cambodia, particularly criticizing the UNTAC and other peacebuilding efforts for failing to address structural and cultural issues in Cambodia. Lizée argues that Cambodian leaders are unlikely to allow shifts that threaten the reproduction of

\(^{38}\) See E.A. Tollefson, *Cambodian Justice System: Action Plan for 2000-2004, Prepared for the Ministry of Justice of the Kingdom of Cambodia* (March 2000) [unpublished, archived at Canadian International Development Agency, Ottawa] [hereinafter *Cambodian Justice System*] in which Dr. Tollefson comments that drafts may be drawn by experts without substantial involvement of Cambodians, meaning that when the expert leaves, Cambodians taking the drafts forward are often unable to discern the intentions of the drafter.


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current power structures. He says UNTAC's lack of success in disarming the factions and creating neutral and democratic political structures virtually ensured the continuing factional and violent nature of Cambodian politics where human rights groups have little real influence. The "constructive engagement" policies of ASEAN, Japan and others after the conflict in 1997, including the maintenance of aid to Cambodia, fostered reproduction of the status quo. A number of foreign governments saw the coup merely as a resolution of the factional tensions that had stalemated progress toward stability and economic growth during the mid-1990s. Similarly, Lizée sees the 1998 elections as failing to bring about any movement toward reconciliation. Hun Sen continues to resist all foreign intervention that would challenge his power.

Lizée uses structuralist theory to examine the effect of the dominant definition of peace in Cambodia, which emphasizes negative peace and stability. The dominance of this definition of peace merely legitimates and reproduces the current social structures, including the role of violence to maintain it.40 Thus, without a shift in the power structures, there is little likelihood of democratic development in Cambodia.

Lizée's hope for fundamental structural change lies in peacebuilding processes that focus more on encouraging grassroots economic development and building local knowledge.41 This can build capacity for internal grassroots demand for changes in governance. International development of local "social capital"42 also prevents accusations of interference with state sovereignty because political pressure for governance reform at the national level would come

40 "Conflict Resolution," supra note 39.

41 Ibid.

42 The concept of "social capital," has been defined as norms and knowledge-sets that allow articulated social action. See Ibid. Works on social capital were not read for this study but seem well worth exploring in the context of building local capacity for peaceful demands for social change in a country like Cambodia where neither direct pressure nor engagement with Hun Sen has been very productive toward social change or power shifts. Works on "social capital" cited by Lizée include James Coleman, "Social Capital in the Creation of Human Capital" (1988) Supplement American Journal of Sociology 95; Robert Putman, Making Democracy Work (Princeton: Princeton University Press, 1993); Patricia Wilson, "Building Social Capital: A Learning Agenda for the Twenty-First Century" (1997) 34:5 Urban Studies 745.
from citizens, not external governments.\(^43\) This development of internal sources of pressure on the government would be a more palatable peacebuilding approach for ASEAN which prefers to avoid direct political pressure.\(^44\)

Structuralist perspectives such as this one are useful. Unfortunately, structuralist approaches tend to be marginalized in most conflict resolution and development work, as is demonstrated later through examination of structuralist critiques of the field of conflict resolution. Throughout this chapter, I try to demonstrate that conflict resolution and peacebuilding work that avoids structural issues or ignores the grass roots in structural change, is fundamentally flawed and unlikely to bring about any significant social change. The field of conflict resolution could learn more from structuralist perspectives of social conflict as a necessary part of striving toward justice, rather than as an evil to be prevented, pacified or settled.

A major challenge in considering conflict in Cambodia from this perspective is that structuralist approaches have often been associated with Marxist-Leninist ideologues who have utilized this approach to social conflict to wreak violence on a mass scale for revolutionary purposes, with catastrophic results. If there are left-leaning sentiments remaining in the CPP party or among Cambodian NGOs, they are not apparent in policies or rhetoric.

### 4.2.5 Cultural transformation: Anthropological and religious perspectives

Another dominant approach for peacebuilding emphasizes the need for cultural transformation. This is often operationalized through development and peacebuilding projects that feature education in concepts of human rights, law, and governance that emerge largely from Western-oriented institutionalist perspectives. Workshops and training sessions comprise a dominant methodological approach of both the international and local community.

\(^{43}\) Ibid.

Some cultural transformation approaches with more traditionalist orientation take the view that the answer lies in the recovery and enhancement of local knowledge based on Khmer-Buddhist culture.\textsuperscript{45} Some people propose a combination of institutional reform and cultural transformation, saying that it is important not only to change external institutions, but also the exploration of the Cambodian psyche and "the transformation of the dangerous, destroyer mentality into a creator mentality."\textsuperscript{46}

### 4.2.6 Sustainable Development

"Sustainable development" emerged strongly on the international development agenda during the 1990s through the Bruntland Report\textsuperscript{47} and the UN Conference on Environment and Development (UNCED)\textsuperscript{48} in 1992. The sustainable development approach grew out of awareness of the limits of the physical environment to support modernization through industrialization. The Bruntland Report defines "sustainable development" as "development which seeks to meet the needs and aspirations of the present without compromising the ability to meet those of the future."\textsuperscript{49} The sustainable development approach also calls attention to the need for international cooperation to prevent and solve environmental problems. Some have criticized the sustainable development movement as "eco-imperialism,"\textsuperscript{50} imposing Western standards of environmental protection and thus threatening economic development of less

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\textsuperscript{46} S. Bit, \textit{The Warrior Heritage: A Psychological Perspective of Cambodian Trauma} (Le Cerrito, CA: Seanglim Bit, 1991) at xix [hereinafter \textit{Warrior Heritage}].


\textsuperscript{48} The United Nations Conference on Environment and Development (UNCED), or the "Rio" conference, involved 170 states, and thousands of NGOs and TNCs.

\textsuperscript{49} \textit{Bruntland Report}, \textit{supra} note 47 at 40.

developed countries. The term “sustainable development” has also been criticized as a “political fudge,”\textsuperscript{51} vague enough to allow groups with conflicting interests to uphold it without any common understanding. The sustainable development approach acknowledges the difficulty of reconciling conflicts between a government's need to provide economic benefits and employment and the need to protect sensitive ecosystems and traditional uses of the environment by vulnerable peoples. Critics of the concept of “sustainable development” say it is a significant challenge to “salvage something meaningful from this concept” and “to achieve sustainable development” given the contradictions within it.\textsuperscript{52}

Many internal and external NGOs have called attention to Cambodia's serious environmental problems. Cambodia has lost about half its forests in the past several years. Erosion of the banks of Tonle Sap threatens several fish species.\textsuperscript{53} The Cambodian government has made some efforts to consider environment impacts of development. Crackdowns on illegal logging have been announced in response to international pressure.\textsuperscript{54} However, corruption, lack of political will and pressure for economic growth constantly hinders environmental protection.\textsuperscript{55} Some human rights conflicts in Cambodia emerge from conflicts over the impacts of degradation of land and water on local populations.

The sustainable development approach was adopted by Stephen Owen for CORE in British Columbia and transmitted in Thailand and Cambodia through his keynote addresses.\textsuperscript{56} Thus, the

\textsuperscript{51}Ibid. at 76.

\textsuperscript{52}Ibid. at 77.

\textsuperscript{53}S. Pou, “Sustainable Development: An Environmental Perspective” in Dispute Resolution in Cambodia supra note 16 at 40.

\textsuperscript{54}“Cambodia Cancels Log Deals, Hopes for More Aid” Kyodo News Service (28 January 1999); J. Cochran, “Corrupt Judiciary Spared in Widespread Reform Package” South China Morning Post (5 February 1999); J. Cochrane, “Army Assault on Logging to Continue” South China Morning Post (16 June 1999).


\textsuperscript{56}See S. Owen, “Keynote Address” in S. Laohasiriwong, C. Morris, & W. Kongdee, eds. Dispute Resolution in Thailand: Working Together for Peace and Prosperity. Proceedings of a Workshop Held in Khon Kaen, Thailand,
sustainable development approach has been linked in Cambodia with development efforts aimed at public dispute resolution and public participation.

4.2.7 Public participation and peacebuilding

Public participation is linked to concepts of civil society, which concept is associated with liberal theory, but has also been developed by leftist thinkers like Gramsci. The concept of public participation gains support in the international discourse about the “right to development” which emerged from structuralist critiques of the dominant world system by coalitions of developing countries. It was formally declared by the UN General Assembly in the Declaration of the Right to Development in December 1986. The Declaration sought increased local participation in development goals that have been dominated by international financial institutions (including their structural adjustment policies.) The Declaration also emphasises ethical obligations to correct structural economic disparities between rich and poor countries. Regardless of the way the Declaration may have been interpreted by authoritarian governments bent on economic growth without protection of civil and political rights, the Declaration gives people-centred development some status as a human right by which

June 8-9, 1995 (Victoria, B.C: UVic Institute for Dispute Resolution, 1996) at 13; see also A. Grzybowski et al., “Working Together: Constructive Conflict Resolution” in Dispute Resolution in Cambodia, supra note 16 at 22, in which Owen, then the B.C. Deputy Attorney General, does not specifically refer to “sustainable development” but to international and local cooperation, public participation and conflict resolution toward “environmental integrity” as well as economic development and respect for human rights [hereinafter “Working Together”].


58 The right to development is widely considered to be “soft law.”
individuals are "...entitled to participate in, contribute to and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized."\(^{59}\)

In Cambodia, the SEILA projects have been held up as examples of good development based on high levels of public participation at the grass roots level. SEILA, meaning "foundation stone" is a government project sponsored by the UNDP aimed at decentralization of governance. SEILA is based on local development committees that include local stakeholders including government officials and local people, including women. SEILA is thus said to foster the building of civil society. The SEILA approach has been critiqued as not taking full advantage of local knowledge.\(^{60}\) Anthropologist William Collins, one of very few researchers to investigate local Cambodian knowledge in governance and conflict resolution, holds up for examination and possible encouragement the village pagoda committee, a local decision-making structure that is indigenously based in Cambodian tradition.\(^{61}\) Pagoda committees have been reemerging with the renewal of traditional Buddhist social structures that centre on the pagoda. Pagoda committees have traditionally used consensus-seeking approaches and local public participation. Contemporary pagoda committees also sometimes include nuns and other local women leaders.\(^{62}\) In the Canadian projects highlighted in this chapter, efforts were made to give voice to Khmer-Buddhist approaches to governance and conflict resolution during all workshops.\(^{63}\)

\(^{59}\) Declaration of the Right to Development, 1986, supra note 57, Art.1(1).


\(^{63}\) Venerable Supreme Patriarch Tep Vong, “Summary of Keynote Address” in Dispute Resolution in Cambodia, supra note 16 at 19.
Participation is a strong theme in the field of conflict resolution, which emphasises the participation of stakeholders in processes for decision making and dispute resolution. With the benefit of hindsight illuminated by knowledge of the existence of these committees, I would now seek to further elevate these local knowledge approaches to governance in conflict resolution projects in Cambodia. As it stands, however, despite rhetoric about public participation and local knowledge, comparatively little foreign attention has been paid to examination or modelling of public participation approaches in peacebuilding work in Cambodia.

4.2.8 Postmodernist approaches: “Deconstruction” and “constructivism”

Finally, it is important to acknowledge the variety of postmodernist approaches to development. It is difficult to define a “postmodernist” approach, except to say that postmodernist writers always provide a radical critique and deconstruction of liberal ideas and other aspects of the “project of modernity.” Postmodernist arguments tend to reiterate many of the concerns of critical theorists about the dominant notions of development described in this chapter. Many postmodernist approaches have been deconstructive, illuminating the liberal hegemonies that tend to be unconsciously taken for granted by Western development practitioners, including academics. Some postmodernist approaches, however, are seen as “reconstructionist.”64 Postmodernists of constructivist disposition tend to seek small-scale solutions to development based on popular community participation, grass-roots democracy, and building of local communities.65 Practical manifestations of postmodernist approaches to development and peacebuilding are primarily normative approaches that are needs-oriented and acknowledge that human needs are constructed and fulfilled in ways that are historically, culturally, and contextually specific. The goal is to derive solutions from within local communities using local resources (including human resources). This approach also emphasises

64 See, for example, W.T. Anderson, ed., The Truth About the Truth: De-Confusing and Re-Constructing the Postmodern World (New York: Jeremy P. Tarcher/Putman, 1995).

65 Development and International Relations, supra note 50 at 77.
attention to local ecosystems, inclusion of indigenous, minority and women's perspectives,\textsuperscript{66} and self-management.\textsuperscript{67}

While most conflict resolution specialists espouse liberal values, some motifs within the field of conflict resolution bear hallmarks of postmodernist discourses of the constructivist kind. For example, one can see mediation in postmodernist perspective as a process of constructing new normative and practical realities among people in conflict, ideally seeking the consensus of all stakeholders. Some postmodernist currents in conflict resolution and peacebuilding are discussed in Chapter Five.

\section*{4.2.9 Conflict analysis, theory and conflict resolution approaches in Cambodia}

Given the attraction to conflict analysis and resolution by those from a variety of political ideologies and theoretical perspectives, and growing awareness of the lack of success of traditional military peacekeeping and diplomacy approaches within realist paradigms, it is easy to see why interest in "conflict resolution" has increased over the past several years as an important part of peacebuilding. Also, international principles concerning human rights institutions express the idea of conciliatory approaches to resolution of human rights issues,\textsuperscript{68} as

\begin{itemize}
  \item \textsuperscript{66} For discussion, R. Braidotti \textit{et al.}, \textit{Women, the Environment and Sustainable Development: Towards a Theoretical Synthesis} (London, UK: Zed Books in association with INSTRAW, 1994). The lack of attention in this paper to feminist perspectives will, I hope, not be seen as a reflection of lack of interest, but simply that as with most of the topics canvassed here, the literature is simply too vast and fraught with theoretical diversity and controversy to consider in depth in these chapters. For an excellent introductory summary of the main feminist positions relative to human rights, see K. Mahoney, "Analysis of Various Theoretical Perspectives on Women’s Rights as Human Rights and Strategies for Implementation" in E. P. Mendes & A.-M. Tracholt, eds., \textit{Human Rights: Chinese & Canadian Perspectives} (Ottawa: Human Rights Research and Education Centre, 1997).
  \item \textsuperscript{67} Development and International Relations, supra note 50 at 77, citing B. Hettne, \textit{Development Theory and the Three Worlds} (Harlow: Longman, 1995).
\end{itemize}

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well as public participation in governance and decision making. These two approaches are strong hallmarks of the field of conflict resolution.

Interestingly, the conciliation based approaches that currently exist within the Cambodian legal system have been largely overlooked. Western lawyers are generally not trained in anthropological research methodology, such as ethnography, and therefore may tend to assume that what is marginal at home is also peripheral in Cambodia. Also, Western legal advisors seldom have much if any training in conflict resolution beyond the dominant adversarial approaches of their accustomed legal systems. They may not be in a position to understand or be discerning about what falls outside more familiar court-centred approaches. Foreign advisors' perspectives very largely control what is reported to outsiders about Cambodian conflict resolution processes and systems, and therefore what kinds of development projects are recommended and funded.

The marginalization of consensual conflict resolution approaches in current foreign-driven

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70 From most of the legal literature and reports by foreigners about the Cambodian level system, one might never know that there is such a thing in Cambodia as a "reconciling/inquiring judge" and an expected conciliation/settlement process built into the court processes particularly in family cases. These are briefly mentioned but not described in K. Neam, Introduction to the Cambodian Judicial Process (Phnom Penh: Asia Foundation, 1998) at 47-53; S. Sok & D. Sarin, Legal System of Cambodia (Phnom Penh: Cambodian Legal Resources Development Center, 1998) at 65-66. The only foreign investigation of court and village level conciliation found were in D. Donovan, "The Cambodian Legal System: An Overview" in F. Z. Brown, ed., Rebuilding Cambodia: Human Resources, Human Rights and Law: Three Essays (Arlington, VA: Johns Hopkins Foreign Policy Institute and Paul H. Nitze School of Advanced International Studies, 1993); W. Collins, Dynamics of Dispute Resolution and Administration of Justice for Cambodian Villagers (Phnom Penh: 1997) [hereinafter Dynamics of Dispute Resolution]; C.M.L. Vasquez, Pre-Trial Dispute Resolution Processes (Phnom Penh: Cambodian Court Training Program, International Human Rights Law Group, 1996) [hereinafter Pre-Trial Dispute Resolution].

71 Tollefson's report on the Cambodian legal system does not report on Cambodian court conciliation. His descriptions of Western ADR processes do not represent current understandings of ADR terminology and practice in Canada (for current understandings, see the glossary at Appendix IV). Otherwise, Tollefson's carefully researched report is thoughtful and insightful and provides useful blueprints for moving forward in the legal system, Cambodian Justice System, supra note 38 at 43, note 40.
Cambodian legal development, is similar to the ways conflict resolution has been viewed in Canada by many lawyers, particularly in the early 1980s when ADR was feared either as soft, dangerous or unnecessary. Nearly two decades later, lip service is now given to ADR in most quarters in Canada, but when one examines comparative funding within government and academic programs, conflict resolution remains marginalised. Understandably, this marginalization is mirrored in Canadian legal development projects in Cambodia. The small initiatives aimed at building capacity for conflict analysis and resolution are minuscule in foreign-assisted development projects in Cambodia compared to the emphasis on advocacy and judicial approaches. Thus, Western “legal transplant” approaches are alive and well in legal development approaches in Cambodia, including Canadian approaches. One wonders how well the transplants will “take,” since Cambodians themselves articulate traditional and ongoing preferences for conciliation and mediation, including for situations in which authority is being abused. Cambodia's religious traditions support non-violence, respect for people, ethical governance, and consensus-based participatory decision making.

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72 Mr. Justice Allan McEachern described mediation as “trendy, compromising, naive and soft.” Quoted in B. Daisley, “BC Chief Justice Puts Boots to Alternative Dispute Resolution,” (1989) 9:39 Lawyers Weekly 2. This mindset has not entirely disappeared from the legal academy or from law practice.

73 For instance, Kran and Rawkins’ only reference to “dispute resolution” is their comment that women victims of violence do not resort to law because it is costly, and it is rarely reported because of shame. “Dispute resolution tends to favour family harmony rather than recognize women's right to a violence-free family life.” The implication harmony ideology makes current forms of conflict resolution dangerous to Cambodian women without adequate courts and laws to protect their rights. M.V.J. Kran & P.M. Rawkins, “Good Governance and Rule of Law Program Development and Scoping Mission to Cambodia, June 5-26, 1999” (Ottawa, ON: Asia Branch, Canadian International Development Agency, 1999) at 18, citing Lindsay E. Harris, “Women and the Cambodian Legal System: A Women's Legal Needs Assessment” (Asia Foundation, February, 1995) at 5, 42, 48. Protection of women’s rights in Cambodia requires much more research about the dispute resolution mechanisms that are in use and how they affect women’s rights. Some assistance might be found in the many critiques of mediation in domestic violence situations as well as the considerable work done by feminist mediators in developing assessment and triage methods designed specifically for women who have experienced abuse.

74 It is pointed out that “most cases settle” in North America using traditional legal negotiation approaches, but it is still the case that most cases settle quite late in the legal process. See J. Macfarlane, “An Alternative to What?” in J. Macfarlane, ed., Rethinking Disputes: The Mediation Alternative (Toronto: Emond Montgomery Publications, 1997) at 5.

75 A. Watson, Legal Transplants: An Approach to Comparative Law (Charlottesville, VA: University Press of Virginia, 1974) [hereinafter Legal Transplants].

76 Dynamics of Dispute Resolution, supra note 70.
4.3 The range of conflict resolution theories and approaches: Situating the Canadian project

None of the members of the Canadian conflict resolution team in the Cambodian 1995 and 1996 projects came from an international relations background. Rather they came from a diversity of contexts within the fields of domestic conflict resolution. To understand the diverse approaches within the Canadian team it seems useful to situate the team-members by taking a brief historical tour of the field of domestic conflict resolution in Canada.

4.3.1 History of Conflict Resolution in Canada: Situating the Canadian Team-Members

The growth of the conflict resolution movement over the past three decades has been ascribed to a variety of factors, including dissatisfaction with courts and the trend toward increased public demand for direct involvement in public policy decisions. The movement has also been ascribed to social justice concerns, and particularly with communitarian concerns for building stronger, more just, and more unified communities.

In Canada, the quest for better conflict resolution might be said to have begun just over three decades ago with the creation of ombudsman offices to address citizen complaints about government institutions and services. The first Canadian ombudsman office was set up in Alberta in 1967. Since then, many jurisdictions and institutions in North America have developed ombudsman offices. One member of the Canadian conflict resolution team in Cambodia, Stephen Owen, was considerably shaped by his experience as Ombudsman of British Columbia.

Parallel to ombudsman developments were grass roots approaches to community conflict and restorative justice. Canadians pioneered a number of community conflict resolution programs

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77 See the Glossary in Appendix II for a general description of ombuds processes.

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and were the first to experiment with victim-offender mediation. During the 1980s, these grass roots efforts were joined by experience in family and commercial dispute resolution. Associated with these efforts was the founding of several Canadian conflict resolution organizations. A good number of legal academics such as Andrew Pirie, and lawyers, such as Catherine Morris were prominently associated with these efforts.

Experiments also began during the 1980s in environmental and public policy conflict resolution, which were closely allied with public participation approaches. Harvard's Lawrence Susskind is one of the best known proponents. During the early 1990s, a notable example of government involvement in public participation approaches to public policy dispute resolution was the work of the Commission on Resources and Environment (CORE) in British Columbia, led by Stephen Owen. This ambitious project used regional and local “round-tables” to attempt to build broad consensus among the various stakeholders who had been embroiled in intense conflict over forestry practices and land use in British Columbia. The CORE experiments drew heavily on the Harvard approach to interest-based negotiation and public policy dispute resolution in designing and implementing its “shared decision making” processes.


79 Among Susskind's many books and articles is the famous Breaking the Impasse, supra note 23.


81 See the Glossary, Appendix II for a definition of “shared decision making.” The work of Stephen Owen, Craig Darling, Dinah Stanley, Alex Grzybowski, Gordon Sloan, Sally Campbell, Michelle LeBaron, Jerry McHale and other Canadian practitioners was also reflected in the work of CORE. B.C.C.o.R.a. Environment, The Provincial Land Use Strategy: Dispute Resolution, vol. 4, The Provincial Land Use Strategy (Victoria, BC: Commission on Resources and Environment, 1995); B.C. Commission on Resources and Environment (CORE), The Provincial Land Use Strategy: Public Participation, vol. 3, The Provincial Land Use Strategy (Victoria, BC: CORE, 1995). For training manuals that reflect the work of these and other BC practitioners over the years, see C. Darling, ed., Reaching Agreement: Negotiating in the Public Interest, 4 vols., vol. 1, Dispute Resolution Series (Vancouver, BC: Continuing Legal Education Society of B.C. and Dispute Resolution Office, B.C. Ministry of Attorney General, 1998); C. Darling, ed., Thinking Strategically: Developing Systems to Resolve Conflict, 4 vols., vol. 4, Dispute Resolution Series (Vancouver, B.C: Continuing Legal Education Society of B.C. and Dispute Resolution Office, B.C. Ministry of Attorney General, 1998); C. Darling, ed., Turning Conflict into Consensus: 245
The work of Stephen Owen, Alex Grzybowski and others whose work was reflected either directly or indirectly in the Canadian work in Southeast Asia was considerably shaped by their experiences within CORE. Grzybowski's background is in land-use planning with experience in CORE's round-table planning and conflict resolution processes.

During the late 1980s, several Canadian academic institutions started programs on ADR including the University of Victoria Institute for Dispute Resolution under the direction of Andrew Pirie, and, later, Catherine Morris. Pirie's critical theory approach to the ADR movement emerged from the critical legal studies theory movement in the 1980s. The main threads of critical theory approaches to conflict resolution are discussed later. Morris developed theoretical and ideological affinities with grass-roots social justice approaches of scholar-practitioners like Dean Peachey and John Paul Lederach as well as critical theorists.

Stephen Owen's work and perspectives were also strongly linked with that of the University of Victoria Institute for Dispute Resolution. Owen was a member of its advisory committee and was an active proponent of several of its multi-sectoral conferences on public policy dispute resolution, drawing in academic practitioners such as Lawrence Susskind of the Harvard Program on Negotiation. In addition to the sustainable development perspective already mentioned, Owen's writings and teaching syllabi reveal a classical liberal perspective with

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83 See for example, S. Owen, "The Ombudsman: Essential Elements and Common Challenges" in L. Reif, M.

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some communitarian leanings. In addition to Owen's classical liberal approach, Pirie's critical
theory background, and Morris's grass roots social justice perspectives on conflict resolution,
the work of the Institute for Dispute Resolution was also informed by the research of Michelle
LeBaron in UVic's Multiculturalism and Dispute Resolution Project. Thus, the Canadian team
in Cambodia was representative of several of the diverse disciplinary approaches and
ideologies present in the field of conflict resolution.

4.3.2 Dominant theory within the Canadian conflict resolution projects in Cambodia

However, one approach within the field of conflict resolution did end up dominating the theory
of the project for all practical purposes, namely the Harvard approaches to negotiation and
public decision making. Generally speaking, this approach is based on a combination of Fisher
and Ury's *Getting to Yes*\(^{84}\) and Lawrence Susskind's work (with others) on publication
participation\(^{85}\) modified through the experiences of CORE.

The Harvard approach dominates the theoretical mood and perspectives of the field of conflict
resolution in Canada and promotes interest-based, problem-solving, cooperative approaches.
This approach is distinguished from dominant Western legal approaches, which tend to be
rights based, adversarial, actor oriented and outcome oriented. The field of conflict resolution,
particularly the ADR movement, tends to retain an individualist, actor oriented focus\(^{86}\) and a
utilitarian approach to the ethics of negotiation and public policy (discussed later).

Briefly, the chief prescriptions of "Getting to Yes"(as interpreted through the work of the

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Marshall, & C. Ferris, eds., *The Ombudsman: Diversity and Development* (Edmonton, Alberta: International
Ombudsman Institute, 1993).

\(^{84}\) *Getting to Yes*, supra note 23.

\(^{85}\) *Breaking the Impasse*, supra note 23.

\(^{86}\) *Conflict and Culture Literature Review*, supra note 25.

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Canadian team in Cambodia\(^7\)) include: a cooperative, problem-solving approach to negotiation; a focus on the issues while respecting the people;\(^8\) a focus on stakeholder “interests” (defined as needs, concerns, fears and goals) that motivate their positions,\(^9\) creation of options to accommodate as many interests of all parties as possible.\(^10\) The hallmark prescription of *Getting to Yes* is to *create* value before *claiming* value\(^11\) or to enlarge the “pie” before dividing it. Fairness is addressed with the prescription to base proposed solutions on trustworthy information and to test proposals against “objective” criteria.\(^12\) Power imbalance and realism are addressed in individualist, actor-oriented ways by prescribing that parties understand their “best alternative to a negotiated agreement” (BATNA),\(^93\) building on best alternatives to give parties more negotiating power. The goal is an outcome that is wise (including fair), efficient and amicable\(^94\) through stages of analysis, planning and discussion.\(^95\)

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\(^7\) See “Working Together,” *supra* note 36; *Building Democratic Institutions*, *supra* note 17.


\(^9\) “Don't bargain over positions or 'bottom lines,'” *Ibid.* at 40-55.


\(^12\) “Insist on using objective criteria,” *Getting to Yes*, *supra* note 23 at 81-94. The notion of objectivity has been much challenged. The notion of objectivity has been much challenged. However, rather than moving to the other end of the conceptual continuum to valorize complete subjectivity, I prefer the notion of “intersubjectively recognized norms” as described by J. Habermas, “Toward a Reconstruction of Historical Materialism,” in F. R. Dallmayr, ed., *From Contract to Community* (New York and Basel: Marcel Dekker, Inc, 1978).

“Intersubjectivity” requires that a norm or proposition is “accessible or capable of being established for two or more subjects” (*Webster's Third New International Dictionary*) and is considered loosely as a synonym of “objectivity.” Intersubjectivity provides the opportunity of jointly established criteria for decisions and agreements made in their own contexts without the necessity of claiming the ultimate, absolute or objective “truth” of the propositions claimed. This kind of intersubjectivity is, I suggest, what Fisher and Ury's famous “objective criteria” may mean to convey.

\(^93\) *Getting to Yes*, *supra* note 23 at 97.

\(^94\) *Ibid.* at 14

\(^95\) *Ibid.* at 12
Fisher and Ury's approach is based on utilitarian ethics and goals of functionally stable agreements that attempt to satisfy as many interests of as many stakeholders as possible. The approach does not focus on structural issues within the negotiating context. Rather it focuses on what individual actors can do to negotiate satisfying agreements “without giving in.”

Susskind and Cruikshank take these principles and apply them to the arena of public policy decision making.96 They add ideas from theories of deliberative democracy and public participation to develop models of public decision making that move beyond paternalistic or traditional lobbying models of political decision making toward governance and decision-making models that involve stakeholders in more meaningful ways. This approach goes beyond narrow public consultation models in which government consults with a representative group of people through advisory councils, public hearing processes and lobby groups and then independently makes a decision. Instead, what is proposed is a multi-stakeholder negotiated approach to the formulation of public policies or regulations. In “policy dialogue,” “regulation-negotiation” (“reg-neg”) and “shared decision-making,”97 representatives of affected parties and sectors of the public (stakeholders) work together with government officials to develop policies or regulations. CORE defined shared decision-making as: “A framework approach to participation in public decision-making in which, on a certain set of issues for a defined period of time, those with authority to make a decision and those affected by that decision are empowered jointly to seek an outcome that accommodates rather than compromises the interests of all concerned.”98

These complex processes utilize impartial process facilitators, often mediators. In this model of decision-making, government participates as a stakeholder at the negotiating table rather than as a sole decision maker external to the stakeholder negotiation process. The theory underlying

96 Breaking the Impasse, supra note 23.

97 “Shared Decision Making” was the term adopted by the Commission on Resources and Environment.

this method of public participation is that, to the extent that consensus is reached by the table, government has no reason to do anything other than adopt the consensus decisions of the round-table, since government interests are reflected in the consensus outcome. While the legitimate authority of government remains intact, the consensus decisions of a representative group in which all interests have been accommodated will be irresistible to government policy makers. Thinking behind shared decision-making also includes the idea that with high levels of direct stakeholder participation, the quality of information brought to the table will be more balanced and more publicly trustworthy, leading to more trustworthy decisions. Furthermore, decisions reached by processes that foster high levels of consensus should generate less public conflict about decisions that are eventually made. Decisions will be more publicly legitimate and, therefore, more easily implementable and enforceable. Also, by ensuring that all interests are represented, outcomes are more likely to balance economic goals with environmental protection, thus working toward goals of sustainable development.

Given the influence of CORE on the Canadian work in Cambodia, it is worth examining briefly some of the critiques of CORE which began to be published around 1996. Some analysts proclaimed CORE a failure because its multi-stakeholder shared decision making processes failed to reach full agreements. Instead, the Commissioner, Stephen Owen, had to make recommendations to government. These recommendations were, in turn, influential, but not completely determinative of the government's eventual land use plans; the government changed the Commissioner's recommendations after powerful interest groups protested them. Some have argued that similar outcomes would have been reached without the consultative process, but, of course, this assertion cannot be tested. Overall, the government was heavily influenced by CORE's recommendations which were in turn heavily influenced by the round table discussions. While none of CORE's regional tables were able to reach total consensus on

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the allocation of land to competing uses,\textsuperscript{101} it has been persuasively argued that the shared decision-making processes contributed to decisions which were better informed, more balanced and more stable.\textsuperscript{102} But it has been noted that implementation has often been mired in continuing conflict.\textsuperscript{103} Thus, the results of CORE have been seen as mixed and the question remains open as to whether it was a useful model to discuss in Cambodia. In Chapter Five, there is consideration of whether the public participation approaches taught in the Cambodia conflict resolution projects have any potential viability in that society, where citizen participation and power is very low and government power is routinely abused, and there are no traditions of power sharing. I believe some of CORE's themes do hold some promise for Cambodia's polarized and unproductive human rights discourse. I hope to show why in Chapter Five where I consider CORE again in the context of connecting some emerging themes in mediation, public dispute resolution and public dialogue. In the meantime, some other critiques of the field of dispute resolution are considered, many of which apply to public dispute resolution models like CORE.

4.3.3 Structuralist critiques of ADR

In evaluating the Canadian work in Cambodia it is also important to consider some of the critiques of the Harvard approach to conflict resolution as well as other critiques of ADR. The field of conflict resolution in North America has been the target of sharp critique for over two decades. Critical theorists have taken aim at some key claims of proponents that conflict resolution processes including voluntariness, inclusiveness, fairness and empowerment.

4.3.3.1 Power, coercion and equality

First, while participation in alternative methods of dispute resolution is generally intended to be

\textsuperscript{101} Ibid.

\textsuperscript{102} “Shared Decision-Making,” supra note 80.

\textsuperscript{103} “Collective Decisions,” supra note 99.
voluntary, critics fear that disputants experience coercive pressures both in the selection of the mediation process and in the process of arriving at the settlement itself. Critics of mediation programs have issued warnings for two decades about possible problems in mediation for vulnerable people or groups of people including women,\textsuperscript{104} indigenous peoples,\textsuperscript{105} racialized minorities\textsuperscript{106} and vulnerable people.\textsuperscript{107} Included are critiques of mediation in human rights cases.\textsuperscript{108} Critics have vociferously opposed the implementation of mandatory mediation programs which compel attempts at mediation prior to court or human rights tribunal hearings.

Critics also challenge the notion that conflict resolution processes can safely assume that private informal dispute resolution processes take places among more-or-less-equals, which tends to be the implicit assumption within most civil ADR processes.\textsuperscript{109} This critique has also been applied to ADR programs within human rights tribunal settings, where issues of unequal power and abuse are common features of complaints.

Where mediation is indicated, however, ADR practitioners argue that power is always shifting


\textsuperscript{105} P.A. Monture-OKanee, “Alternative Dispute Resolution: A Bridge to Aboriginal Experience?” in C. Morris & A. Pirie, eds., Qualifications for Dispute Resolution: Perspectives on the Debate (Victoria, B.C: UVic Institute for Dispute Resolution, 1994) [hereinafter “Bridge to Aboriginal Experience?”].


\textsuperscript{108} “Equivocations,” supra note 107.

\textsuperscript{109} Severe power imbalances among parties, including a history of abuse or violence, are considered indicators that mediation is not appropriate. See e.g. B. Landau, “Qualifications of Family Mediators: Listening to the Feminist Critique” in C. Morris & A. Pirie, eds., Qualifications for Dispute Resolution: Perspectives on the Debate (Victoria, B.C: UVic Institute for Dispute Resolution, 1994).
among the parties and is rarely, at a given moment, equal. Commonly applied power-balancing
techniques applied by mediators include:

- Insisting on open sharing of relevant information;
- insisting that parties have opportunities to fully participate, including for example, opportunities to attend meetings, or equal time to speak;
- slowing down the pace of discussion (to allow full understanding and careful thought processes);
- pointing out patterns of power;
- helping underpowered parties to identify and build on their sources of legitimate and appropriate power, by building alternatives that decrease reliance on the relationship or the outcome of the conflict, by building knowledge, and by building coalitions;110;
- strengthening and enhancing parties' communication skills and process knowledge;
- creating safeguards against the abuse of power by one or more parties;
- ensuring that resources are available to support participation so that no party is disadvantaged by a lack of financial resources.111

Practitioners agree that these techniques do not work where power disparities are severe, or where some parties cannot be persuaded not to abuse power. ADR practitioners have been criticized for being largely incapable of discerning many cases when power is being abused during mediation processes112 and the likelihood that mediators from mainstream culture may overlook systemic power imbalances that are "normalized" within society. Thus, critics have questioned whether ADR processes, particularly when institutionalized by governments or

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110 Fisher and Ury addresses the issue of power imbalance by urging negotiators to identify and build their "best alternative to a negotiated agreement" or BATNA.

111 Taken from A. Grzybowski & C. Morris, "Canadian Negotiation, Mediation and Communication Training Materials" in Building Democratic Institutions, supra note 17 at 32, which is drawn largely from materials developed by Catherine Morris from various sources including B. Mayer, "The Dynamics of Power in Mediation and Negotiation" (1987) 16 Mediation Quarterly 57.

112 There is a considerable literature on this topic together with continuing research reports. See e.g. supra note 92.
institutional elites, do adequately address power imbalances between disputants in effective and equitable ways. This critique has been most harsh as it relates to family mediation, in which it is suggested women may not achieve satisfactory outcomes.\(^\text{113}\)

This critique can also be applied to the Harvard approach to public participation, which may not provide sufficient equality among stakeholders in shared decision making processes. The experience of large multiparty dispute resolution processes also reflects concern on the part of some groups about their ability to participate on an equal footing with better funded, more politically experienced groups.\(^\text{114}\) As discussed in Chapter Three, if Susskind and Cruikshank's definition of “stakeholders” is applied (those who can decide, those who can block decisions, or those who can garner sufficient public sympathy to cause decisions to be made or blocked), any supposed equality at the public policy bargaining table may be illusory. Those most affected in public issues are often voiceless and may not even count as “stakeholders” in a shared decision making process. And not all who are identified as “stakeholders” have sufficient resources to participate adequately or all. Or they may have insufficient respect from others or insufficient advocacy to be persuasive to more powerful or more “legitimate” stakeholders.\(^\text{115}\) This was recognized by Stephen Owen and his colleagues in CORE, so CORE aimed for better equality by trying to adopt a broader definition of “stakeholders” than outlined in Susskind and Cruikshank. They included “youth” as a stakeholder, for example. But not all the stakeholders CORE identified chose to participate; many First Nations decided it was not in their interests to


\(^{114}\) This concern is repeatedly expressed in the public treaty negotiation processes between governments and Aboriginal people in Canada.

\(^{115}\) Indeed, the British Columbia CORE processes tried to include First Nations in its round tables to discuss land use. However, First Nations opted out of the process, even though they received assurances that their bargaining over land use issues would be without prejudice to treaty negotiations that were external to the process. Research among participants in the Vancouver Island CORE process said they believed that First Nations participation in the process would have undermined their positions in treaty negotiations or would have been otherwise adverse to their interests. R.A. Kelly & D.K. Alper, *Transforming British Columbia’s War in the Woods: An Assessment of the Vancouver Island Regional Negotiation Process of the Commission on Resources and Environment* (Victoria, BC: UVic Institute for Dispute Resolution, 1995) at 20 [hereinafter *Transforming BC’s War in the Woods*].
Public participation processes may also be evaluated to see whether power has shifted from government decision makers toward a sharing of power with citizenry. In the case of CORE, it was argued that the outcomes of CORE processes showed a failure to devolve any real decision making authority away from the traditional power structures. However, others have argued that it is important to look beyond decision outcomes to other results of the process; these commentators suggested that the processes of CORE changed the political environment, transformed the way people saw the issues after talking together about them, and shifted the power balances among the stakeholders. Many representatives perceived a continuing imbalance of power at the table, but some sectors who felt they had virtually no power prior to CORE believed they were considerably empowered by the process and that the CORE process had increased the legitimacy of their sector in the eyes of the government. Also, the CORE processes included smaller sub-regional planning processes, called Land and Resource Management Planning (LRMP) processes, several of which shared decision making processes have resulted in multi-sectoral agreements that were approved by the government. Thus, CORE’s consultative processes are seen to have represented a shift away from traditional top-down, lobby-induced decision making on issues that were highly contentious. It is argued that the CORE processes may have fostered some degree of structural transformation and power shifts.

Not all parts of the conflict resolution movement can be critiqued equally for presuming equality. Non-violent direct action is specifically aimed at power disparities through coalition building, non-violent confrontation and civil disobedience approaches to social injustices. Non-

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117 Transforming BC's War in the Woods, supra note 115

118 Ibid. at 18-19.


120 Transforming BC's War in the Woods, supra note 115 at 19.
violent direct action is often theoretically and philosophically underpinned with Gandhi's *Satyagraha*\(^{121}\) approach. Non-violent direct action approaches are not opposed to some of the approaches of conflict resolution practitioners who work on developing the constituencies and other power of some parties. This is seen as necessary to develop sufficient power to manifest the issues in conflict, to cause the more powerful stakeholder to come to the table and to develop effective representation at the negotiating table.

In Cambodia, the closest to this approach is the work of the *dhammayietra* movement; however, this movement has focussed mostly on Buddhist conceptions of peace and ethics, and has not been active in non-violent advocacy on political or social concerns, although the walks are believed to have been effective in encouraging the large voter turn-out in both 1993 and 1998 elections. In Cambodia most demonstrations on political or labour issues have not taken this strongly Buddhist non-violence approach. Rather, demonstrations have often been aggressive and even violent.\(^{122}\) In Cambodia, however, even non-partisan and seemingly modest calls to Buddhist morality by the *dhammayietra* movement have been viewed as potentially dangerous by those involved. One peace activist, recalling peace walks in August 1997 to try to stop the violence and extrajudicial killings after the July coup, says that at that very volatile time walkers were fearful of calling attention to morality through signs they made with sayings taken from Buddhist scripture. "We had eleven quotes including 'Thou shalt not kill,' 'It is wrong to steal'... even if you say these it is risky in case these are seen as political statements... We were afraid, so we did extra planning. No monks with bags. Nothing in hands. . . People didn't like what the CPP did [in the coup and aftermath]. It was very wrong.

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\(^{121}\) Gandhi coined the term *Satyagraha* for his independence movement in India. It literally means "Force which is born of Truth and Love or non-violence."

\(^{122}\) The demonstrations after the election in 1998 started out very peacefully but became increasingly dangerous with violence by citizens and violence by authorities including aggression and violence to monks who were part of the demonstration in a non-dhammayietra-type of manner. Anonymous videorecording of demonstrations in Phnom Penh, September 1998 (obtained by the author October 1998) [On file]. See also the UN reports of these demonstrations Special Representative of the United Nations Secretary-General for Human Rights in Cambodia, "Monitoring of Election-Related Intimidation and Violence, August 20-October 28, 1998" (Phnom Penh: Cambodia Office of the High Commission for Human Rights (COCHR), 1998); Cambodia Office of the High Commission for Human Rights (COCHR), "Killings and Other Instances of Violent Deaths Documented in and around Phnom Penh between 7 and 19 September 1998" (Phnom Penh: COCHR, 1998).
Hun Sen knew this." Hun Sen allowed these dhammayietra walks; he had already secured power and even encouraged the people to join the walks. While these approaches have gained considerable fame and popularity, the learnings from this movement have not been deeply plumbed by foreign researchers. More is said about concepts of power later in this chapter.

Restorative justice is another part of the conflict resolution movement that specifically addresses issues of power and morality. Restorative justice approaches are aimed at accountability and reconciliation between victims, families, society and offenders. Restorative justice approaches have been used in the criminal justice system in many places in North America and Europe. Restorative justice ideology also underpinned the South African Truth and Reconciliation Commission. Restorative justice approaches have been largely absent from Cambodia. The topic of restorative justice is a large one in itself, and would overwhelm this project if addressed further. Much more attention needs to be focussed on restorative justice approaches in Cambodia, particularly in coming to terms with the Khmer Rouge atrocities.

One possible reason for hesitancy about restorative justice work at the grass roots in Cambodia is the tendency there for private settlement of criminal cases at the village level. For example, Canadian lawyer, Kathy Neilson (who has since been appointed to the Supreme Court of British Columbia) cites her experience at a meeting in rural Cambodia. She describes the incident as follows:

... one man spoke up for the military commander in his area. He says that recently several soldiers 'took girls for love without asking.' When he reported this to their commander, he took appropriate disciplinary steps. He made them marry the girls. I [Neilson] look at him in amazement, but there are nods of

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123 Interview with a civil society leader in Phnom Penh (6 June 2000) [Notes on file]. Normally monks carry cloth bags. What this speaker is referring to is that walkers avoided carrying anything that might appear to be or to contain a weapon.

124 For one preliminary example, see C. Morris, “Cases in Religion and Peacebuilding: Cambodia” in H. Coward & G. Smith, eds. Religion and Peacebuilding (New York: SUNY) [forthcoming in 2002].

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approval around the table, and Sam Oeurn [Neilson's interpreter] is not taking issue with them. At times like this I take my cue from him and swallow my western views. Later he explains to me that in Khmer custom this is the only way the women can continue to live in their village with dignity. There are no resources to remove them from their homes and support them elsewhere, and they would be ostracized if they remained unmarried in these circumstances.\textsuperscript{125}

This kind of "ADR" process tends to be decried by human rights activists and legal development specialists. Edwin A. Tollefson, another Canadian lawyer, insightfully comments as follows:

\begin{quote}
The ADR principle is often used inappropriately by the police, even in serious criminal cases like rape. When they get a confession, they often essentially force the parties to agree to a monetary settlement (out of which the police take a percentage), following which the proceedings are dropped. While diversion of some forms of criminal proceedings out of the court process is usually a good thing, there are number of reasons why this form is unacceptable. First, it is based on involuntary confessions by the suspect and extorted consent by the victim. Second, there is an absence of judicial supervision. Third, it removes the opportunity for the court to impose an appropriate sentence for the criminal act. Fourth the motivation for this practice is that it is a means whereby the police can extort money from the suspect and the victim.\textsuperscript{126}
\end{quote}

While it is clear that corruption and inappropriate coercion are part of current expressions of informal settlement of local offences, this traditional community approach is unlikely to be halted, particularly in rural areas. Criticism of unhelpful negotiation over human rights violations and crimes is important. Increased attention might usefully be placed on identifying

\textsuperscript{125} K.E. Neilson, "A Day in Rural Cambodia" (1996) 54:2 The Advocate 209 at 214.

\textsuperscript{126} Cambodian Justice System, supra note 38 at 43 note 40.
what may be some positive restorative elements of these processes and enhancing those positive aspects while developing appropriate policies, safeguards and methodology to protect the public interest and ensure that all parties' human rights are upheld and protected. The growing body of literature and experience in restorative justice and participatory development could be used to facilitate the building of restorative justice approaches toward international standards.

4.3.3.2 Harmony ideology: Structural functionalism unexamined

Some critical theorists have levelled attacks at some deeper ideological assumptions of the conflict resolution movement. Nader has noted a propensity of the dispute resolution movement to replace principles of justice with “harmony ideology,” and to “trade justice for harmony.”¹²⁷ One way this plays out in the discourse of the conflict resolution movement is in the disparagement of “rights” and “positions” and the valorization of processes and outcomes that articulate and synthesize party “interests.” The interplay of rights and interests within conflict resolution rhetoric is discussed later.

4.3.3.3 Widening the net of elite social control

It should not be surprising, therefore, that another critique of conflict resolution and ADR with its predominant harmony ideology, is that it serves as a means of increasing state-sponsored or elite social control.¹²⁸ Conflict resolution processes and programs, particularly institutionalized programs, may do this in at least four ways.


First, institutionalized dispute resolution systems may distract attention and energy away from larger social injustices. There is a fear that a focus on individual problem-solving may undermine efforts to generate collective solutions to societal problems. Disputes that are symptomatic of larger social conflicts may be individualized and tamed. Pacifying the most vocal individuals may distract attention from systemic injustices. By focussing on an individualized, actor-oriented approach such as the Harvard model, mediation schemes can suppress social conflict and thwart legitimate social change.

Second, there is a concern that institutionalization of conflict resolution programs, which are designed to remove cases from the formal legal system, may actually have the effect of increasing the numbers of cases that come forward under the purview of state-sponsored or state-funded programs. This is related to the issue of coercion; many conflict resolution programs rely on cases being “referred” by the courts or police. Even though not mandatory, police and judge referrals may be perceived as pressure. Judicial mediation, particularly when recommendatory in style, can also be seen as pressure. The professionalization of mediation is seen as part of the movement toward changing mediation from something “alternative” into just another institutionalized tier in the judicial system. Institutionalization and professionalization, together with individualization of disputes, may have the effect of increasing public satisfaction with existing institutions when what is really needed is radical change in social structures.

Third, by focussing on “interests” and “consensus” there is a not-so-subtle pressure for parties to abandon rights. The language of entitlement and morality is reframed as “interests” or “differences” which may further individualize and trivialize important social conflicts and claims. A new settlement-based “tier” in the justice system thus works toward removing the courts as a forum for social struggle and political action. This increases social control of a type that represents the status quo rather than social change.

Fourth, ADR’s “liberatory” potential for social transformation is feared to be systematically

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129 “Controlling Processes,” supra note 127.
being “colonized” by policymakers who are increasingly turning ADR into a set of formalized practices associated with the legal system. We see this in the increasing public regulation of ADR practices and the establishing of qualifications for dispute resolution practitioners which are turning ADR into a particular set of technical practices aimed at increased efficiency of courts, tribunals and public agencies. This is particularly so in legislated or publicly regulated ADR schemes, including mandatory mediation programs.130

Proponents of informal conflict resolution programs and mediation have largely ignored these critiques or attempted to respond in piecemeal ways that fail to attend to the deepest criticisms. Mika, noting the “astructural bias” 131 within the field of conflict resolution, attempts a corrective approach, suggesting that dispute resolution programs can respond to these critiques by such means as targeting structural sources of conflict within communities, by being predisposed to intervening in group conflicts, and by working closely with other organizations “to broker resources on behalf of clients . . . in a mutual effort to address root sources of community conflict . . .”132

This sounds good, and indeed, many community dispute resolution centres in Canada have aspired to these goals. However, most community mediation centres are under constant pressure from funders to provide more service for less money. They are largely reliant on referrals from courts, police and government departments. Many have had to abandon or curtail pro bono services and community activism in order to survive. Some court-based mediation programs in the US and Canada exploit pro bono mediators. As mediation becomes more institutionalized, there is more pressure for qualifications standards. More and more training for


mediators has become more focussed on shorter, more evaluative recommendatory mediation processes. Those conflict resolution pioneers who embarked on a journey toward social justice, have increasingly found themselves complaining that the ADR schemes and organizations they founded have been more influenced by traditional legal approaches and the needs of courts for efficiency than the other way around.\textsuperscript{133} Those who have promoted public policy negotiation processes are now often disappointed to see their ideas translated into a routinization of “public consultation” processes that provide a way for members of the public to say things in surveys, focus groups and public meetings, but with seemingly little influence on decisions that seem to have already been made. The public in Canada has become suspicious of what are sometimes referred to as “time-wasting” attempts at pacification.

These critiques are all important to consider in Cambodia, where authoritarian social control together with harmony ideology have had the effect of fostering compliance with injustice, power abuse and human rights violations at structural, institutional and individuals levels including the family. For example, even though the Buddhist peace ethic does not support any kind of violence, instances of domestic violence are considered “small things” by the Cambodian courts. Women are told to go home, be a good wife and cook good food.\textsuperscript{134} Existing pre-trial conciliation processes are not seen as any better at supporting women's rights.\textsuperscript{135}

Dissent is frowned on by political elites and their supporters in Cambodia. Political dissidents are criticized for “disturbing society.”\textsuperscript{136} Opposition members of parliament have been rounded


\textsuperscript{134} Quoting a speaker, S. Monh, (paper presented at the Southeast Asian Consultation on Draft Asian Human Rights Charter, Kowloon, Hong Kong, 8-11 August 1995 1995).

\textsuperscript{135} Pre-Trial Dispute Resolution, supra note 70.

\textsuperscript{136} A pro-government student group called the Pagoda Children, Intelligentsia and Student Association (PCISA) has conducted counter-dissident activities and defended its pro-government activities by saying that “in a democratic country, pagoda students have a right to express their opinions and do not welcome [activities] that will cause instability in society.” B. Bainbridge & N. Lon, “Patriot Games: Inside the Student Movement” Phnom Penh Post (2-15 March 2001).
up and arrested without warrant when there are seeming threats to the government. When strong-arm tactics are seen as increasingly unacceptable, conflict mediation programs may very well be seen by government as a more civilized way to pacify individuals and distract attention away from issues of corruption, endemic human rights violations and untenable courts. Conflict resolution mechanisms could indeed be used to reproduce existing power structures.

From a theoretical and ideological perspective, there is a need for conflict resolution scholars to come to terms with the trends and swings in sociological theory, from the strong structural functionalist assumptions of the 1950s and 1960, to the growing critiques of structural functionalism that put it seriously out of fashion as the critical studies movement gained momentum in the 1970s and 1980s. Now, “neo-functionalist” and other “constructivist” approaches are again providing some theoretical grounding as well as challenges for the field of conflict resolution. Unfortunately, the field, driven by practice as it is, and dominated by liberal leaning practitioners and scholars, often seems unaware of academic trends beyond the critical theoretical approaches of the 1980s (which themselves have been largely marginalised.) Forester points out: “Too much of the negotiation and mediation literature... remains

137 For example, after the recent night attack on vacant government buildings orchestrated by an American-based anti-communist fringe group, the “Cambodian Freedom Fighters,” government forces arrested, mostly without warrant, about 200 people, including many members of the opposition Sam Rainsy Party (SRP), one of whom was allegedly tortured, and at least eleven others beaten or kicked by police. See the following stories: “Cambodian Police Detain 66 over Attacks on Govt Buildings” Associated Press (30 November 2000); “Opposition Members Charged in Cambodian Violence” Agence France-Presse (4 December 2000); “Hun Sen, Rights Groups Clash over Cambodian Fighting and Arrests” Agence France-Presse (6 December 2000). I have omitted several partisan press releases by the SRP detailing specific complaints of intimidation including killings of SRP members.

138 “Hun Sen, Rights Groups Clash” supra note 137.

139 In September, 1995, I had an informal conversation with a senior Cambodian government official who expressed concern that the conflict resolution training he had been part of (involving John Paul Lederach) might have had the effect of teaching him “smoother” techniques to persuade members of the public to do what he wished them to do. This thoughtful and intelligent individual was concerned about such superficial results of conflict resolution training. While it might be argued (as it was by one Canadian colleague) that smoother negotiations to prevent violence by authorities against citizens is an incremental improvement, obtaining public compliance by authorities through less violent means is not much of a measure of fundamental change in governance modes, structures or institutions or attitudes.
economistic, more concerned with trading and exchange than with learning, more concerned with interests-based bargaining and 'getting to yes' than with the broader public welfare and the practical and political significance of public deliberation.\textsuperscript{140}

In its projects, the Canadian team did not present critical theoretical perspectives. While it might seem desirable to have done so, the political tension in Cambodia was palpable at that time. There was no appetite to discuss controversial issues in public forums, where one of the goals was to pose ideas about conflict resolution that would attract rather than threaten senior government leaders.\textsuperscript{141}

Not to neglect structural issues altogether, however, the Canadian team did present conflict analysis models that included attention to structural issues, albeit briefly. For example, Christopher Moore's taxonomic framework\textsuperscript{142} of sources of conflict was presented and discussed in training sessions\textsuperscript{143} and also appear in workshop materials made available in Cambodia in English and Khmer.\textsuperscript{144} Also advocated were ombuds-type approaches to resolving

\textsuperscript{140} J. Forester, \textit{The Deliberative Practitioner: Encouraging Participatory Planning} (Cambridge, MA: MIT Press, 1999) at 90.

\textsuperscript{141} For example, in 1995 it was not possible to discuss Cambodia's land disputes in direct way because of political sensitivities that could not be talked about. While land disputes were a major source of disputes, it was not possible to talk about the land issue other than very indirectly in a public forum such as the one we were involved with. By 1996, the time of the Canadian team's second conference, the political climate in Cambodia was even more tense and people were very nervous. The CPP takeover occurred only a few months later. It may be the case that opting for liberal "harmony ideology" was a "sell out" for those of use interested in the full gamut of peacebuilding approaches including oppositional approaches. This is an example of how foreign development projects tend to be squeezed into the mould of development agencies with a liberal agenda.

\textsuperscript{142} \textit{Mediation Process, supra} note 24.


public complaints.\textsuperscript{145} While the ombudsman approach can be seen as an institutionalist approach, the ombudsman role can be played in ways that address structural issues, largely through public reporting, negotiating with government for changes in institutional policies or practices, and making recommendations concerning legislation.\textsuperscript{146} Nevertheless, the presentations of Canadian team members dominantly featured the Harvard approach. The problems associated with using the Harvard approach now seem more obvious after conducting the conflict analysis in Chapters Two and Three, revealing the dominance of conflicts of a structural, cultural and moral nature which may not be very permeable to the actor-oriented, utilitarian Harvard approach.

4.3.3.4 An ethical critique of utilitarian conflict resolution: Privileging interests over rights

The movement toward interest-based negotiation and alternative dispute resolution has de-emphasized rights in favour of interests.\textsuperscript{147} In the Harvard approach, and the ADR movement in general, conflicts are persistently characterized as conflicts of interest. Rights-talk is discouraged as fostering adversarial or positional bargaining.\textsuperscript{148}

\textsuperscript{145} Training in ombudsman-type investigations was part of the 1996 training sessions. Harley Johnson, then Ombudsman of Alberta conducted this section of the training. Stephen Owen also advocated ombudsman approaches.

\textsuperscript{146} More is said about the whole issue of Cambodia's readiness for an ombudsman or a national human rights commission in Chapter Five.


In the interest-based account of conflict analysis and resolution, where do ethical values and moral entitlements fit? When asked about this, proponents of interest-based dispute resolution tend to say one of two things. One is to say that “rights” are important types of interests. Another is to say that claiming “rights” is a “positional” way of trying to satisfy interests. In conflict resolution ideology, it is considered better to appeal to the interests that underlie the articulated rights and not to the rights themselves. Thus, there is a conflation of values, rights and interests – with interests being the lens through which values and rights are considered.

This conflation of rights and values into interests strains ordinary lay definitions of “interests” and indeed may also strain Fisher and Ury's own definition of interests as “needs, desires, concerns and fears.” In the philosophical, jurisprudential and human rights literature there is a good deal of dispute about the connections between rights, interests and needs.

What are the philosophical foundations of “rights”? Dworkin developed a typology of theories of rights in which theories were classified as right-based, duty-based or goal-based. In right-based theories, moral duties are ground in others' entitlements. In duty-based theories, one's rights are grounded in others' duties. Kant takes this approach, saying people are ends in themselves and should not be treated in instrumental ways. By contrast, in goal-based theories rights are grounded in the interests of society – that is, they are based in utilitarian ethics. A thing is right if it maximizes the most happiness of the most people. (Of course, this is oversimplifies the many nuanced approaches to utilitarian ethics.) Utilitarian ethics are consequentialist in nature. Things are right or wrong because of their consequences.

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149 “Position” are defined as “proposals (or ideal solutions) as to how an issue should be addressed” and are contrasted with interests “that need to be satisfied for a solution to be seen as acceptable.” C. Morris, “Dispute Resolution in the 1990s: An Overview of Principles and Practices in Canada,” working paper (Victoria, BC: UVic Institute for Dispute Resolution, 1995) at 5-6. “Position negotiation” is seen as tending toward being “adversarial.” A. Grzybowski's material in Pacific Resolutions, ed., Conflict Management Training Materials: Cambodia Commission on Human Rights and Receptions of Complaints (Victoria and Phnom Penh: Pacific Resolutions, 1996).

150 Getting to Yes, supra note 23 at 40.

Situationalism can predominate. In a utilitarian approach, a right may be “nothing but a particularly important interest.” Critics of utilitarianism say that in order to prevent abhorrent policies that utilitarian reasoning might justify under some conditions, one must resort to deontological reasoning to justify the intuition that certain things are always completely unjustifiable, such as torture. Duty-based deontological or “principlist” approach argue that certain behaviours are constrained not primarily because of their consequences or because they maximize social welfare, but because they are right in themselves regardless of their utility in maximizing average or aggregate public happiness.

Dworkin, Rawls and Sen have been among the chief critics of the utilitarian bias that has dominated social policy creation in liberal societies. Utilitarian policy ethics may not be very robust when one considers the effects of utilitarian policies on the least powerful groups in society who are often the most deleteriously affected if decisions fail to treat them as important. Those who attack majoritarian utilitarianism often appeal to individual rights or minority group rights. The philosophical question remains as to how to justify rights other than to appeal to the human interests they protect (which Scanlon points out is itself a utilitarian argument).

Another approach to rights is to found them in basic human needs (as distinguished from wants or other interests.) This argument is often connected to deontological constructions of human rights which Christian Bay defines as “all entitlements and immunities that, as a matter of moral urgency, must belong to every human being qua human being.” Fisher and Ury subsume needs into their definition of “interests,” saying “the most powerful interests are basic human needs.” This is the only reference to needs theory in Getting to Yes; the implication is

152 Ibid. at 15.
155 Ibid. at 235-6.
156 Getting to Yes, supra note 23 at 40

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that this is obvious. Yet, some renowned conflict resolution scholars do not so assume and say, by contrast: "... interests are not the same as needs." \(^ {157}\) *Getting to Yes*, does not really discuss rights or entitlements or moral obligations.

One has to admit that the question of "what are rights" is a philosophical conundrum. The arguments become circular. The question does not need to be resolved here. However, it does seem appropriate to conclude that the terms "rights" and "duties" have a moral imperative that the term "interests" does not attain unless one strains the meaning of "interests."

It really cannot be denied that interest-based negotiation, also called "principled" negotiation, \(^ {158}\) valorizes interests as the most important consideration. Interest-based negotiation and dispute resolution focuses on negotiation from the perspective of enlightened self-interest and the Pareto principle \(^ {159}\) as basic premises. Interest-based dispute resolution is fundamentally grounded in a utilitarian ethical framework which maximizes the accommodation of the self-interests of all those concerned.

The point of this discussion is to call attention to a side of the field of conflict resolution that needs to be turned toward the light for clearer examination. The Western, utilitarian ethical biases in the dominant Harvard approach to negotiation and conflict resolution have generally been overlooked. The field of conflict resolution popularly pays little attention to discussions about moral entitlements and obligations, and when it does, interests are generally contrasted with rights (interests being superior). Also, "rights" are often narrowly construed to mean "legal rights." Alternatively, rights, values and needs are all reframed as "interests." \(^ {160}\) The


\(^ {158}\) *Getting to Yes*, supra note 23 at 10.

\(^ {159}\) Negotiation theorists explain the "Pareto frontier" as the place on the frontier of options where one cannot improve one's position further without making the other party worse off. This is said to be the place at which joint gains have been optimized. This utilitarian principle is named for the Italian economist Vilfredo Pareto.

discussion thus privileges utilitarian assumptions. At the same time, the field disenfranchises deontological ethics and morality by focussing the moral imperatives of entitlements, duties and virtues – and even basic human needs – through the lens of “interests.”

What is the practical effect of this confusing conflation of meanings and the privileging of utilitarian “interest” based approaches? Some groups have objected to the “interest-based” approach at the negotiation table (if they get that far) because of its practical effect of disparaging claims to legal (and moral) entitlement. This has occurred when mediators and negotiators try to see the interests that underlie a claim to entitlement as more important than the moral claim to entitlement itself.

In collegial discussions, negotiators and mediators trained in the Harvard approach tend to block out or disparage rights-based approaches either as heretical or as the unenlightened views of the unconverted. However, it is not just a matter of some people misunderstanding interest-based approaches and being in need of better education; some people understand it really quite well (intuitively or otherwise) and find it morally offensive when their values and moral claims are reframed as “interests” by well-meaning negotiators or mediators who do not seem to understand the meaning or moral weight of the insistence on entitlements, duties or

the way a popular approach in Ontario, Canada, has articulated “interests.” The acronym “CHEAPBFVs,” is attributed to Stacey Holloway, a popular BC trainer. This acronym has become popular in Ontario and includes concerns, hopes, expectations, assumptions, perceptions, beliefs, feelings and values. It does not include any direct reference to rights claims or moral entitlements or virtues. Apparently trying to come to grips with some contradictions, Menard, at 16-17, says: “I wonder if we come closest to understanding interests when we think of them as values. Values are things like financial security, peaceful and quiet lifestyle, community-mindedness. We feel strongly about values. We want to hang onto our values. We 'need' our values... when we try to highlight an interest... we are actually searching for a party's values.” (p. 16) In responding to Menard's article and to trainers who promote this acronym, I suggest that the inclusion of values, perceptions, beliefs as “interests” rather strains the meaning of “interests” in the worthy attempt to get beyond Fisher and Ury's conceptions of “interests” which are clearly inadequate to what mediators need to do. I do agree with Menard's statement that "... we may all mean different things when we say 'interests' and... talking about what we mean can help bring more clarity to our search for how best to approach 'interest-based' negotiation.” Finally, she seems to hint at some disparagement of the questions around interests that she has noticed in the field, saying, “Perhaps... the question: 'What really is an interest anyway?' will be seen as an invitation to dialogue, and not a sign that someone doesn't get it.” Menard's perceptive article attempts to struggle with the dominant discourse of interests (as perhaps does Holloway who coined the interesting CHEAPBFVs acronym). It is interesting that with many others, Menard does not give up the attempt to push all these concepts through the sieve of “interests.” Conclusions I might draw from the CHEAPBFVs acronym and Menard's useful insights is that the sieve of “interests” that helped us move beyond “positions” may have outlived its usefulness.
responsibilities. The utilitarian assumptions of interest-based approaches can even offend those for whom entitlements or obligations, defined in deontological moral terms, are what is really at issue for them. An approach that is overly focussed on entitlements, as opposed to obligations, can also seem offensive to those whose morality does not centre primarily on claiming rights but on fulfilling promises and obligations. The flip side of the rights/duties coin tends to be obscured: moral obligations, duties or virtues are rarely part of the “interest-based” negotiation or mediation scene. Thus, the pervasive utilitarian emphasis in the Harvard-dominated field of conflict resolution may run counter to the deeply deontological morality of people from some faith traditions and cultural traditions. Given its ethical biases, “interest-based” dispute resolution is not at all a “universal” theory that can be applied anywhere with the proper education and skills training.

When human “rights” (or, more broadly speaking, “entitlements”) or obligations are described by parties in universalist and deontological terms – as they often are, particularly by marginalized groups who tend to assert entitlements – I am of the view that they must be seen as analytically distinct from interests and positions. In particular, human rights cannot – should not – be harnessed into the yoke of interests or positions, thus seeming (however unintentionally) to disparage them in the attempt to squeeze them into interest-based theory. Taking the famous typology that divides dispute resolution methods into power-based, rights-based and interest-based approaches, there needs to be consideration of the complete trilogy of interests, ethical entitlements and power without automatically privileging one or the other in the moral universe, and without forgetting other kinds of values or world views. An entitlement approach or even a power approach, such as non-violent direct action, may sometimes be the best process choice for a marginalized group or individual.\textsuperscript{161}

Where Cambodia is concerned, one must be careful not to automatically assume that the utilitarian biases of the Harvard approach are suitable to resolve the very practical concerns

about human rights, which are centred in international deontological/utilitarian moral debates. The Canadian team, like most of the field of conflict resolution, did not ponder these issues at the time, let alone the possible effects of promoting a utilitarian ethical approach to the resolution of public policy concerns, which in Cambodia have international human rights implications.

Some human rights commissions in Canada that have considered alternative dispute resolution schemes have contemplated “rights-based mediation.” Whereas “interest-based” mediation is said to be “facilitative” in process style, Stitt defines “rights-based” mediation as involving recommendations by the mediator. Thus, he appears to equate “rights-based” mediation with “evaluative mediation” or non-binding arbitration.162 This, I suggest, reduces rights-based approaches to blame-oriented processes that resemble the traditional legal system in all but its publicly binding quality. This distinction between rights-based and interest-based mediation tends to conflate or at least blur two analytically distinct features of mediation, its degree of coerciveness, and the degree to which it emphasized the rights of the parties. Recommendatory or “evaluative” mediation can be conducted without reference to parties' rights and in exclusive consideration of their interests.

From a theoretical perspective, therefore, the Western field of conflict resolution has a great deal more work to do to find ways to resolve human rights issues in ways that are socially transformative and keep parties focused on moral nature of international human rights standards. Some of the work of thinkers like Martha Nussbaum,163 Amartya Sen164 and Seyla Benhabib165 might be usefully applied to this important issue. I discuss several approaches to


165 S. Benhabib, Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics (New York: Routledge, Chapman and Hall, 1992).
this dilemma in Chapter Five.

4.3.4 Conflict, culture and transformation

Anthropologist Clifford Geertz once claimed that there is “no such thing as a human nature independent of culture. We are... incomplete or unfinished animals who complete or finish ourselves through culture – and not through culture in general but through highly particular forms of it...”

The prescriptive models of negotiation and mediation most frequently taught in North America, based largely on Harvard approaches, have been critiqued as unsuited to individuals in North America from outside its dominant culture, let alone cultures that are radically different from that of North America. To counter North American cultural bias, conflict resolution researchers like Michelle LeBaron have proposed that a more flexible individualized client-centred process design may be more desirable than prescribed models based on the Harvard approach. LeBaron's thinking was largely inspired by Lederach's “elicitive” model of conflict resolution training inspired by Freire's concepts of popular education. Elicitive training is contrasted with the more prescriptive approaches to training customary in North America (and, indeed, elsewhere). LeBaron also emphasizes the central importance of cultural awareness for dispute resolution practitioners.

In Cambodia, the Canadian team recognized that North American cultural biases in training and


169 Conflict and Culture Literature Review, supra note 25.
process design could not be overcome without first undertaking elicitive training sessions and elicitive research with Cambodian training partners in Cambodia. Given the constraints of the project, therefore, we opted to use a modified prescriptive approach with opportunities for elicitive discussion among participants during training and debriefing. In particular, there was an attempt to leave room for discussion of the suitability of the foreign conflict resolution approach in Cambodia. There was also some focus on issues of culture in the training materials, however, this was limited to some quite brief material on face issues as well as some presentation on the importance of understanding that our ideas of how to approach and resolve conflict are based in culture and, therefore, not immutable. Unfortunately, the constraints of the project also meant there was little opportunity to design or implement culturally sensitive methods of evaluating the training in detail.

With the benefit of further research and reflection on Cambodia and on “culture,” and the added benefit of hindsight that informs the work in all these chapters, I would like to offer some reflections on the topic of “culture” as it relates to the work of foreigners with dual roles of conflict resolution trainers and development workers. These thoughts have also underpinned

170 See Preparing for Peace, supra note 13 at chapters 6-8.


172 Dispute Resolution in Cambodia, supra note 16 at 88-89.
4.3.4.1 Conflict and difference

People tend to focus on and accentuate differences of various kinds, particularly when they are in conflict. In Cambodia, political differences are a primary focus, along with ethnic differences between the Khmer majority and various minorities, particularly the Vietnamese minority. There are also important cultural and ideological differences among the Cambodian government, people, and the international community. Some kinds of conflicts between those from differing cultures and ideologies are very intense and may erupt into violence. For example, conflict between Khmer and Vietnamese people centres around ethnic characterizations as well as historic orientations. For example, Khmer people remain deeply influenced by ideas and symbols that are Indic in origin; Vietnamese have been influenced more by Chinese and Confucian ideas. Another example is the deep division between the sovereigntist position of Hun Sen, sometimes framed in terms of Cambodian nationalism, and the international governance and human rights perspectives of the UN and many NGOs.

For these reasons, it is tempting to see cultural difference in itself as a source of conflict instead of looking to other potential sources of conflict such as structural injustices, unfair distribution of resources, disrespectful and unequal relationships, or inequitable or otherwise poor decision making processes. It is also tempting to focus the topic of “culture” and peacebuilding in Cambodia on cultural differences within Cambodia, or on differences between Cambodian and foreign peacebuilders.

Considerations of culture must go beyond a consideration of “differences.” All conflict, even conflict that does not involve obvious cultural differences such as ethnic, religious or language differences, is inextricable from its particular cultural context. And all cultural contexts present remarkable diversity. One tends to be blind to one’s own cultural context because one is used to it, like fish in familiar waters. Only when confronted with difference and dissonance does one become aware of having moved out of one’s own comfortable cultural context – like fish out of
4.3.4.2 What is “culture”? 

Whereas the study of social structures and social interactions is the domain of sociologists, the study of “culture” is the domain of anthropologists. When one begins to study “culture,” one becomes aware of myriad definitions, many of which overlap with sociological concepts of social relations. It is important to state that I do not consider that there is a “correct” meaning of “culture” to be discovered. The very concept of “culture” has been created by generations of anthropologists who have argued about its meaning. Geertz provides a summary of various definitions of culture, including:

- “the total way of life of a people . . .”
- “the social legacy the individual acquires from his [or her] group . . .”
- “a way of thinking, feeling, and believing . . .”
- “an abstraction from behavior . . .”
- “a theory on the part of the anthropology about the way in which a group of people in fact behave . . .”
- “[a] storehouse of pooled learning . . .”
- “a set of standardized orientations to recurrent problems . . .”
- “learned behavior . . .”
- a mechanism for the normative regulation of behavior,
- “a set of techniques for adjusting both to the external environment and to other [people]. . .”
- “a precipitate of history . . .”
- a map,

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• a sieve,
• a matrix.

Because of this array, Geertz points out the temptation to opt for an eclectic approach, but warns: “Eclecticism is self-defeating not because there is only one direction in which it is useful to move, but because there are so many; it is necessary to choose.”

As an ethnographer, Geertz chooses an “interpretive” approach: “Believing, with Weber, that man is an animal suspended in webs of significance he himself has spun, I take culture to be those webs, and the analysis of it to be therefore not an experimental science in search of law but an interpretive one in search of meaning.”

He describes the role of the ethnographer as an elaborate venture in “thick description” which he says is not just a formal comparison of particular kinds of behaviours (or in the case of law, formal comparison of legal institutions). Rather, “thick description” aims for comparative and various meanings of that behaviour in various circumstances and contexts. Thus, a “thin” description of an “eye twitch” would be “rapidly contracting . . . eyelids.” “Thick description” would involve a “stratified hierarchy of meaningful structures in term of which twitches, winks, fake-winks, parodies [of winks] . . . are produced, perceived and interpreted, and without which they would not . . . exist, no matter what anyone did or didn't do with his eyelids.”

Geertz’s purpose in using an interpretive definition of culture is based on his purpose as a researcher, which, he says, is not aimed at learning how to be “natives” of a particular place, nor to mimic them. Rather, he says: “We are seeking . . . to converse with them, a matter a great

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175 Ibid. at 5.

176 Ibid. at 5.


178 “Thick Description,” supra note 174 at 7.

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deal more difficult, and not only with strangers, than is commonly recognized.” With this purpose in mind, Geertz's defines culture as “interworked systems of construable signs... culture is not a power, something to which social events, behaviour, institutions or processes can be causally attributed; it is a context, something within which they can be intelligibly – that is thickly – described.”

Thus, some kind of meaningful understanding of another's “culture” is important in order to converse with any degree of understanding. But to what end is this conversation and understanding? For the researcher’s purposes, understanding may be a sufficient end in itself. For the purposes of peacebuilding, however, one hopes that conversations may be toward understanding, but the goal of understanding may be for further ends, like transformed relationships, structures – and even the “culture” itself. The transformation sought may be toward “settlement,” “resolution,” “justice,” or “peace.” In the context of foreign development work in Cambodia in the area of conflict resolution, the further question becomes what is the meaning of “resolution,” “justice,” and “peace” and why these might be desired or sought. Who decides whether, when, how and what to discuss? Who is invited or allowed to enter into the conversations? Whose definitions emerge as dominant in the conversations?

For my purposes as a conflict resolution practitioner and researcher, and to help me get at what things may “mean” for the various stakeholders in a conflict, I have developed a way of thinking about “culture” that I use as part of conflict analysis or for planning an intervention. While “patterns and meanings” are a useful way to think about culture, the job of conflict analysis requires (to my way of thinking) some more specific ways to identify and examine the threads that make up the patterns. The job entails identifying the group of people in question and also the thematic threads within the context. In a given conflict context, there is likely to be a number of “cultures” interacting. While I do look at a list of “things” that might include a group's dominant patterns of ethics, values, world views, spiritual revelations, historical

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179 Ibid. at 13.

180 Ibid. at 14.
traditions, customs or behaviours that are involved in "culture," I also want to get a sense about peoples ways of knowing, feeling, being, acting and interacting with one another and within the spiritual realm in the particular place, time and context under consideration. More importantly, however, I look at "culture" from a social constructionist perspective. My emphasis is on patterns of social dynamics, interactions and transformations within and among particular individuals and groups. This is because people – individual actors and networks of actors – create and recreate culture through dynamic social interactions and social discourses in particular environments and circumstances and times. People create and recreate "conflict cultures" including networks of intersecting "sub-cultures" that develop with and from interaction and discussion and action within particular contexts, places and times and events, including institutional contexts. External influences and interactions are part of this. Climate and geography are also relevant to the ways people see the world, congregate and interact. Thus, transformations do occur, but one often does not really know what or when or why or how.

If culture is socially constructed, there exists the possibility of deliberately creating a new culture through conversation among those who are different from each other. Change agents might ask questions such as: "What patterns of interaction will emerge from which conversations among which people about what topics?" "What kind of culture would we like to emerge?" We can also ask questions about processes, including: "What kind of culture is likely to emerge from the ways we talk about, to and with one another? What does this say about how we would like to interact? How can we change the ways we are interacting in order to move us toward the transformations we desire?"

Therefore, a social constructionist way of thinking about culture is centrally important for the task of conflict analysis for two reasons. First, it helps us understand that people do not act in atomistic ways but as part of complex interactions in particular contexts. Second, it is important because it emphasises that individuals and groups of people can and do make a difference.

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181 See John Paul Lederach's description of his social constructionist view of conflict in Preparing for Peace, supra note 13 at 9-10.
Thus, a social constructionist approach to culture helps us think about conflict intervention in ways that can take us mindfully into the realm of social and cultural transformation. Conflict intervenors with a social constructionist approach do not just hope or think they can influence the situation and the people; they know they do. The questions for the intervener become in what way and to what end will one's actions count. Conflict resolution practitioners do not apologize for aiming at transformation of the relationships among actors, the political legal and social structures, and the cultures (using the term broadly) and sub-cultures of the groups, institutions and general population of the place of our interventions. But if conflict is deeply cultural, and culture is deeply about the meaning of things, then we as conflict analysts and practitioners need to understand that when we aim for transformation we walk on holy ground.

In this perspective, the goal of conversation among those who are culturally different may include de-constructive discourse so as to better understand the various holy-nesses (and what unnecessary or profane shoes may need to be taken off). This kind of de-construction is not an end in itself as it is for many critical theorists; rather it is ultimately for a re-constructive purpose. This perspective, I suggest, is not a Parsonian\textsuperscript{182} one, although it is synthetic and constructivist. That is, conflict (as in classical structural functionalist thought) is not merely a symptom of system disequilibrium that should move toward system learning. Conflict resolution is not merely a function of system maintenance or for the purpose of finding an new equilibrium within the existing system. Conflict always poses the possibility of more radical change – revolution if need be, although I do not allow violence (even in its broadest senses) to be included in my understanding of legitimate means or ends. Also illegitimate are so-called “resolutions” that maintain unjust structures. Such outcomes do not meet my definition of “resolution.”

I admit this is an aspirational definition, aiming at places where the past, present and future possibilities meet in truth, mercy, peace and justice.\textsuperscript{183} Therefore, in the practical realm, I move

\textsuperscript{182} This refers to Talcott Parsons. See Chapter I, note 95 and accompanying text.

\textsuperscript{183} I used part of this metaphor in C. Morris, “Where Peace and Justice Meet: Will Qualifications for Dispute Resolution Get Us There?” in C. Morris & A. Pirie, eds., Qualifications for Dispute Resolution: Perspectives on
toward more modest and practical goals of transformative processes, dialogues and relationships that may help people walk even a little bit more successfully together, particularly those for whom going separate ways is not an option.

4.3.4.3 Conflict and culture: Some traps

The road toward transformation of relationships and public dialogues, has some theoretical and practical potholes and traps. This section identifies some traps and tries to show how selected foreign peacebuilding projects have fallen into them in Cambodia.

People seem to fall most frequently into “taxonomy traps”184 in which they identify particular disputants or groups of disputants with particular cultural groups. By studying essentialized characteristics of the “other” group, they hope to become “culturally aware” (or gender sensitive). While it is important to study the norms, customs and protocols of groups with which one comes into contact, including to avoid offending politeness norms of others, this method conceals the trap of unhelpful stereotyping. One also can fall into a similar trap by conceiving of “culture” too narrowly as connected only with race, ethnicity or religion. Michelle LeBaron points out that cultures vary with age, generation, gender, socio-economic situation, education, national origin, sexual orientation or disability,185 and, I would add, political ideology, particularly in the context of thinking about past and present conflicts in Cambodia. Class is also important, including informal “classes” within institutions whereby members of some groups automatically receive greater economic clout and status than others, and therefore develop different sub-cultures.186 Differentiating people according to these

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185 Conflict and Culture Literature Review, supra note 25.

186 Canadian universities provide an example.

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differences, however, creates opportunities to fall into unhelpful taxonomies and stereotypes (as could happen with the kind of classification and discussion of stakeholders I have undertaken in Chapter Three).

This trap bears the broken and whitening bones of those who have painted various picture of Cambodians as “gentle” and “affable” but “concealing contention and bitterness”\textsuperscript{187} or as having a “warrior complex.”\textsuperscript{188} While it is useful to draw attention to historical antecedents and to trace patterns of passivity and violence within ancient and recent Cambodian history,\textsuperscript{189} some may take such ideas and wander heedlessly into the territory of immutable cultural stereotypes. Perhaps a worn-down Rita Reddy stumbled near to the “taxonomy trap” when she decried the persistent violence in Cambodia and fell in headlong when she was caught quipping “maybe it has become incorporated into their genes.”\textsuperscript{190} She was unable to scramble out when she later tried to explain that her remarks were taken out of context.\textsuperscript{191}

Related to this trap is the idea that culture is a fixed and rigid receptacle in which people are locked into certain norms and ways of being because they are from or within a particular culture. I call this the “container” trap. Culture, however, is not static. Cultures and sub-cultures develop in fluid and dynamic ways through the interaction of people within particular contexts. Related to this is the “baggage” trap by which culture is conceived as a “thing” or collection of things that people carry around with them that identify them or to govern their beliefs, values and behaviour. These “things” may be viewed as precious treasures or useless or harmful


\textsuperscript{188} I heard the term “warrior complex” from a well-known foreign human rights worker in Cambodia in 1994. During research I learned that he was probably thinking of Bit Seanglim's social psychological study which describes self-perceived Khmer identity in terms of a “warrior heritage.” \textit{Warrior Heritage, supra} note 46.


hindrances, depending on the perspective of the one viewing the relevant “artifacts” of culture. When aspects of a culture are seen as precious and perennial treasures, people can easily fall into the “cultural relativism” trap by which people see themselves as justified in certain behaviours because their culture either prescribes or allows certain norms or behaviours. Using my previous metaphor, one can mistake a collection of assorted comfortable or not so comfortable shoes for the holy ground itself. The shoes conceal the trap. This trap may spring in ways that are particularly deleterious to some members of the group in question if we fail to ask “who defines the culture?” and thus fail to learn that the definitions may reflect the views only of the more dominant or more articulate members of the group in question. I believe the proponents of “Asian Values” fall into this trap, as do foreign cultural relativists who justify either inaction or strong-armed imperialistic prescriptions when they say things to the effect of “it’s their culture” to be corrupt or to devalue women and girls. Cambodian Buddhists, human rights groups and women’s groups, not to mention victims of corruption and exploitation, beg to differ.

Then there is the “paternalism” trap. Those in this trap are rightly concerned about injustice and racism -- the trap is that they may end up treating some people or groups as victims who are fully capable of discernment, action and full working partnerships – if accepted as equal.

Alternatively, people may fall into the “universalism” trap if they treat culture as “irrelevant” and differences as illusory or unimportant. They have many friends and colleagues from “other” groups with whom they get along well. They may conclude that “everybody is really the same under the skin.” People who expect everyone to be the same may be disappointed or become critical when they discover major conflicts in world views, values, religious norms or even work styles in settings that they hoped would remain comfortable. If they are part of a powerful group within the setting, they may dismiss the views of others either deliberately or inadvertently, or they may despair and wonder “why can't they just get along?” This may also be at the root of complaints like “what's wrong with those people? Why are they so difficult, contrary, violent, apathetic, or (fill in the blank)?” What they might really mean is “why can’t
those people be like us?" People may also fall into the universalism trap when they assume everyone believes – or ought to believe and do as they do. One sees this trap in many public debates in which people talk past one another or when the differing norms of “others” are viewed simply as “deviant.” The Harvard approach to conflict resolution may not always fall into the trap at these extremes, but it does tend to universalise its actor-oriented, interest-based approach to conflict. Its prescriptive approach does not foster inquiry into local understandings about “how to negotiate” in a given context. In fairness to the Harvard approach, it has been well received in many diverse places in the world, including Cambodia, although it has been noted that modifications may be necessary to suit the Cambodian context.

At the other extreme, people may stumble against the “deconstruction” trap if they see people or groups of people as so different that meaningful dialogue is impossible. Or they may be so fearful of “universalism” or “essentialism” that they find it impossible to move farther than their critiques of traditional and alternative methods of conflict resolution. They may become immobilized and not even attempt to build common institutions or shared approaches to designing dispute resolution processes. Those who are halted by the deconstruction trap may also be those who have become worn out and disaffected in their attempts to work within hegemonic or patriarchal systems they find abhorrent, including development projects – they may become estranged from others or even “self-estranged.” Their important voices are at risk of being lost in conflict resolution or development as less insightful people pass them by, especially when they stop engaging in dialogue with these passers-by or even stop paying attention to regressive developments. I see this happening in the field of conflict resolution. In the late 1980s and early 1990s critical theorists and feminist critics were effective in causing

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192 Even in the 21st century, this seems possibly, sometimes, to mean “why can’t a woman be more like a man?” I assert this with no apologies to Henry Higgins, and with every confidence that this point of view is alive and well in international development missions to Southeast Asia, where (according to one key informant in Cambodia and any review of the literature and the most influential reports) many visiting teams are either exclusively male or male dominated both in numbers and in decision-making power within the team.

193 Warrior Heritage, supra note 46; Mindful Mediation, supra note 12.

the conflict resolution movement to slow down and think carefully about safety of vulnerable
individuals and groups in mediation. This was particularly so in Canada, where mandatory
mediation programs were effectively halted by feminist warnings. However, critical theorists
have not written much lately about the field of conflict resolution. Scholarship in conflict
resolution is veering more and more toward compliance with hegemonic voices that provide
funding only for conflict resolution programs that serve the court system by making it faster,
cheaper and more accessible. Thus, the field of conflict resolution, rather than being urged
toward challenging the status quo, is being squeezed into the comfortable mould of the justice
system which has stolidly resisted all but superficial change. Similarly, in Cambodia there are
powerful forces at work within the development movement that are inexorably pushing and
pulling Cambodia into the global economy with seemingly little benefit to ordinary
Cambodians. Neo-liberal hegemonies at work in North America mean that the field of conflict
resolution is at risk of not having anything useful to offer in Cambodia, where the last thing
people need is training and education that is aimed at introducing North American ADR
programs as adjuncts to neo-liberal legal reform and governance reform projects which do little
to address deep inequalities in Cambodia.

Finally, people may end up seduced by the “status quo” trap if they see “culture” as a nice
veneer on policies or processes. The temptation is to accommodate culture (including gender)
and cultural difference in a superficial way through changes in language or stated policy. If
“culture” is understood as an optional “add on,” it will not be understood as deeply affecting
the ways business is done within existing institutions. If people minimize the centrality of
culture, they will not understand how deeply entrenched are many institutional beliefs and
practices. Efforts at institutional design or change may lack deep commitment and may suffer
from superficiality or ineffectiveness. Existing patterns may end up replicating themselves
within reformed or new institutions. Reform policies and practices that fail to recognize or
elicit changes in deep seated patterns may be wasted effort. If status quo patterns are
unidentified and unaddressed, structural conflicts are unlikely to be addressed, and there will be
increasing numbers of individual complaints, labour disputes and grievances and political unrest.
Because of the traps associated with discussion of “culture,” there are risks attached to asking “what is the culture?” or “what 'cultural' factors or differences are involved” in a given context. More useful questions may be: Which processes, interactions and discourses will create the future dominant relational ethos and structures within this conflict context? Which people or groups of people will be included or excluded, respected or disrespected (either overtly or covertly) in the interactions and discussions that “count”? What kind of a culture will be maintained, built or rebuilt in this particular context?

A conflict “culture” can be changed and reconstructed through the deliberate efforts of change agents and through education. This is not to say that change is easy. As Lizée has pointed out, change is resisted by those who stand to benefit from the status quo. This is why neutralist third party interventions may be ineffective to do other than pacify the weak. This is why more activist (yet still non-partisan) third party interventions into conflicts may be resisted by the powerful. This is why third party intervention may be very difficult – sometimes even dangerous. And this is why activist orientations to third party intervention are necessary. When a conflict intervener, like a mediator, insists on a process which is truly non-partisan in that it insists on accommodating all perspectives and voices, the most powerful voices may resist. Allowing the very presence of a such a mediator is risky for the powerful – it can challenge the dominant ways of doing and deciding things.195

4.3.4.4 Cultural resources: Local knowledge

Consideration of local culture and knowledge is important for another reason. Within the local culture are patterns of conflict and conflict resolution that may be tapped for their resources. Foreigners who fail to consider culture, or are given inadequate resources to do so, may overlook and fail to tap important local ideas, resources and people that can be elicited, drawn out, and enhanced for effective conflict transformation from within.196

195 This is one reason mediation and mediators are not “neutral.”

4.3.5  Power and neutrality

It is important to consider conflict resolution theory as it relates to power. Power is central to conflict. Ironically, power continues to be a neglected topic in the field of conflict resolution. If discussed at all, most existing dispute resolution literature treats it superficially, as part of what disputants carry with them. It is generally acknowledged that much more research is needed to understand the role and manifestations of power in conflict, the social context in which power is exercised and the ways power is exercised by parties and third parties. The intersecting concepts of power and third-party neutrality and impartiality have yet to be thoroughly examined. Because of this lack of research, there is a tendency to ignore or marginalise issues of power in conflict resolution education and training. This was the case in the Canadian projects in Cambodia, where only thin ideas of power were presented by way of a mediator's role in balancing power among disputants, in the terms mentioned briefly below.

4.3.5.1 What is “power”?

In the field of dispute resolution power has been defined as the ability to influence a situation. Mary Parker Follett defines power as “...the ability to make things happen, to be a causal agent, to initiate change.”197 Power, in itself, is seen within the field of conflict resolution as neither good nor bad, right nor wrong. Rather it is the way people use their influence that determines whether power is being used for good or for ill.

The field of conflict resolution generally recognizes that power is seldom balanced among parties. Power imbalance is the norm, not the exception. However, in contrast to the realists' "zero sum" ideas of power, the field of conflict resolution has drawn on broader conceptions of power, although this is not well developed in the literature.198 Follett contrasts “power over”


198 This was noticed by Juliana Birkhoff in J. Birkhoff, “Conflict and Power: An Interdisciplinary Review and Analysis of the Literature,” in University of Victoria Institute for Dispute Resolution (Victoria, B.C.: 1996).
and “power with.” Power may be exercised “over” or “against” others (competitively), or it can be exercised “with” others (cooperatively).199 Also, individuals and groups have “power to” think and do particular things. Kenneth Boulding identified three categories of power.200 Boulding’s “threat” power, or dominance power – the power to dominate – is analogous to Follett’s “power over.” Boulding’s “exchange” power is the power to make and create including exchange and trade. It functions on reciprocity. According to Boulding, “integrative” power results from a consensus about how to meet common needs and objectives. Follett does not appear to require a preexisting consensus for the use of “integrative power;” she sees the possibility of harnessing cooperative power to discover and integrate the needs of all those involved, thus precluding the perception of need for one side or the other to gain or use “power over” the other. Another way of using integrative power is to create rules jointly; if everyone involved creates rules together and everyone obeys them, “power over” is not required.201 These theorists do not see power as necessarily being on a zero-sum balance-scale where more power for one party means less for the other. Rather, conflict resolvers are encouraged to use power cooperatively through an agreed sharing of influence.202

In practice, issues of power are usually difficult to examine, understand and navigate. Mediators find that transformation of disputants’ concepts of power, and particularly their style of power use (or abuse) in conflict, is the most difficult challenge in any conflict intervention, particularly where power is both unbalanced and abused. The urge to use “power over” and “power against” seems deeply entrenched in the thinking of individuals and institutions in Canada. This is also the case in Cambodia, including in the dynamics between the Cambodian government and the United Nations and other governments. Among Cambodians and foreigners working in Cambodia, practical “theories” of power are demonstrably inadequate to shift discourse beyond confrontational patterns.

199 “Power,” supra note 197 at 103 - 109.


201 “Power,” supra note 197 at 107.

202 Conflict and Culture Training Materials, supra note 25 at 92.
The political discourse exhibits a working familiarity with the use of exchange power ("carrots") and "power over" ("sticks"), but there is a notable lack of working understanding about how to use or engage "power with." This conceptual gap suggests that education about alternative conceptions of power may have useful potential. However, one must be mindful that the notion of "power with" may be dismissed as inapplicable or impossible for parties with seemingly adverse interests or mistrustful relationships. As pointed out earlier in this chapter, individuals and groups or organizations exercise their power within a social, political, historical and environmental context. Every society has prevailing structures in which power (conceived as a commodity) is distributed among various groups of people. In every society, some people and groups have more power than others. The prevailing cultural values of a group or society will determine what power structures are considered "right" or "normal." A given society may use formal or informal means to attempt to maintain the "right" power structures. Usually these structures are hierarchical, with "power over" or "exchange power" being exercised in dominating ways by economic or political elites. The idea of "power with" may be dismissed in situations where "power over" patterns are entrenched or are being abused, such as situations of physical or "structural violence" (structural injustices). "Power with" may also be dismissed by those who can see power only in commodified terms.

I have already reviewed some scholars' observations that power among Cambodians is generally viewed as a scarce commodity and brokered in a zero sum fashion. The UN uses face threats and adversarial power tactics. Civil society groups use moral persuasion bolstered by coalition building. Hun Sen has used violence to demonstrate his power and to silence opposition. He builds coalitions with non-Western and non-democratic countries, such as China, as a counter weight. Examples of cooperative use of power in Cambodia are very limited; this may be at least in part due to limited ways of conceiving of power in zero-sum ways. A zero-sum view of conflict can, in itself, contribute to fear of power sharing.

In situations where powerful parties exercise zero sum approaches to power as the norm, educational approaches to underpowered parties may need to include an emphasis on peaceful oppositional uses power. It may be important to recognize that exercising "power with" may
not be possible and may need to be postponed until the ones exercising “power over” are demonstrably persuaded that power sharing is either morally right or in their interests. Persons and groups who are the targets of abusive “power over” may need training and facilitation in developing coalitions and the use of non-violence strategies as part of the repertoire to shift power over time. Also, development strategies toward further local education and economic autonomy among vulnerable groups can build confidence and negotiating power. Understandings and commitments to non-violence strategies and the future possibility of “power with” are important for oppressed groups. This is because efforts at power-shifting that are based on only zero-sum conceptions of power can easily turn to violent or armed revolution, which often just keeps in operation the “power over” dynamic of “carrots and sticks” – only the identity of power-holders and the power balance changing. Here, it is useful to repeat what Maha Ghosananda and other non-violence advocates say:

. . . it is a law of the universe that retaliation, hatred and revenge only continues the cycle and never stop it. . . Reconciliation does not mean that we surrender rights and conditions, but rather that we use love. Our wisdom and our compassion must walk together. Having one without the other is like walking on one foot; you will fall. Balancing the two you will walk very well, step by step.203

Ghosananda thus cautions against naivety. A paradigm shift in ways of seeing power will not, in itself, necessarily transform the ways power is being exercised. But without an adequate concept of “power with” or a commitment to it as an ideal, there may never be a reason to move in its direction. If alternative ways of seeing and using power are not even envisioned, there is no possibility at all of transformation toward that vision.

It is important to say to the international community that it is insufficient to place all the responsibility for transformation on oppressed groups. Grass roots empowerment should not be

203 One Million Kilometres for Peace, supra note 21.
an isolated strategy. Because of their international legitimacy and financial resources, international organizations like the UN, international financial institutions like the IMF and World Bank and donors and diplomats from other countries have important roles to play. The Cambodian government is unlikely to respond, at least in the short term, without persistent exercise of carrots-and-stick forms of power by donors. This theme is briefly taken up again in Chapter Five.

### 4.3.5.2 Neutrality

Given the deep concern about lack of trusted institutions and individual mediators of Cambodia's many conflicts, it is important to comment on the vexed topic of neutrality within the field of conflict resolution. "Neutrality" and "impartiality" are concepts that are central to Western notions about competent third parties and fair, effective dispute resolution processes. After having been involved in discussions, thinking and writing about mediator ethics and standards for over a decade, I am drawn towards the conviction that many of current Western ideas about impartiality and neutrality are not adequate to help with practice or theory development. I am not alone in this conviction, however, challenging current myths about "neutrality" and "impartiality" means wrestling with ideas that are deeply embedded within the discourse of ethics in law and conflict resolution. The icon of the legal profession in the West is Justitia, as she was known in Rome. This goddess of justice stands as a powerful metaphor for dominant myths we have about justice and due process and the proper role of a third party. Justitia's blindfold suggests that the ideal intervener presides over the dispute untouched by knowledge of the parties or the conflict. She stands alone and autonomous. She weighs evidence objectively on a balance scale. Evidence is carefully packaged and transmitted to the

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205 In Greece she was known as Themis. For an interesting article about the goddess of justice, see D. Curtis & J. Resnick, “Images of Justice” (1987) 96 *Yale Law Journal* 1727.
decision maker with tightly controlled and rule-centred formality. Justitia must not see the parties, lest she be tainted by prejudice or bias. She weighs only the merits of the parties evidence and arguments. Justitia's balance scales evoke the idea that the proper way to resolve a dispute fairly is through decision-making by an objective and impartial third party.

Adjudication and the adjudicator are central. The disputants evidence and arguments are stacked up on each pan of the scale. The scales tip one way or the other according to the merits. The supposed result is truth, vindication of a winner and denunciation of a loser.

The alternative dispute resolution (ADR) movement has gone some way in North American in the past two decades in convincing the public and many lawyers that adjudication, positional arguments, and the inevitability of zero-sum, right-wrong, win-lose outcomes are not the only ideas worth considering. The dispute resolution movement has provided a different mythological ideal, the win-win solution. The ADR movement has made significant headway in decentring the primary role of court adjudication to provide disputants with more active roles than just having their arguments weighed.

The balance-scale myth, however, is still present and operative in prevailing ideas about impartiality and neutrality within mediation. In the labour context, at least in Canada, recommendatory styles of mediation have been the norm for many years. Evaluative styles of mediation are increasingly being given more attention and public credit in civil dispute contexts. Justitia's scales are set at zero. Taking seriously the dictum audi alteram partum, she hears both sides equally (formalistically speaking). She treats everyone the same way. Indeed, Justitia's blindfold ensures she cannot see any special circumstances that might tempt her to set the scales to accommodate one party or the other. There has been considerable critique of this myth both in law (which literature was not reviewed for this project) and within the field of dispute resolution.

How realistic is the metaphor of the mythical balance scale? We need to remember that metaphors are less concerned with reflecting objectively determinable realities than they are with expressing and reproducing socially-constructed norms and standards. This means we
must ask who sets the scales of justice? Who decides where zero is? The neutral standard – the “zero” at which the balance scale is set – may not neutral at all, but rather may be socially and ideologically stacked against those who are marginalised and vulnerable in society. Cambodian human rights activists have called attention to this problem, discussed in Chapter Two.

The Justitia myth has been incorporated into standards for mediation in the field of ADR. This myth suggests that the only just and fair third party is blind to and untainted by any prejudices or by any knowledge of the parties or the dispute. The blindfold suggests a way to determine truth objectively. The laudable message of the blindfold is pure, uncorrupted fairness, but the metaphor can cause us to forget that real mediators are not goddesses or gods, but human beings. Human mediators (and judges) are often blind to their own cultural and ideological assumptions that they inevitably bring to the dispute resolution process. Human mediators do have opinions about issues and have emotional reactions to what – and who – they see and hear. The neutral, objective mediator is a mythical creature removed from the realities of interaction among human beings who live and work in communities.

The discourse on “impartiality” and “neutrality” in conflict resolution literature is quite confusing. The terms are not always defined. Existing definitions are inconsistent. Concepts are entangled. A review of the literature and mediator codes of ethics revealed the following definitions:  

- “Impartiality” or “neutrality” are not defined, or the terms are used synonymously.


207 This is another reason to critique Rawls. His conception of the “veil of ignorance” recalls Justitia.

208 This section is drawn from “Trusted Mediator,” supra note 204.

209 It is quite often presumed in conversation and writing that these terms are synonymous. When some people use the terms synonymously, and others have more nuanced usage of the terms, discussion can become confusing.
and/or

- "Impartiality" means unbiased, and fair to all parties equally, and/or
- "Impartiality" refers to an unbiased attitude and "neutrality" refers to unbiased behaviour and relationships, or
- "Neutrality" is comprised of two contradictory concepts: impartiality and "equidistance" between the parties, or

or unhelpful.

210 Webster's dictionary defines impartial as not partial or biased and "treating or affecting all equally." It is a synonym for "fair" which Webster's defines as "marked by impartiality or honesty: free from self-interest, prejudice, or favouritism."

211 Christopher Moore distinguishes impartiality from neutrality." In his thinking, "impartiality refers to the attitude of the mediator concerning the issues and to having an unbiased opinion or lack of preference in favour of one or more negotiators." Neutrality has to do with the mediator's working relationship with the parties during the mediation process." Thus, Moore says, the attitude of impartiality will be reflected in the mediator's (neutral) conduct. He counsels mediators to tell parties that they are impartial meaning that they have no preconceived bias toward any one solution or toward one S.R. Party, "King Intervenes in Favour of Dismissed Workers," (Phnom Penh: Sam Rainsy Party, 1999) at. over the other. Mediation Process, supra note 24 at 197. Since Moore's work is a leading text in the field of mediation, and the Academy of Family Mediators (AFM)" has adopted Moore's definitions of impartiality and neutrality in its code of ethics, it is important that his approach be mentioned in this discussion. Moore's attempt to clarify the differences and connections between behaviour and attitude is useful, and his definitions help readers to understand his uses of the terms. His particular way of distinguishing impartiality and neutrality do not appear to be in common use among the public or among mediators.

212 Rifkin, Millen and Cobb" have made widely-cited and significant contributions to the literature on neutrality and impartiality. Their unique two-pronged definition of "neutrality" incorporates two concepts: impartiality and equidistance. Impartiality is defined as the ability of the mediator (interventionist) to maintain an unbiased relationship with the disputants. J. Rifkin, J. Millen, & S. Cobb, "Toward a New Discourse for Mediation: A Critique of Neutrality" (1991) 9:2 Mediation Quarterly 151 at 152-53. According to Rifkin et al, this means the mediators make it clear that they are present simply to listen and not to influence the disputants' explication of the case." Parties are given equal opportunities to speak. Equidistance, they state, identifies the ability of the mediator to assist the disputants in expressing their 'side' of the case. Thus, mediators will temporarily align themselves with parties to support each party. Equidistance involves actively supporting each party in a symmetrical way. These authors see impartiality (using their definition) and equidistance (symmetrical alignment with the parties) as contradictory. Empirical research by these authors and others" suggests that mediators do influence both process and outcome. They profoundly affect the legitimacy of each party's point of view by determining the order in which parties speak, deciding when and how to intervene, when to ask another party to speak, when to caucus and the order of caucusing, how to respond, and when and how to reframe what the parties have said. Rifkin et al do not view this as a problem of deficiency in skill to balance these two paradoxical roles. Rather, their view is that neutrality itself is not a helpful discourse for the practice of mediation because it is inadequate to account for the dynamic process of storytelling within mediation." Rifkin et al have contributed a valuable critique of the notion that it is possible for mediators not to align with parties and not to influence outcomes. However, their unique use of the term "neutrality" may confuse readers who do not take time to study their definition. See also S. Cobb & J. Rifkin, "Neutrality as a Discursive Practice: The Construction and Transformation of Narratives in Community Mediation" in S. Silbey & A. Sarat, eds., Studies in Law, Politics and Society (Greenwich, Conn.: JAI Press, 1991); S. Cobb & J. Rifkin, "Practice and Paradox: Deconstructing Neutrality in Mediation" (1991) 16: 1 Law &
“Neutrality” means non-intervention, and/or “Neutrality” means objectivity.

Some of these ideas overlap and some even contradict one another. The various and sometimes contradictory definitions and uses of the terms impartiality and neutrality have reduced the usefulness of the terms without considerable definition and explanation. However, many valuable concepts are buried within these single terms, including ideas about non-partisan fairness, avoidance of pecuniary and other self-interests, incorruptibility, role clarity, care concerning third party affiliations, appropriate use of third-party power and intervention strategies, and objectivity. These concepts are all considered important for a third party to maintain respect and trust of the parties. However, these concepts may be variously understood across cultures and contexts.

In Cambodia, as in Canada and the United States, these related, but analytically distinct concepts are often subsumed into vague or confusing discussions about “neutrality” or

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213 Another important definition of “neutrality” refers to non-intervention. Webster’s dictionary says “neutral” means “not engaged on either side; not siding with or assisting either of two contending parties.” This definition provides two shades of meaning. One meaning suggests fairness to all the parties (not siding). The other implies non-intervention (not assisting). This second meaning attached to “neutrality” has been seen as a kind of passive objectivity – the idea of being inert, disengaged, colourless, bland and even impotent and powerless. The “neutral” mediator has thus been described as “a eunuch from Mars, totally powerless (and totally neutral).” This analogy, attributed to Roger Fisher in 1981 (cited in Mediation Development Association of BC (MDABC), “Brief on Standards and Ethics for Mediators Presented to the Attorney General of British Columbia” (Vancouver, B.C: Mediation Development Association of British Columbia, 1989) at 27[source not attributed] suggests that “neutrality” refers to not intervening to influence the process or outcome of mediation. Neutrality is contrasted with interventionism and would not necessarily mean aligning with both parties equally. This definition is quite different from Rifkin et al’s concept of neutrality, which incorporates interventionism within their concept of equidistance. Thus, the term “neutrality” appears to have two contradictory definitions (with respect to intervention.)

214 The colourful analogy of the “eunuch from Mars” points to yet another important conception of neutrality. That is, being a outsider or stranger to the parties will prevent suggestions of bias. This conception of neutrality flows from the idea that it is possible to put aside biases and be autonomously objective. The impassive Justitia and her blindfold evoke this concept of neutrality.

215 The idea of detached “objectivity” has been much challenged. I prefer the term “intersubjectivity,” see note 92.
"independence." The symbol of the scales of justice has been introduced into the modern legal imagery of Cambodia, even though there appears to be no such symbol in Cambodian (pre-colonial) history. The discourse about neutrality and independence in Cambodia, as in Canada, reflects little depth of consideration of the concepts that tend to be subsumed within these terms in vague, circular or confusing discussions.

More research on what it means and what it ought to mean to be "in the middle" seems called for in Cambodia, as in Canada. We need better metaphors and myths and theories better suited to real third parties intervening among real people in their particular political, cultural, social, and legal contexts. We need metaphors that pay heed to the fact that conflict practitioners are not detached or blind. They are always active participants with disputants in the processing of their disputes. Instead of creating unrealistic aspirations to more independence or more neutrality, theory and practice about the various concepts intertwined within terms "neutrality" and "impartiality may be better be served by asking some different questions. Rather than asking "how much neutrality or intervention is ethical or appropriate in a given situation?" we may find better answers if we ask "What characteristic of interveners and intervention processes are conducive to trustworthiness by all the stakeholders in a given situation? The particular context in which these questions are asked is centrally important. It cannot be assumed that all disputants, mediators, or sponsors of mediation in all places, at all times and in all contexts, have the same values concerning individual autonomy, group welfare, or the public interest.

4.4 Law and development movements and the crises of scholars

It is important to connect the work of the Canadian team with the field of development. This is

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216 The scales of justice appear on the letter head or name cards of several legal development groups, including Legal Aid of Cambodia and the Cambodia Defenders Project.

217 Electronic communication from Hélène Legendre de Konincke, Ph.D an art historian and specialist in history of civilization with longstanding research experience in Southeast Asia. She is the author of Angkor Wat: A Royal Temple (Weimer: Verlag un Datenbank fur Geisteswissenschaften Marienstraße, 2001)
because the work was conducted as “development” projects under the rubric of “good governance,” a widely used donor euphemism for liberal legal and economic development and human rights reform. While development literature has been dominated by economists and political scientists, it has seen significant contributions from law, legal anthropology and sociology, including “law and society” scholars. This chapter considers the Canadian conflict resolution projects in Canada and other foreign development projects primarily in the light of literature of American law and society scholars who have examined and critiqued “law and development” over the past several decades.

4.4.1 The law and development movement

The theme of development was brought into legal scholarship and practice chiefly through “law and development” studies in the 1960s. The law and development movement originated as part of the overall program of American development initiatives after World War II, modelled on post-war development work in Europe. Americans believed foreign aid could also assist development in the third world. During the 1960s, Americans spent millions of dollars on legal development projects in Latin America, Asia and Africa. Projects often involve training of lawyers in law schools and legal institutions. Most law and development projects carried with them unexamined theoretical and ideological hegemonies of modernization, structural functionalism, and liberalism.

Results were disappointing. American lawyers went into missions with little preparation and

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219 See *ibid.* at 6.


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knowledge of the cultures or legal systems of the host cultures (particularly in the case of civil law jurisdictions). They tried to transfer American legal methodology and ideology. There was little long-term receptivity. Funding for legal development projects largely evaporated during the 1970s.\textsuperscript{223}

The law and development movement was also subject to the critiques of dependency theorists\textsuperscript{224} and critical theorists of the 1970s and 1980s. Some scholars became "self-estranged"\textsuperscript{225} after reflecting on their overseas experiences. They became discouraged about lack of usefulness of a liberal paradigm for legal development in non-Western, non-liberal and non-democratic jurisdictions.\textsuperscript{226} Critiques included lack of theoretical articulation or

\textsuperscript{223} Legal Imperialism, supra note 218 at 8-10.

\textsuperscript{224} Very briefly explained, the dependency theorists divided the world into "centre" and "peripheries." Exchange between centre and periphery countries is essentially unequal and asymmetrical. Peripheral countries export raw materials to centre countries who manufacture goods that are sold back to peripheral countries at high prices. Workers in the central countries benefit and peripheral workers continue to suffer. Exports from the periphery remain inexpensive to the central countries, but imports from industrialized nations are expensive to peripheral countries. Industrialized nations may progressively become richer and able to spend comparatively less on resources imported from peripheral countries. In the meantime, demand for resource exports from the peripheral countries remained relatively stable, meaning that export income does not expand. This all means that increased productivity in the peripheral countries ends up benefiting central industrial countries, leaving the countries of the periphery unequally developed and continually dependent. Some dependency theorists attribute dependency to world capitalism and propose a Marxist solution. Others, such as Johan Galtung, have suggested that asymmetrical centre-periphery relationships may be more a function of dominance and power relations. See J. Galtung, "A Structural Theory of Imperialism" (1971) 2: Journal of Peace Research 81. For a Marxian perspective on dependency literature as it applies to law and development, see "Law and Development," supra note 222. For a detailed review and critique of literature on dependency theory from a liberal perspective, see Packenham, R.A., Liberal America and the Third World: Political Development Ideas in Foreign Aid and Social Science (Princeton, NJ: Princeton University Press, 1973) [hereinafter Liberal America].

\textsuperscript{225} "Scholars in Self-Estrangement," supra note 194.

\textsuperscript{226} Ibid. See also D.M. Trubek, "Toward a Social Theory of Law: An Essay on the Study of Law and Development" (1972) 82:1 Yale L J. 1 [hereinafter "Toward a Social Theory of Law"].
coherence, ethnocentrism, imperialism, ideological controversy, and loss of funders' interest in legal development. Interestingly, some of these scholars became leaders in the critical legal studies movement in the 1970s and 1980s. Scholars such as Richard Abel, Marc Galanter, David Trubek, and Laura Nader were among the comparative law scholars, legal sociologists and legal anthropologists who took their experience with comparative dispute resolution systems in developing countries and applied them to powerful critiques of the ADR movement that was beginning to burgeon at the time in the United States. I have already demonstrated how these scholars' concerns still apply to the field of conflict resolution.

Liberal legal development projects did not stop altogether. The loss of funders' interest and the crises among scholars did not prevent lawyers in developing countries from drafting laws and building legal institutions based on Western models and with the advice of Western


228 Legal Imperialism, supra note 218; “Scholars in Self-Estrangement,” supra note 194, which article is still cited as a leading article in law and development studies.

229 Legal Imperialism, supra note 218.

230 See Liberal America, supra note 219.


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consultants. The crises did not stop the process of globalization of law reflected in GATT, and now the WTO, as well as UN and other involvement in the creation of international model laws and contracts. Neither did they stop the development of a Western liberal constitution for Cambodia in the early 1990s.

The powerful critiques by dependency theorists did result in some of their perspectives being accommodated if not formally acknowledged in mainstream development thinking. For example, the dominance of the GDP approach to development was moderated by human needs theory in the 1980s. The "basis needs approach" insisted that development must take human needs into account, not just economic growth. If human needs are not considered, "development escapes into production and distribution patterns, institution building and structural transformation, cultural 'aspects' and natural balances." Thus, "development" became redefined as the process of progress toward satisfying basic human needs both in more dimensions and at higher levels. The basic needs approach found its way into the official policies of the International Labour Organization (ILO), the United Nations Development Program (UNDP), the World Bank and other development agencies including CIDA. The World Bank has now gone beyond the needs approach toward Amartya Sen's and Martha Nussbaum's "capabilities" approach to human development which aims at more nuanced


237 Ibid. at 474.


239 F. Lisk, ed., Popular Participation in Planning for Basic Needs (Aldershot, UK: Gower Publishing, 1985). This collection of papers was sponsored by the ILO which at that time endorsed the Basic Needs Approach (BNA) to development.


approaches to functional (rather than formal) equality. However, in spite of its formal adoption of the human development and capabilities approach in preference to a narrow economic development focus on GDP, the World Bank's practices remain largely focussed on neo-liberal economic approaches. The "sustainable development" movement also tinkered with liberal approaches by taking into account the growing worries about environmental degradation as a result of deforestation, soil erosion, species endangerment and pollution resulting from "development."

Thus, within the development community, ideas of modernization have given way to visions of "sustainability" and "human development." Both these approaches have led to incorporation of some concepts of deliberative democracy into development theory, including public participation which ideas have been embraced and refined within the conflict resolution movement. To combat human rights abuses in the course of its projects, the World Bank has tried to incorporate public participation into all phases of project cycles. This is one way the World Bank has used the rubric of "good governance" to concern itself with human rights, even though the World Bank, like the IMF, is not permitted to interfere in internal political matters. Development is also incorporated into concepts of peacebuilding, which now goes beyond narrow military visions of "security" toward broader visions of "human security." Peacebuilding now incorporates economic development and legal development through "governance" programming.

243 Bruntland Report, supra note 47; The United Nations Conference on Environment and Development (UNCED), or the "Rio" conference, involved 170 states, and thousands of NGOs and trans-national corporations (TNCs).


Despite the efforts for nearly five decades of the new international economic order (NIEO)\(^{247}\) the non-aligned movement, the G77 and left-leaning scholars, the dominant development paradigm has never really shifted from Western liberal economic approaches. Economically liberal approaches to development have gained new momentum in the Post-Cold War era with the supposed end of ideological conflicts\(^{248}\) and the imagined triumph of liberalism at the so-called “end of history.”\(^{249}\) The free market approaches of the past two decades have been less assertively tied to political liberalism, as we have seen in the absence of rigour with which Western countries discuss human rights with countries at such opposite political ideological poles as China on one hand and Indonesia, Singapore and Malaysia on the other.

While critiques of modernizing and liberalizing agendas for development have abounded for the past three decades, along with counter arguments,\(^{250}\) the ferment unfortunately did not result in any radically new paradigms of development. Rather the scholarly discourse was embroiled in the often bitter ideological controversies in the academy in the 1980s that marked the emergence of the critical studies movement. Most practitioners and scholar-practitioners had little interest in this.

With the post-Cold War's increased energy for neo-liberal agendas, a revival of legal development began to occur during the 1990s. The intense conflicts that emerged after the breakup of the Soviet Union have also intensified interest in legal development as part of post-conflict peacebuilding efforts. There has been increased interest in legal development and rule of law projects on the part of various institutions including the World Bank, USAID and


These initiatives are often grounded in discourse of democratization and human rights, but they are in no small part also based on stated needs for legal frameworks that will provide stability and support for emerging market economies. Thus law and development has “emerged from the ashes as big business.” Thus, the “peacebuilding” movement has been part of a shift of the international security agenda away from narrow visions of peace as the absence of armed conflict toward visions of peace that are quite strongly tied to liberal conceptions of democracy and international human rights.

With increased legal development projects has come some increased scholarly interest in “law and development” beginning in the early 1990s. Scholars, practitioners and graduate students dusted off old journals containing articles written in the 1970s and 1980s. Increased scholarly interest in the relationship between law and development is also associated with the development of international human rights and the increasing interconnection of themes of human rights, development, governance and rule of law.

4.4.2 The Canadian projects: Grounds for self-estrangement?

Six years after my first visit to Cambodia, and several projects later, I can now relate personally to the “self-estranged” scholars of the 1970s and 1980s. Many of their concerns apply to legal development projects today. When I considered the projects I have been involved in, as well as others, using the criticisms of law and development projects developed by Trubek and Galanter and others three decades ago I could not help muttering “plus ça change, plus c’est la même

<sup>251</sup> “Law and Development: Then and Now,” *supra* note 231 at 223. Note that the Canadian International Development Agency (CIDA) also has a rule of law emphasis pursuant to Canada’s formally articulated foreign policy. CIDA, *Canada in the World* (Hull, Que: CIDA, 1995) at 36.

<sup>252</sup> “Law and Development: Then and Now,” *supra* note 231 at 223.

4.4.2.1 Lack of theoretical articulation or coherence

Critics of the law and development movement of the 1960s and 1970s pointed out failures of the movement to articulate definitions of "law" or "development." Rather, projects proceeded within unspoken hegemonic assumptions. "Development" was assumed to mean modernization and liberalization. "Law" was not defined, but it seemed to have been assumed that law was an instrument of liberal development to increase equality and public participation, and to curb arbitrary government action, increase government accountability, and increase public freedom.255 "Law" was usually assumed to be narrowly defined as positive law, but it was also seen as an instrument of social change that included addressing the "gap" between "law in books and law in action."256

Critics pointed out that these narrow positivist definitions of law obscure perception of other potent social control mechanisms present in a given society, including "customary law" and informal dispute resolution methods.257 Thus, the critics pointed out, there was a bias in legal development projects against customary approaches, informal dispute resolution, and other non-court centred processes for social control. I have already pointed out similar definitions of law in Canadian legal development projects in Cambodia, with similar blindnesses about important but less formal Cambodian social control mechanisms like conciliation.

Another criticism was that the law and development movement appeared not to consider questions of the relationships between positive law and social change. There was no theoretical

254 "Comparative Law," supra note 227; Liberal America, supra note 219.

255 "Scholars in Self-Estrangement," supra note 194 at 1074

256 E.M. Burg, “Law and Development: A Review of the Literature and a Critique of ‘Scholars in Self-Estrangement’” (1977) 25 Am. J. C. L. 492 at 511. He points out that it was Roscoe Pound that coined the term “law on the books and the law in action.”

257 Ibid.
consideration of whether positive law actually causes social change, is driven by social change, or whether the relationships between law and change is reciprocal. 258

These are more than neat questions for the classroom. Trubek and Galanter worried that a lack of reflection about this might lead to legal training of elites in developing countries who might then subvert their training for their own less egalitarian instrumental social engineering ends. They also worried about whether legal action alone would be sufficient to further the interests of "have-nots" in the absence of political action. These arguments are being made again. For example, Carol V. Rose expresses concern about reinforcing authoritarian legal structures by transferring Western notions of legal instrumentalism "in the absence of Western notions of individual rights." 259 Legal assistance projects may favour the concerns of the elites and not ordinary people if legal development projects favour economic neo-liberalization without equal emphasis on the concerns of poor and oppressed people. Legal development projects that facilitate neo-liberal agendas may be party to fostering the increasing gaps between rich and poor. 260 There is also the concern that repressive regimes may be propped up in the name of stability. 261 These argument are alive in Cambodia, as has been discussed in Chapter Two.

One reason for the lack of theoretical articulation in the law and development projects, which were largely educational projects, was that the law and development movement of the 1960s and 1970s was not grounded in theory but in service. The law and development movement was criticized for being heavy on action and thin in inquiry with an impatience for theory. 262 There was also little reflection on how American law teaching methodology applied to the primarily civil law jurisdictions in which the law and development projects took place.

258 Ibid. at 505- 510
259 "'New' Law and Development Movement," supra note 253 at 133.
260 Ibid. at 133.
261 Ibid. at 131-32.
262 "Comparative Law," supra note 227.
There are many parallels with legal development projects in Cambodia today, including the Canadian conflict resolution projects (since for this project I have defined “law” broadly to include all social control mechanisms, including dispute resolution processes and policy decision making). Human rights and legal development projects in Cambodia are focused primarily on teaching and building practices of international human rights and Western positive law concepts. Examples include Legal Aid Cambodia and the Legal Defenders Project, both heavily influenced by American legal advisors. Another example is the legal education project of the University of San Francisco, which is focused on teaching international human rights law and other legal principles. This project also teaches local Cambodian law to the extent it is available. In the human rights area, teaching has focused on prescriptive teaching of international human rights principles. The focus of reports of Canadian foreign legal advisors is on analysing the Cambodian legal system and prescribing reforms from a traditional liberal and positive law perspective.263

The Canadian conflict resolution team did not consider questions of positive law, and questions of law and the legal system were not addressed by the project. This was largely because in 1995 the team was not part of a “legal development” project. Actors within the legal system were not involved in the projects. Also, the Bar Association in Cambodia had not even been formed at that time the projects were being planned. While the law school at the University of Phnom Penh had commenced operations, there had been no graduates. The Dean was at that time was not a lawyer but an economist.264 There were fewer than a dozen lawyers in Cambodia at the time. The courts had, and have, little credibility. I remember raising concerns during informal consultation that conflict resolution programs should not proceed in isolation of development of the legal system, however it was not possible to address this concern in the context of the short-term nature of the missions. Questions of law and conflict resolution were addressed briefly in the conferences by a Cambodian lawyer whose emphasis was on adherence to

263 See Good Governance, supra note 73; K.E. Neilson, They Killed All the Lawyers: Rebuilding the Judicial System in Cambodia, Occasional Paper 13 (Victoria, B.C.: Center for Asia-Pacific Initiatives, 1996); Cambodian Justice System, supra note 38.

264 Dean Yuok Ngoy has since earned his LL.M at the University of San Francisco.
positive law with emphasis on social order.\textsuperscript{265}

The Canadian participants in the conflict resolution projects did not articulate a theory of development but accepted CIDA's liberal paradigm.\textsuperscript{266} Some team members had considered some of the development theory outlined by conflict resolution practitioners such as John Paul Lederach; however, there was no particular consensus or even discussion around this definition. There was a strong assumption within the framework of the funding proposals that the goals of the conflict resolution projects were in aid of democratic development and "good governance." Even though there was considerable ideological diversity on the Canadian team, a working consensus emerged without much discussion that we would preach the familiar gospel of interest-based conflict resolution and hope for the best.

4.4.2.2 Ethnocentrism\textsuperscript{267} and imperialism\textsuperscript{268}

Law and development projects of the 1960s and 1970s were sharply criticized as thinly disguised imperialism fraught with lawyerly "hubris," ethnocentricity, and missionary notions. During this period, lawyers in the "development decade" travelled to other parts of the world . . . relatively free of carefully considered social or law and development theory - - they were pragmatic and problem-solving lawyers getting off airplanes to confront foreign political economics, legal cultures, and rapid and massive (and often authoritarian) change processes. In short, by training, intellectual tradition,

\textsuperscript{265} L. Pol, "The Legal and Justice Framework" in \textit{Dispute Resolution in Cambodia, supra} note 16 at 88-89 at 42-52.

\textsuperscript{266} Staff of the Cambodia Development Research Institute had been well experienced in development issues in Cambodia since 1979, but discussions about philosophy of development were not part of the planning process for the conflict resolution projects. CDRI had been concerned about the movement toward the market economy and the results for poor people in Cambodia. It had not been involved in projects involving the legal system, and its focus on reconciliation was primarily oriented toward grass roots reconciliation and training of public officials in negotiation and conflict resolution.

\textsuperscript{267} \textit{Legal Imperialism, supra} note 218; "Scholars in Self-Estrangement," \textit{supra} note 194.

\textsuperscript{268} \textit{Legal Imperialism, supra} note 218.
and professional experience, American lawyers were often poorly equipped for the tasks undertaken. Knowing relatively little of the Third World, they were all the more predisposed to rely on what they did know: American legal culture. As a result, American legal assistance was inept, culturally unaware, and sociologically uninformed. It was also ethnocentric, perceiving and assisting the Third World in its own self-image.\footnote{Ibid. at 9.}

These prescriptive approaches have been called a “mixture of missionary activism and lawyerly hubris”\footnote{Ibid. at 37.} Legal transfer approaches are still dominant today in Southeast Asia\footnote{“New’ Law and Development Movement,” supra note 253.} including Cambodia. Legal development projects in Asia have been described in 1999 as follows:

...Western legal assistance to transforming socialist states, including Vietnam (and China), attempts to refashion (capacity building) existing institutions into the neo-liberal mould. Projects are overwhelmingly concerned with perfecting legislative drafting, establishing a normative legal framework, strengthening legal institutions (particularly the courts), including the number of lawyers, and providing Western commercial legal training.\footnote{J. Gillespie, “Law and Development ‘in the Marketplace’: An East Asian Perspective” in K. Jayasuriya, ed., Law, Capitalism and Power in Asia: The Rule of Law and Legal Institutions (London:: Routledge, 1999) at 122 [hereinafter “Law and Development ‘in the Marketplace’”].}

The concept of “legal transplant”\footnote{Legal Transplants, supra note 75.} is said to be “as old as international commerce, domination, and interpenetration generally.”\footnote{Legal Imperialism, supra note 218 at 21.} Cambodia has seen centuries of legal transplants of one kind or another, some voluntary and some not, including the French Civil Law system, the Khmer Rouge cultural revolution approach, Vietnamese-sponsored Soviet-style legal

\footnote{269 Ibid. at 9.}  \footnote{270 Ibid. at 37.}  \footnote{271 “New’ Law and Development Movement,” supra note 253.}  \footnote{272 J. Gillespie, “Law and Development ‘in the Marketplace’: An East Asian Perspective” in K. Jayasuriya, ed., Law, Capitalism and Power in Asia: The Rule of Law and Legal Institutions (London:: Routledge, 1999) at 122 [hereinafter “Law and Development ‘in the Marketplace’”].}  \footnote{273 Legal Transplants, supra note 75.}  \footnote{274 Legal Imperialism, supra note 218 at 21.}
system, and the semi-voluntary transplantation of liberalism in 1991 through the Paris Peace Accords. It is not denied that the Accords were largely the result of the UN intervention, and that the subsequent Constitution of 1993 was also largely assisted by UN and other foreign advice. Cambodia had too few legally trained people to create a constitution with complete independence. The development practices of the past decade have been to prescribe the full working out of the 1993 Constitution in terms of the rule of law and other liberal democratic reforms to the legal system.

Critics of the law and development movement of the 1960s and 1970s also pointed out that the proponents of legal liberalism were ethnocentric in assuming that host countries place as much value as they do on liberal democratic ideals such as social and political pluralism. In fact, the political and economic elites of many countries prefer existing "social stratification and class cleavage juxtaposed with authoritarian or totalitarian political systems." Legal development projects tended to assume that the state is the central locus of social control whereas in many developing places the family or local community (or in the case of Cambodia, personal patronage and family ties) may command as much or more loyalty than the abstraction of the state. It may also be assumed by Western development personnel that the law reflects the interests of the majority through the process of democratic multi-party elections, whereas in fact, the law in many places is imposed by a minority. Thus, positive law may not be widely honoured or observed. In some places, people may obey the law only when they are compelled to do so. A related assumption made by Western development lawyers is that the courts are or ought to be the central actors and that they are "relatively autonomous from political, tribal, religious, or class interests." In fact, in many third world countries "courts are neither very independent nor very important." We see this in the collision of these perceptions among legal development specialists in Cambodia as they interact with government officials who place far less priority on legal reform than foreign donors and experts do.

276 Ibid.
Whereas most ordinary Cambodians do not think very much about courts and laws when they have a dispute; Western observers tend to answer (in my perception): Well then, give them laws and give them courts as quickly as possible, and let’s make sure they are good, Western, liberal (and adversarial) courts. The experience to date indicates that justice for the mass of ordinary poor Cambodians may not be achieved quite as simply as that. In the East Asian context, the neo-liberal assumption of the need for centrality of courts to facilitate market transactions and resolve commercial disputes has been questioned. In some societies, adversarial litigation is considered to reflect unfavourably on all the parties, and win-lose outcomes are offensive since they encourage adversarial approaches. In such societies, non-court approaches to dispute resolution are not marginalized.

In 1974, Galanter and Trubek challenged Western legal assistance as naive and ethnocentric. Westerners may naively carry into foreign development assumptions that “law” and “legal development” are political neutral. But the promotion of Western legal development is far from neutral; it is intended to be in support of liberalization. This, Trubek and Galanter would say, is a “mask of imperialism.” This critique still holds in 2001. We still see ethnocentric assumptions, including ethnocentric assumptions about the nature of law, with Western lawyers viewing law in narrow positivist and instrumental ways. Also, there are many cultural stereotypes that run both ways. As Rose points out in the Vietnam context, both host country and Western lawyers essentialize each other. This tends to magnify cultural gaps and ignores diversity among both host-country and Western lawyers.

Conflict resolution specialists working on development projects do not escape this castigation. In Canada in 1992, John Paul Lederach challenged Western conflict resolution practitioners and trainers to consider whether North American conflict resolution training was based on

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277 “Law and Development 'in the Marketplace',” supra note 272. This article refers to China and Vietnam, both socialist countries with strong Confucian harmony ideology. Harmony and face preservation are also said to be preferred in Cambodian culture.

278 “Scholars in Self-Estrangement,” supra note 194 at 1095.

assumptions that contain "a subtle residue of imperialism." His questions were mirrored in some of the questions being asked in 1992 by Michelle LeBaron at the University of Victoria. In 1995, some Canadian members of Cambodia project team were asking similar questions about the proposals to use the prescriptive Harvard approach in Cambodia. It was hoped that some of Lederach's ideas about the use of elicitive approaches could be applied to the development of conflict resolution modules for use in Cambodia and Thailand. Lack of time, lack of resources for intensive joint design by the whole team and a lack of experience on the Canadian team with elicitive approaches meant that in the end, Harvard won the day in terms of the Canadian presentations. There was no money or time for elicitive research about Cambodian conflict styles.

"Imperialism" seems rarely to be the work of those who deliberately set out to colonize those in other countries with their ideas. Rather, it is the product of a combination of unexamined ideologies, theoretical assumptions and unwitting ethnocentricity made potent by economic and hegemonic power. It is also likely to be the product of insufficiently funded projects coopted by agendas of globalization of major funding bodies.

Charges of ethnocentricity and imperialism can lead to a trap of another kind of cultural superiority; the paternalistic idea that people in developing countries are somehow naive, unwitting or otherwise incapable of discerning the agendas of foreign funders and experts. Rose points out that the history of the law and development movement of the middle of the last century is not just repeating itself. First, Americans are not the dominant players in foreign development as they were during the law and development movement in Latin America and Africa in the 1960s. Host countries now have more leverage and influence, and they can and do resist links between foreign legal assistance and political reform. The major donor to Cambodia is not the United States, but Japan and China. Also, both donor and host partners are now more skeptical about the utility of Western models of legal development. It is not clear that market

capitalism is the only development alternative, and it is even less clear that neo-liberalization will lead to global liberal democracy. 281 Many countries have adopted market economies while retaining authoritarian and centralized governance. 282

In Cambodia, one finds resistance to efforts that are not welcome. Most efforts are greeted with gracious politeness, but one might find that certain meetings are unproductive, correspondence unanswered or requests neglected. Western experts may be inclined to be insulted by this lack of response to their efforts and may form the view that Cambodians are “corrupt,” “lazy” or “incompetent.” But from the Cambodian perspective, the western top-down advisory “expert” may not be sufficiently expert to assist Cambodians with the particular problems. Alternately, many Cambodians, particularly government officials and often NGO leaders, may be caught in pressures that foreigners cannot really appreciate. Foreign experts generally have little at stake; their interventions have few adverse personal consequences.

In the case of Hun Sen, he has made it plain that the efforts of the UN to install international human rights in Cambodia are not welcome. He has done this through a series of outright statements and skilful stalling. This has been seen in the way the negotiations and legislation about the Khmer Rouge tribunals have been handled to date. 283 This is not to say that the international community should back away from making demands of other countries that are signatories to international treaties and instruments. Nations do and should hold one another accountable for their bargains and under jus cogens. However respectfully framed, one is bound to find resistance to change when it threatens powerful interests. International challenges are important, particularly when local NGOs, citizen groups and in some cases official bodies are


282 "'New' Law and Development Movement,” supra note 253 at 126.

283 At the time of writing, in August 2001, the Khmer Rouge tribunal legislation has been passed by the National Assembly, the Senate and the Constitutional Council. It has been signed by the King. Currently the UN is reviewing the legislation to determine whether it complies with the agreement between the UN and the Cambodian government. Even after UN approval, a number of months of implementation procedures are expected.
welcoming the interventions. However, one might fairly question the negotiation effectiveness of international interventions that include public insults or statements couched in economic or face threatening terms, particularly when the interventions are formally framed in terms of "assistance."  

4.4.2.3 Ideological controversy

A myth has been circulating that ideology is dead. This idea has been put forward by liberal triumphalists who believe that since the end of the Cold War socialist ideology is dead. While socialist, centrally planned economic systems are globally giving way to neo-liberalism, it is foolish to say that ideology is dead. It is simply that socialist countries no longer have sufficient power to create a bipolar split. Marxist ideology is very much alive in the academy. Socialist critiques of the neo-liberal agenda are alive and growing. Within the Western academy, there is much more heterodoxy now than there was in the 1950s and 1960s. While most law and development practitioners still have an instrumental view of law based on legal realism, jurisprudential debates have raised the level of awareness of theoretical debates among legal scholars and more recent law graduates. Foreign assistance project staff are often familiar with the approaches and arguments of the critical studies, law and economics, feminist theory, critical race theory and other postmodern debates. Theoretical debates are also present among conflict resolution academics, although less so among conflict resolution practitioners who have not had the benefit of being exposed to the increased conflict resolution scholarship over the past decade.

284 The formal mandate of the COHCHR is "to assist the Government and people of Cambodia in the transition to democracy, the establishment of the rule of law and respect for human rights." See "COHCHR Mandate," online: <http://www.un.org/official/uncohchr/about/about.html>(date accessed: 5 May 2001).

285 See Liberal America, supra note 219.


288 Conflict resolution as an academic field of study is still in its infancy. There are very few programs on
4.4.2.4 Fickleness of funders' interest in legal development\textsuperscript{289}

Finally, it is important not to ignore Trubek and Galanter's comment that law and development of the 1950s and 1960s foundered partly for lack of funding of legal development projects. To funders of the day, "development" meant economic development, not legal development.\textsuperscript{290} If funding had continued, the "self-estranged" scholars may very well have gotten over their sense of personal dis-integration, formed long-term trustful working relationships with sympathetic colleagues in relevant host countries, become more competent, more understanding of local concerns, more discerning (and less naive) about the agendas of their funders, and more adept at working effectively with host-country colleagues to further the aims of justice and not just the aims of economic growth.

The amount of Canadian Official Development Assistance (ODA) is notoriously low. The arguments of the dependency scholars have not been countered convincingly: Rich countries have exploited poor countries and have given precious little in return.\textsuperscript{291} When speaking of imperialism and the spread of neo-liberal hegemonies, one must recall the generally accepted General Assembly standard that countries target to give 0.7 percent of the GNP in ODA. Only four countries meet this standard, Netherlands, Norway, Sweden and Denmark. Canada's contributions in 1999 were only about 0.28% of GDP,\textsuperscript{292} reflecting a trend downward from 0.49 percent in 1991-92, but slightly up from 0.27 in 1998.\textsuperscript{293} Despite Canada's professed target of conflict resolution in Canada.

\textsuperscript{289}"Law and Development: Then and Now," \textit{supra} note 23 at 223.

\textsuperscript{290}Ibid.

\textsuperscript{291}The Christian church-driven "Jubilee" project did result in some debt relief for some countries, but not before millions of poor children's, women's and men's lives were harmed by structural adjustment policies that increased their poverty and lessened their government's ability to focus on education and other social programs.


meeting the 0.7 percent standard, it has not made significant concrete moves in this direction. In this, Canada is still better than the US which in 1997-98 contributed only 0.09 in ODA. In 1997-1998 the average country gave 0.3 percent in ODA.\textsuperscript{294}

In 1996, CIDA received cutbacks to its budget that meant the conflict resolution projects in Thailand and Cambodia ended before they could reach the "program status" that would have secured growth and more learning among the Canadian, Thai and Cambodian partners. As it stood, host partners in two countries learned that Canada does not keep its promises. While the foregoing critiques show that these projects were flawed, the host partners saw them as useful and said they wanted them to continue. Considerable experience was gained by both donor and host partners, including much of the learning documented in this thesis.

In pressing the case of increased ODA, it is important to note that simply throwing money at Cambodian problems has not necessarily been productive. Cambodian capacity for absorption of aid remains fairly low given the poor infrastructures and the lack of good management. In the early 1990s a good deal of international aid "found its way into the black market."\textsuperscript{295} This does not mean that aid should be curtailed, only that it should be provided through reliable mechanisms and organizations who have the capacity to do the work envisioned and the ability to work collaboratively in full partnership with reliable Cambodian agencies.

\textbf{4.5 Conclusions}

While neo-liberal institutionalist approaches seem the dominant mode for legal development, overall the methodological approaches to development in Cambodia are eclectic. The dominant dialogue about human rights within Cambodia appears to emphasize prescriptive education, monitoring and enforcement as well as capacity development for "good governance." International human rights, the rule of law and liberal democratic institutions are the current


\textsuperscript{295} "Conflict Resolution," \textit{supra} note 39 at 12.
prescriptions of the West.

It is common ground among Cambodians and development donors that the status quo must not continue, but there are conflicts about what path Cambodia will take in the future. Given Cambodia's experiences with communism under two regimes, there is little appetite to move toward any approach that might evoke fears of renewed authoritarian socialism. Will Cambodia continue to move toward the globalized neoliberal economic and associated institutions and norms as seems to be the current direction? Will Cambodia try to incorporate structuralist and post-structuralist concerns and move toward more egalitarian social reforms? Will Cambodia try to restore and enhance its Buddhist cultural and moral heritage? While normative discourse is implicit in virtually all approaches, nowadays it is hidden in liberal talk of “human rights,” “good governance” and “civil society” in order to secure Western donor support. Moral traditions of Cambodians generally receive short shrift in development projects and in most scholarly treatment of Cambodian conflicts.

Concepts of participatory development do not seem to be much applied by the foreign community in the area of human rights policy or practice. Planning in the area of human rights policy is noticeably top-down. The closest to a participatory approach to human rights in Cambodia appears to be the important support of Cambodian human rights NGOs who do the day-to-day human rights monitoring in Cambodia and who do receive and investigate complaints from the public. The most highly visible efforts appear to be driven by officials in the UN and other international bodies. Similarly, the government demonstrates little commitment to initiatives or processes that require power-sharing or are independent of government control. The Cambodian government, striving for international legitimacy and aid, sees the UN as dictating the terms of reference of a Khmer Rouge tribunal in ways that potentially interfere with Cambodian sovereignty.296 As already discussed, neither international nor domestic discussions about development of human rights policy or mechanisms have so far demonstrated action toward broad consultation among the Cambodian population. However, in

296 For example, see the interview with Hun Sen in 1999, C. Chaumeau & B. Carette, “Hun Sen Makes His Case on 'the Trial'” Phnom Penh Post (19 March - 1 April 1999).
Chapter Five, there is discussion about the UN process of technical assistance for development of National Human Rights Commissions which do provide hope concerning possibilities for public dialogue about human rights mechanisms in the future.

It is important to urge that major international organizations and country donors, including Canada, adequately and consistently support peacebuilding and legal development projects that are respectful of Cambodian culture and inclusive of Cambodian people. Above all, international donors need to be urged toward long-term, persistent and faithful commitments to international human rights over self-interested economic or political expediencies. There is good reason to believe that sustained foreign pressure and aid incentives are essential in the long term if power sharing is ever to be established in Cambodia.

In the meantime, should Canadian practitioners and scholars avoid becoming involved in conflict resolution or legal development efforts that are less than ideal? Should Canadians avoid intervention because of the fear of imposing outdated "grand theories" at the expense of local knowledge, or neo-liberal agendas at the expense of the poor and oppressed? I suggest that "self-estrangement" or other disillusionment that falls into isolationism is tantamount to being immobilized in the "deconstruction" trap, discussed earlier, in which great energy is expended on critique, but there is failure to move toward re-constructivist alternatives to address theoretical inadequacies, injustices, and the other problems they rightly expose.

Cambodian colleagues would likely disagree with an isolationist approach, since they remain very dependent on foreign funding and expertise until their own numbers of knowledgeable scholars and practitioners increase. If any country is in need of progressive and constructive measures, it is surely Cambodia. The chief caveat here is to recognize that conflict resolution specialists who work internationally are more likely to be the chief beneficiaries until they build up a significant level of knowledge and contacts within the host-country to be of real service.

One should not overlook the benefits of doing international work for the development of the field of conflict resolution at home. The work of Trubek, Galanter, Abel and Nader and others is one example of the useful ferment that can be generated even from flawed efforts elsewhere; their work still represents the leading critiques within the field of ADR. Also, speaking from a personal perspective, the shock of recognizing that one's own previously held – and often largely unexamined – ideas and methodologies are not, after all, the centre of the universe can be bracing and invigorating to one's own practice and scholarship, and hopefully, to the field of conflict studies more broadly. Surely that cannot be a bad thing in a field that is still nascent, as scholars and researchers are ever reminding practitioners and policy makers.

Notwithstanding many criticisms of conflict resolution theory and practice, and the particular criticisms of foreign conflict resolution initiatives in Cambodia, the field of conflict resolution has much to offer to the design of fair and effective human rights processes and institutions. Of particular importance are approaches that have commitments to participatory design. Some possible further contributions from the field of conflict resolution to peacebuilding in Cambodia are the subject of Chapter Five.

Within the framework of existing development agendas there is plenty of room for “oppositional approaches” that support the existing international rhetoric of “poverty alleviation,” “international human rights,” “public participation,” and peacebuilding. One can take advantage of the rhetoric of equality, gender equity, minority rights, decentralization and grass roots development. In support of rhetoric about public participation, one can also take advantage of the postmodernists' call to listen to all voices, not just elite voices. The rhetoric of “equitable development” is highly visible and important in the rhetoric of the World Bank and the UN. There is growing recognition of the contradictions between the neoliberal promises of prosperity, and the real inequalities and suffering that are increasing under free market practices.

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One can participate in mainstream development work by concentrating on putting this rhetoric into practice. This requires a focussed and disciplined approach that incorporates four main strategies. First, it is important to get rid of all illusions that development work is politically neutral. Naivety can lead to ideological co-optation. Second, it is important to keep a bias in favour of those who are poor, oppressed, suffering injustice or are otherwise disadvantaged; otherwise one will be coopted by economic elites. In this, the possibility of non-partisan intervention is not necessarily proscribed. Interveners always have partialities and need to recognize them. As I have urged earlier, more theory development and practical work is needed to illuminate trustworthy ways of “being in the middle” that go beyond theory that is currently available in the field of conflict resolution. Chapter Five tries to illuminate newer currents in the field of conflict resolution that may provide better insights into this problematique.

Third, in the field of conflict resolution in Cambodia, it is particularly important not to become mesmerized by harmony ideology. The successful work of the dhammayietra movement in calling Cambodians to morality, justice and non-violence shows that one can be oppositional and peaceful.

Fourth, it is important to remove the “astructural” blinders that hinder the field of conflict resolution and law in North America. Conflicts that have sources in structural “violence” need processes and solutions that address structural injustices at the roots. In structural critique one must also prefer and defer to local actors, local perspectives and local knowledge that can be brought to bear. General theories and universalized prescriptions may not provide lasting solutions. By contrast, “...[p]articularity is the deconstructive companion of structuralism inasmuch as [s]tories, parables, chronicles, and narratives are powerful means for destroying mindset – the bundle of presuppositions, received wisdoms, and shared understandings against the background of which legal and political discourse takes place.”

An example of the power of a particularist narrative approach is seen in the high impact of the

physical presence and personal stories of Cambodian land-mine accident survivors on the
discourse that led toward the international anti-land mine treaty. A preference for the local does
not exclude external interventions, but it does prefer interventions by those who stand in
solidarity with those who are affected, rather than interventions that chiefly benefit local elites,
external interveners or their funders. One must unashamedly contradict overly rationalist
approaches by allowing for individual stories that give human faces to problems and provide
less opportunity to hide human impacts behind statistics and abstractions. Critical scholarship
should be “thick” and contextual, and should be produced with grassroots activists, members of
non-governmental organizations, and academics in local communities. This way, contradictions
between the stated goals of neo-liberalism can be held up against what is actually happening to
individuals and communities, exposing weaknesses and increasing the will to seek equitable
development.
Chapter V

5 Transforming the Script: Dictate, Diatribe or Dialogue

A cake can never be bigger than its pan.¹
Don't throw the fishing line across the mountain.²
When the elephants fight, it is the ants that get trampled.³ – Khmer proverbs.

These Cambodian metaphors suggest that it is futile – even dangerous – to try to break traditional moulds, rock the boat or take on the powerful. Historical patterns in Cambodia, if not repeated, may rhyme.⁴ Nevertheless, despite the old saw, "plus ça change, plus c'est la même chose,"⁵ Buddhist wisdom suggests that things do change.

5.1 Telling the Future and Retelling the Past: What, by Whom, for What Purpose and for Whom?

The "theatre state" may be breaking down. Chandler suggests that historic patterns of power may be shifting at last.⁶ The Cambodian population may be starting to act on the idea that they should not be passive spectators – that their votes and their voices count or ought to count.

¹ This proverb warns about the impossibility of moving outside the social and class confines of one's family. Discussion by the author with two NGO workers, December 1996.

² This proverb warns not to circumvent the chain of command. Quoted in H.C. Mehta, Cambodia Silenced: The Press under Six Regimes (Bangkok: White Lotus Press, 1997) at 37.

³ This proverb, also found in Thailand, comments on what happens to the masses of people when their leaders fight.

⁴ See Chapter Two, note 16 and accompanying text.

⁵ This French proverb is frequently quoted by foreigners in relation to Cambodia. See for example, K. Frieson, "Cambodia in Crisis" (1997) 11:1 Asia Pacific News I; K. Frieson, "Despair and Turmoil in Cambodia: Plus Ça Change," paper presented for Centre for Asia-Pacific Initiatives (Victoria, B.C.: 3 February 1998) [unpublished].

⁶ Please refer to the discussion about Cambodian conceptions of power in Chapter Two, notes 155-62 and accompanying text.

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Many people are standing up for something better in labour and student demonstrations and through the activism of NGOs. There is active, legitimate political opposition that has considerable popular support. Cambodia is neither a truly democratic polity nor an egalitarian society, and NGOs do not make much impact on government policy. But there are indications that civil society is developing strongly enough to keep speaking out despite considerable government hostility and pressure. This may be largely because of foreign funding, presence and pressure in Cambodia.

In the international community there has been much talk about participatory democracy and participatory development. But what kind of democracy and development will actually take place in Cambodia relative to human rights and human rights institutions? If a trial of Khmer Rouge leaders ever does take place, what will happen after the ritual drama of the trial is over and the international reviews are archived in news annals and journals?

The previous chapters have used Western modes of analysis to examine Cambodian human rights conflicts and critiqued Western development projects in the area of conflict resolution. This chapter has its focus on what the field of conflict studies and practice may have to offer to Cambodians. Specifically, what can the field of conflict studies contribute to building of policies (including laws), institutions, mechanisms or initiatives effective for education, monitoring, or investigation and resolution of human rights issues?

In this chapter, I do not depart entirely from the guiding literary image of the theatre. Theatre is not just a place of ritual and ceremony. Theatre is not just a place where the status quo is represented and valorized and existing hegemonies reproduced. Theatre is a forum for telling

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8 Theatre in Cambodia still functions to replicate traditional hegemonies. See for example the following story: 
"...more than two million people in Cambodia and Thailand have flocked to theaters to see the first Cambodian film to be produced since the 1970s. The "Baby of a Giant Snake," which opened Jan. 28, is based on an ancient Khmer legend about a wife who committed adultery with a huge python every time her husband went on a business trip... Som Sokun, director of the Cinema and Culture Dissemination Department [of the government], told Kyodo News that the original "Giant Snake" legend tried to teach people, particularly women, not to cheat on
stories. Theatre is a place of teaching and learning. Theatre connects the past to the present through traditions and tales, sometimes retold and reconstructed to fit new truths and emerging realities. Theatre connects present work of directors, authors and performers with present lives of audiences. Theatre touches and magnifies the lives of ordinary people by telling some stories or speaking some truths that perhaps cannot be told – or heard – elsewhere. Theatre can present oppositional stories to subvert hegemonic ways of looking at things. The theatre is also a place of collaboration among actors and audiences. But what happens in theatre does not just happen by magic; the journeys toward performances may be fraught with difficulty and conflict.

Using these images of theatre, the questions for this chapter might become: What stories will now be told? Whose stories? By whom? For whose benefit? To what purposes and ends?9 My questions assume changing metaphoric images: In the new stories there may be new roles for the audience – the Cambodian people and the world community. In the new dramas, perhaps the audiences participate, not just through horrified silence, weeping, cat calls or applause, but by being involved in the development of scripts, and, sometimes, possibly, by joining the actors.

In the spirit of participation, this chapter conceives of going beyond conflict resolution models that reduce ideas about empowerment to “being heard” and reduce participatory education to “seriously considering local as well as expert knowledge.” In such models, participation is “reduced to speaking, and learning is reduced to knowing – and the transformation of done-to into doers, spectators and victims into activists, fragmented groups into renewed bodies, old resignation into new beginnings, are lost from our view.”10 This chapter rather calls for development and use of theories that help us address and process public conflict in ways that their partner, or he or she would meet misery or sorrow in the end.” “Cambodian Film Delights Millions of Viewers” Kyodo News (18 March 2001).


10 Ibid. at 115.
explore

... not only how our arguments change in dialogues and negotiations but how we change as well. At the heart of this transformative account is a view of citizens' performances in safe rituals of participation in which citizens not only pursue interests strategically and display themselves expressively, but reproduce and reconstitute their social and political relationships with one another too. To understand participatory and deliberative encounters as social and political ritual performance means coming to see these as organized forms of presenting and exploring value rather than as going through meaningless motions, as forms thus connecting past memory and obligation to future strategy and possibility, and far more. Far from being empty containers in which dialogue takes place, these deliberative rituals are laboratories, if not cauldrons, of political judgment.\textsuperscript{11}

5.2 Key Challenges Posed by the Human Rights Discourse in Cambodia

Four problems pose particular challenges for stakeholder involvement in dialogue about public policy in Cambodia. A key problem is the incommensurable moral orders present within debates about international human rights including in Cambodia. There is difficulty in coming to consensus in Cambodia about what governance norms should be implemented, how and by whom. In particular, by whom should norms be monitored and enforced, and who should be accountable for keeping (or breaching) the norms? Another key problem – perhaps the most difficult one – is the way power is conceived and used by factions in “power against” and “power over” ways by the dominant political party, especially by Cambodia's strong man, Hun Sen, and his allies. Another aspect of the problem of power is reflected in the continuous debate between Cambodia and the international community and human rights NGOs. A third problem, related to the first two, is that concepts and practices of independence and impartiality are poorly developed in Cambodia. Neither liberal models nor Buddhist ideals of impartial

\textsuperscript{11} Ibid. at 115.
governance are internalized or practised, which creates extreme weakness in Cambodian capacity to find people or ways of being "in the middle" to mediate among polarized disputants and polarized ways of framing issues. Fourth, Cambodia's conflicts are characterized by extreme levels of mistrust that penetrate the whole society. As I have tried to show, the Western field of conflict resolution has provided limited offerings to date. The dominant approaches to conflict "management" or "resolution" may not fit the structures, culture or actors in Cambodia very well.

5.2.1 Moral conflict

One difficulty with traditional power-based or interest-based approaches to negotiations is that they do not take account of the communication challenges presented by social conflicts that involve differing moral orders, or where there is more than one moral authority in society. The classic example of such an "incommensurate" moral conflict in North America is the debate about abortion in which both sides take the moral high road, accusing the other of moral deficiency. One side valorizes the human right to ethical (and religious autonomy) autonomy and the other valorizes the human right to life. The debate also includes interesting shades of dilemmas about individual versus community interests – individual and community interests are argued by both sides. The two sides articulate fundamentally contradictory public policy positions. Neither side acknowledges the legitimacy of the other's moral framework. This human rights conflict resembles other international human rights conflicts in which traditional or religious perspectives are held up against principles such as women's equality or other human rights.

While neither of these particular issues are debated quite so vigorously in Cambodia (although

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12 Habermas draws attention to a distinction between "ethics" and "morality." Ethical issues are "those that come up when we are concerned with questions of my or our own plan of life . . ., while moral issues (italics Habermas') are at stake when we wish to solve interpersonal conflicts in concordance with the interests of everybody involved and affected." Thus, when dealing with societal conflict over "human rights" one is concerned with the realm of moral conflict. J. Habermas, "Human Rights and Popular Sovereignty: The Liberal and Republican Versions" (1994) 7:1 Ratio Juris 1at 3 [hereinafter "Human Rights and Popular Sovereignty"].
the debates are not absent), there is a similar kind of incommensurable conflict in Cambodia in the moral dicta of those who say they are upholding international human rights at the international level. One might say (hypothetically):

We uphold international human rights by trying to persuade you – yes, even coerce you to implement civil and political rights by promoting aid conditionalities and providing only certain kinds of help of our choosing – oh, yes, and by the way, economic restructuring toward a free market. While we don't want to say it in so many words, you are a hypocrite because you have these norms in your treaties and in your constitution, but your behaviour is not consistent with these documents. You hide behind sovereignty to avoid implementing international law norms because you want to hold on to your centrally-held governing power. This is understandable, but wrong. Possibly you don't know any better because of your tragic history and consequential lack of education and lack of understanding of the liberal democratic norms within the constitution we helped you develop. We are prepared to help you remedy this deficiency.

The other hypothetical conversant says (considerably more at length because they have a lot more at stake, a lot more personally):

It is you who are hypocritical and “deficient,” not to mention patronizing, neocolonialist and just plain rude. But of course we will reciprocate your forbearance from bluntness, so we won't say it quite so harshly as that. Regrettably, it is you who do not uphold international norms. We uphold international law by adhering to the principle of the sovereignty of nations, which you and those like you have violated in our past and which you are attempting to thwart by insisting that we pass certain laws and implement certain norms that – quite simply – are not the first priority for us. We are trying to uphold international human rights by working to improve the economic and
social situation of our population, which you erode with your structural adjustment policies. You should really mind your own business. You should look at the poverty and international human rights violations in your own countries. Yes, it is you who are hypocritical. Look at what your “helpers” did during UNTAC, when they came into our country and behaved like barbarians. They helped create our AIDS problem. And your “experts” – they may know a lot about some things – or they think they do – but they don't know or even seem to care much to learn about us. Nor do they pay much attention to the things we know. Nor do they try to learn about our traditions. Such incompetence! We'd like you to go away, except that what happened to us, which was partly – no, largely – brought on by you and your kind, was such that we can't afford to tell you to go away, although we are trying our best to make friends with other powerful countries with whom we see more eye to eye. Frankly, you and your experts can't even imagine what it is like for us to be developing laws and policies in the shadow of trauma with no resources. Maybe one day we will be able to get you to leave. In the meantime, go ahead and play your power games – but we have a few tricks up our sleeve that mean they won't have much effect, especially since we can see that you don't really mean what you say about your conditionalities. We think you only want to seem as though you are helping. What you are really doing is helping yourself by trying to keep stability. We know this game, and we are prepared to play it as long as you don't get the idea that we are prepared to do more than keep the stability and order you want so as to keep your money flowing. We'll make strategic references to your past if you threaten to cut our aid. We know you are paying partly because you feel guilty about the past, and mainly because you think it's important to ensure stability among your would-be trading partners in the region.

Of course, this is my own version of some aspects of the discourse over human rights by the UN (and others including local NGOs) and Hun Sen. I could develop hypothetical rejoinders to demonstrate the lack of progress of the debate, which circulates in a judgmental and adversarial


"dialogue of the deaf." The discourse is an example of what Pearce and Littlejohn call "moral conflict." It is an "abnormal discourse"\(^\text{13}\) in that there is no moral consensus on which the parties can build common understandings. They cannot have a "normal discourse"\(^\text{14}\) because they do not share normative assumptions nor a common "life-world."\(^\text{15}\) In such situations, the conflicting parties are said to be speaking from "incommensurate moral orders."\(^\text{16}\)

Incommensurate world views, social realities – including moral orders – are those which cannot be expressed in or reduced to the terms of the other. Pearce and Littlejohn use a simple example to explain: inches and centimetres are commensurate, because one can express inches in terms of centimetres and vice versa. In contrast, Pearce and Littlejohn explain incommensurate conflicts this way: "...an interior decorator might evaluate a book's worth by its size, shape and attractiveness in a bookcase, but this standard of value is incommensurate with that used by a scholar, whose library means something entirely different."\(^\text{17}\)

In the so-called "postmodern condition" it no longer seems possible to claim that certain political or religious elites should determine what is true, right or good for people to do.


\(^{\text{14}}\) *Moral Conflict*, supra note 13.

\(^{\text{15}}\) This is a term that Habermas frequently uses in many of his works. A "life world," according to Habermas comprises three components, "culture," "personality structures," and "society." The more society "as the totality of legitimate orders, concentrates itself in the legal system, the more ...[law] is burdened with the functional imperative of integrating society as a whole." "Human Rights and Popular Sovereignty" *supra* note 12 at 5. The term "life world" originated with Alfred Schutz and was picked up by Clifford Geertz and others. A. Schutz & T. Luckman, *The Structures of the Life-World (Strukturen Der Lebenswelt)*, trans. R. M. Zaner & H. T. Engelhardt, Jr. (Evanston, IL: Northwestern University Press, 1973).


\(^{\text{17}}\) *Moral Conflict, supra* note 13 at 15-16.
“Truth” has become “truth claims.” All relevant truth claims have equality at the table. This postmodern “turn” or “aesthetic,” brings welcome relief from the hegemony of Enlightenment liberal, rationalist, individualist humanism in Western discourse. It means that all voices, including the voices of the oppressed are welcome. Minority and marginalised views, including religious views, are no longer to be silenced. Or so the theory goes. The dark side (or so I say) of postmodernist discourses is that (logically speaking) voices must be heard that are in opposition to oppressed individuals and groups, and in opposition to international human rights norms.

The “postmodern condition” is one in which no one truth is accepted by all human beings as a universally legitimate foundation for law or public policy. The anti-foundationalist argument is that there is no universal arbiter of truth, righteousness or “good” goals. But this is really nothing new. In this world there never has been a universally accepted arbiter. Some “foundations” have had more hegemonic force in some places than in others, and this has shifted through the centuries as we have seen in the intellectual history of Europe. But now the forces of globalization mean that it is less possible to escape popular awareness of the lack of universal consensus about the spiritual, ethical or cultural foundations of public morality, including how human beings ought to treat one another.

The end of the cold war seems to have broken down the polarized contest between the two secular humanist “grand narratives” of liberalism and communism in world politics, but one must be sceptical of the proclamation of the triumph of liberalism. While the political ideology of “left” and “right” seems at least for the moment to have given way to the neo-liberal right, Huntington claims that the post-Cold War world is headed for polarizations based

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18 Postmodernist ideas provide a way in which people of faith can insist that their minority moral and spiritual perspectives be respectfully taken into account, including universalist and absolutist perspectives such as those of “people of the Book,” namely those who subscribe to the scriptures common to Judaism, Christianity and Islam).


on cultural divides.\textsuperscript{21} We can point to the Asian Values debate that was only momentarily put on “pause” for the distractions of economic crisis of the late 1990s. There seems to be no end in sight for ethnic, ethical and identity wars and rumours of wars everywhere.

The field of conflict resolution may itself be a postmodern movement in its disposition toward trying to bring consensus out of pluralistic dissensus. The conflict resolution perspective may be one that is trying to find a way to navigate through the ideological and cultural battles of those who joust precariously from now-perceptibly-drifting ethical and moral foundations (although some claim precariously from now-perceptibly-drifting ethical and moral foundations). In the absence of an ability to “discover” the truth or the “right” way to do things, consensus \textit{itself} becomes the only way to legitimize actions, including governmental actions. From a normative perspective, “consensus” can no longer be defined in terms of what political, economic, religious or secular elites claim it is. From a practical perspective, however, the ideals of “conflict resolution” stand on rocking foundations if they rest entirely on pluralist ethical relativism. In the absence of normative consensus based on some universally accepted norms, perhaps we can aim for better dialogue (although in postmodernist perspective, the cacophony of moral voices makes it a challenge to find consensus on what “better” might mean).

All of this reminds me of what Clifford Geertz said about the incompleteness of any analysis (although in postmodernist “tradition,” I am taking his comment out of the anthropological context in which they were written). Says Geertz:

\begin{quote}
There is an Indian story – at least I heard it as an Indian story – about an Englishman who having been told that the world rested on a platform which rested on the back of an elephant which rested in turn on the back of a turtle, asked (perhaps he was an ethnographer; it is the way they behave), what did the turtle rest on? Another turtle. And that turtle:?'Ah [said the Indian]. . . after that
\end{quote}

\begin{footnotes}
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it is turtles all the way down.'

"Such indeed is the condition of things," adds Geertz\textsuperscript{22} who goes on to say that "[a]nthropology, or at least interpretive anthropology, is a science whose progress is marked less by a perfection of consensus than by a refinement of debate. What gets better is the precision with which we vex each other... Monologues are of little value... because there are no conclusions to be reported; \textit{there is merely a discussion to be maintained}."\textsuperscript{23}

Extrapolating Geertz' comments to the subject at hand, if no "perfection of consensus" is likely anywhere, it may be useful to strive for more refinement of debate and more precise vexations that at the same time foster maintenance of discussions. Such dialogue is unlikely to emerge by itself anywhere, let alone in Cambodia. I propose that the most important business of conflict resolution practice is to foster the kinds of dialogue that can build sufficient relationships for \textit{sustained} discussion.

"Abnormal discourses" need not be unproductive. Rorty, who coined the term, defines it as discourse in which, while not giving up on consensus, there is no agreed criteria for reaching agreement.\textsuperscript{24} Geertz points out that dissensus and "confusion of legal tongues" is not temporary, but "the hardening condition of things."\textsuperscript{25} Abnormal discourse,\textsuperscript{26} Geertz says, may be "a practicable method for living in a situation where dissensus is chronic, probably worsening, and not soon to be removed."\textsuperscript{27}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{22} As cited in C. Geertz, \textit{"Thick Description: Toward an Interpretive Theory of Culture"} in \textit{The Interpretation of Cultures: Selected Essays} (New York: Basic Books, 1973) at 29 [hereinafter \textit{"Thick Description"}].
\item \textsuperscript{23} \textit{Ibid.} at 29 [emphasis added].
\item \textsuperscript{24} C. Geertz, \textit{"Local Knowledge: Fact and Law in Comparative Perspective"} in \textit{Local Knowledge: Further Essays in Interpretive Anthropology} (New York: Basic Books, 1983) at 223 [hereinafter \textit{"Local Knowledge"}].
\item \textsuperscript{25} \textit{Ibid.} at 220.
\item \textsuperscript{27} "Local Knowledge," \textit{supra} note 24 at 224.
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Charles Taylor's analytical distinction between norms, on the one hand, and their philosophical foundations, on the other, is helpful. It may be possible, says Taylor, to come to consensus on norms while retaining "a profound sense of difference, of unfamiliarity, in the ideals, the notions of human excellence, the rhetorical tropes and reference points by which these norms become objects of deep commitment for us."28 We may be able to agree on what to do without necessarily agreeing on why. Taylor points to Thailand as an example where the solid Thai respect for the monarchy in the tradition of the dhammaraja enhance support for what in the west is called "human rights" even though the philosophical foundations are quite different.29

Taking these concepts into the Cambodian setting, one might ask whether "human rights" and democracy are incommensurate with Cambodian moral orders, which are within the realm of the traditional. Khmer-Buddhist conceptions of governance and morality are not "post-traditional,"30 enlightenment or liberal concepts. Yet, the kind of consensus on norms described by Taylor is present among Buddhist monks and human rights activists in Cambodia. Buddhist thinkers have not seen "human rights" as incompatible with Buddhist tradition. There are many people within Cambodia who are highly educated in Western liberal thought and who see practical harmonies with traditional Buddhist thought. But it is a mistake to assume that when we discuss "human rights" with Cambodian government, NGO and monk leaders we all have the same notions in our heads. Rather, it appears that Cambodian human rights leaders, including monks, have tried to map Buddhist principles onto the discourse of international human rights for purposes of legitimating their human rights education and advocacy. Western thinkers should be careful not to try to map their own liberal (post-traditional and rationalistic) constructions of morality onto traditional Cambodian conceptions of corruption and immorality. As Taylor warns, a consensus on norms is only a start; it must be followed by a


29 Ibid. at 133.

30 "Post-traditional" is the term Habermas uses to describe the ethos that developed with the "rationalization of the life-world" in the Enlightenment period and particularly in nineteenth century European thought. "Human Rights and Popular Sovereignty" supra note 12 at 1-6.
process of “mutual learning... in which the moral universe of the other becomes less strange. Out of this will come further borrowings and the creation of new hybrid forms.”31 He points to Martin Luther King’s borrowings from Gandhi as an example of what he means. We might also point to the work led by Maha Ghosananda in this light.

Thus, there are examples of “abnormal discourse” of the consensus-seeking type in the current discourse about human rights in Cambodia.32 However, if one focuses on the “what” of the consensus without being aware of fundamental difference in the “why,” it is possible to stumble into less benign forms of “abnormal discourse” than contemplated by Rorty, Geertz and Taylor. Abnormal discourse can easily shift to talking past one another and beyond that toward hostility.

Since “abnormal” consensus on human rights norms does exist among some in Cambodia, it seems possible that it can be extended. To extend it beyond those who are already relatively comfortable (though strange) bedfellows in Cambodia, abnormal dialogue needs to be extended toward building understanding, shared meanings and transformative dialogue about governance between pro-democracy and human rights leaders and pro-CPP leaders.

There is another way to conceive of the human rights discourse in Cambodia. It may also be seen as resembling the discourse in the West in which tensions between human rights and democracy come into conflict. One current liberal view is that human rights trump individual autonomy (and we might extrapolate to say that international human rights trump national sovereignty, as is increasingly a politically powerful argument internationally).33 On the other hand, the Western republican view valorizes democracy and emphasises human ethical

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autonomy or "popular sovereignty." Thus, Habermas provides some insight into why we might see the discourse in Cambodia as mirroring the tensions between international human rights and the democratic self-determination (although in Cambodia the tensions do not play out with respect to assertions of individual autonomy, but assertions by the government of state autonomy.) Also, in Cambodia, traditional Khmer-Buddhist discourses align with the post-traditional liberal discourse of international human rights.

Finally, because of the radical differences in ways of thinking about "human rights" in Cambodia, it may be tempting to see the competing world views as a "clash of cultures" a la Huntington. As discussed in Chapter Four, I reject the idea that cultural differences are, in themselves, a source of conflict. Rather, destructive conflict emerges from other sources, such as lack of respect and appreciation for difference, competition over who gets to decide what, who trumps, and what and whose views are marginalized or ignored. A constructivist approach can frame and reframe differences in a manner that people can at least live together without harming one another and at best transform their interactions away from violence-prone power struggle and towards dialogue.

5.2.2 Power

In Cambodia there is a second challenge – a severe practical one. What seems to be common ground is that Hun Sen is powerfully in charge, and that nothing happens without his say so. Power is centralized in the "strong man" and the CPP party. Cambodia is not ruled by democratic principles that effectively constrain the power of government. There is little apparent assimilation of the liberal concept of a "loyal opposition."

Neither is traditional Buddhist morality being practised in Cambodia. Leaders and population are only nominally Buddhist. In Cambodia, the abnormal discourse is complicated by habits of

34 "Human Rights and Popular Sovereignty" supra note 12 at 1-6.

factionalised power plays which mean that the “discourse” is more or less frequently punctuated with demonstrations of power, including corruption, veiled or open threats, and sometimes extreme violence.

In Cambodia the conflict is not between the differing Buddhist and Western conceptions of “human rights,” but between factions whose disputes are not based on ideology or ethics, and who do not appear to claim support for their actions from any moral tradition. In Cambodia the problem of factionalism is linked directly to the fact that there is no tradition of any real power sharing. In that sense, the concept of power of Cambodian leaders does not appear to have moved beyond historic modes that have little to do with Buddhist moral precepts. Attachment to power, along with other forms of greed, are contrary to Buddhist teaching. Current patterns of government are characterized as morally corrupt and deviating from traditional Buddhist moral precepts for rulers.36

I have already commented on the importance of sustained moral pressure and economic incentives to the Cambodian government by the international community. However, where long-term peacebuilding is concerned, the offerings from realist traditions may be limited, since they are largely confined to rather unidimensional carrot-or-stick approaches. Liberal political theory does not provide the whole answer either; the liberal approach to power is to limit the coalescing of governance power through institutional checks and balances. Both realist and liberal institutionalist thinkers tend to retain a zero-sum approach to power, in which power conceived as a commodity to be gained, lost, balanced or traded.

But this has all been said before. It seems time to move beyond deconstruction and to join with practitioners in building new popular theories of power that give people the ability to change things. As scholar-practitioner John Forester urges:

Let us stop rediscovering that power corrupts, and let's start figuring out what to

36 See Chapter Two for a discussion.
do about the corruption. Let us not just presume as unshakeable truth that disciplinary power is total, that rationality self-destructs, that hegemonic culture is all pervasive, that we can do nothing to address inequality, poverty, environmental destruction, and needless human suffering. If we are to analyze power as a political, and thus alterable, reality rather than as an unchangeable metaphysical ether, let us stop rediscovering power and instead assess practically, comparatively and prescriptively what different actors can do about it.  

It may help to consider postmodernist and feminist conceptions of power in which power is conceived as residing in dynamic and shifting networks of people. Concepts of “power-to” and integrative concepts of “power-with,” discussed in Chapter Four, can illuminate a broader range of possible options for action, including ideas about how the underpowered in society can broaden their bases and uses of power.

Participatory action research could canvass alternative theories and ethics of power in Cambodia, including existing integrative uses of power. Findings could be developed into education around ideas that might resonate for Cambodians, including Cambodian leaders who may, perhaps, find integrative concepts of power to be liberating in ways that would help them voluntarily loosen their fearful grip on central control. Such research would need to be cognizant of the “abnormal discourses” in Cambodia and work toward building shared understandings rather than the shallow consensus that seems apparent in current discourse between Westerners and Cambodians.

Nevertheless, it is important not to be naive about the central problem of power intertwined with corruption. As Buddhist wisdom suggests, greed is a powerful motivator. However, the importance of fear in consideration of the problem of power in Cambodia should not be underestimated. Drawing on Buddhist theory, Aung San Suu Kyi suggests:

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It is not power that corrupts but fear. Fear of losing power corrupts those who wield it and fear of the scourge of power corrupts those who are subject it. Most Burmese are familiar with the four a-gati, the four kinds of corruption. *Chandagati*, corruption induced by desire, is deviation from the right path in pursuit of bribes or for the sake of those one loves. *Dosa-gati* is taking the wrong path to spite those against whom one bear ill will, and *moha-gati* is aberration due to ignorance. But perhaps the worst of the four is *bhaya-gati*, for not only does *bhaya*, fear, stifle and slowly destroy all sense of right and wrong, it so often lies at the root of the other three kinds of corruption.\textsuperscript{38}

Thus, the problem of power in Cambodia may require a combination of strategies aimed at building broader conceptions of power, knowledge of ethics, and—perhaps most important—moral courage at all levels of society.

5.2.3 Impartiality

Problems of corruption and polarization mean that Cambodians find it difficult to perceive non-partisan or impartial institutions or persons. There is urgent need for an independent judiciary, an impartial election commission and non-partisan human rights bodies that the population can trust. Chapter Two describes how the Buddhist idea of the “middle way” and the experiences of the *dhammayietra* movement have contributed to local knowledge about practical impartiality. Research into the qualities of non-partisanship of acceptable traditional conflict resolvers in Cambodia might unlock some ideas that could be useful in the human rights arena.

5.2.4 Trust

Cambodia’s conflicts are characterized by suspicion, mistrust and corruption that pervade all

levels of society. Cambodian informants pass along hints or rumours about a variety of covert alliances, demonstraters and assassins in disguises,\footnote{S. Chea & J. Eckardt, “Activist Monks Dare to Defy Authorities” \textit{Phnom Penh Post} (12-17 September 1998); J. Eckardt & S. Chea, “Diary of a Demonstration” \textit{Phnom Penh Post} (4-17 September 1998); Interviews with various informants in Phnom Penh (May-June, 2000), notes on file with the author.} communist plots,\footnote{J. Eckardt & S. Chea, “Diary of a Demonstration” \textit{Phnom Penh Post} (4 September 1998) [hereinafter “Diary of a Demonstration”]; “Cambodia Workers Claim They Were Duped into Battle” \textit{Associated Press} (24 November 2000).} racially motivated schemes,\footnote{“Diary of a Demonstration,” supra note 40; K. Johnson, “Monks March in Anti-Viet Protest” \textit{South China Morning Post} (28 March 2000).} supernatural curses\footnote{“Royal Rumour Sparks Mass Haircut” \textit{Agence France-Presse} (21 June 1999).} and secret assassination squads.\footnote{Interview with NGO leader in Phnom Penh (6 June 2000) [notes on file].} Whether true, partly true or not true at all, one does not really know. What “really” is happening, what is “really” motivating leaders and who is “really” pulling the strings, are constant sources of speculation and gossip and reading between the lines. I do not say these things suggest the truth of such stories, nor to suggest a stereotype about Cambodians. Many people from the international community readily join in the gossip. Rather these stories illustrate the ethos of suspicion in Cambodia. In such an atmosphere of such mistrust it is difficult to contemplate development of public confidence in government transparency, trustworthy public participation, accountable administration or fair dispute resolution processes. This chapter later describes several Cambodian projects aimed at building trust among factions. It seems important that more attention be paid to ways of facilitating true reconciliation at all levels of Cambodian society.

5.3 \textbf{Peacebuilding and Human Rights Initiatives Promoted or Considered for (or in) Cambodia}

Despite this difficult atmosphere, there is a great deal of inspiring, energetic and effective work by many people. The next section describes some positive examples of what foreign entities are prescribing in Cambodia. Following that is a section describing some newer currents in the Western field of conflict studies that may have some useful application in Cambodia. The
section after that turns to some Cambodian-based initiatives that may resonate with these newer conflict resolution approaches and from which there are interesting and positive lessons to draw.

5.3.1 Public participation

Participation is prescribed by the UN, the World Bank and others as important for equitable and effective economic and democratic development. Participatory approaches to economic development have been taken in Cambodia. While the government has little experience with public participation in policy making, it has been involved in efforts to decentralize village decision making through the SEILA program. Concepts of participatory development have not been applied as much to date in areas of legal development or in human rights policy or practice. The Cambodian government is demonstrating little leadership or political will for developing human rights policy or legislation. The efforts by the UN for a trial of Khmer Rouge leaders appear to be driven mainly by the UN and other international bodies, but with support from local NGOs.

Local NGOs have called upon the international community to support their efforts to encourage the government to engage civil society in implementation of reforms and public dialogue. They have also called upon donors to model democratic processes and to “promote public

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44 Please refer to Chapter Four's brief discussion of the UNDP-supported Cambodian government initiative SEILA (meaning “foundation stone”) which has developed systems for decentralized participatory planning and management of rural development in five provinces. See NGO Forum on Cambodia, Mekong People: The Role of Local Communities in Hydro-Planning toward Public Participation in S/Eia, Cambodia (1997), online: NGO Forum <http://www.camnet.com.kh/ngoforum/WokingGroupIssues/Environment/mekongpeople.htm> (date accessed: 8 June 2001). In this report, training in dispute resolution was emphasised as a “productive framework for stakeholders to exchange perspectives, consider development options and initiate responsible decision-making,” citing Khon Kaen University Institute of Dispute Resolution, “Energy and Conflict: Thailand, Cambodia, and Laos PDR Interim Report” (Bangkok: Khon Kaen University, 1996).

participation and openness when providing technical assistance.\textsuperscript{46}

Some foreign scholars have also called for local participation and a "local knowledge" approach to peacebuilding in Cambodia.\textsuperscript{47} Some foreign NGOs have been facilitating the development of local knowledge and local participation in the area of legislative reform and resolution of land conflicts, a primary source of serious disputes and human rights conflict in Cambodia. For example, an OXFAM project on land disputes\textsuperscript{48} in Cambodia has been able to persuade the government to engage in discussions with a number of civil society leaders in order to utilize their expertise to make significant improvements to a draft land law.\textsuperscript{49}

\subsection*{5.3.2 UN plans for an international trial of top Khmer Rouge leaders}

The United Nations approach to human rights in Cambodia has prominently featured high-level efforts to create a UN-supported trial process for key Khmer Rouge leaders. The theory seems to be that if impunity of the past is addressed, this will have the effect of addressing the present culture of impunity. This process has been led by the UN with the support of several Western nations and Cambodian human rights NGOs. The process of developing these plans has been notably top-driven.


Among those who work a bit closer to the grass roots, there are fears that a trial of Khmer Rouge leaders may "...open old wounds, force them to relive their personal nightmares and possibly throw them into an even deeper vault of trauma and fear."\(^50\) Some fear that a trial may inflict new damage rather than heal wounds. Others, including Ok Serei Sopheak, the director of the Cambodian Centre for Conflict Resolution, argue that speaking about Khmer Rouge atrocities is vital for many Cambodians:

The majority of Cambodians are not living yet. They are only just surviving. I agree that many people will feel their traumas coming back and in my opinion it represents a lot of courage for this generation to go though this process. But that is a small price to pay for a clean future where crimes of the past have been punished. It is the future of our children and grandchildren and they deserve some sacrifices.\(^51\)

Most people have been severely traumatized by their experiences and losses during the Pol Pot regime, news reports and other commentators suggest that Cambodians are clear about wanting fair treatment and accountability in government in the present and the future. But there is a great deal of uncertainty and no real consensus among Cambodians about how to address the past.\(^52\)

The three expert consultants who visited Cambodia and reported their findings to the UN in 1999, recommending an international tribunal process, noted that no polls had been taken of Cambodians. The group of experts claimed popular Cambodian support for a tribunal based on

\(^{50}\) Quoting Dr. Kirsti Oksarsson, a psychiatrist coordinating a Norwegian sponsored project to train Cambodian psychiatrists, in A. Marcher, "Khmer Rouge Trials Could Renew Trauma" Phnom Penh Post (6-19 August 1999).


their own conversations with a very few people they met outside the scope of their formal interview schedule with government officials and NGO leaders during their short assessment visit to Cambodia. This international-expert-driven process of high-level interviews within short time-frames of several days (or at best weeks) appears to be a common process for international fact-finding and assessment missions for a variety of issues, including Canadian initiatives.

Little attempt has been made by foreigners to gauge the views and feelings of the Cambodian population about this issue. Research for this project uncovered only one very modestly-funded foreign attempt to engage the Cambodian public about this issue. In 2000, the Canadian Embassy in Cambodia sponsored a research project by American lawyer Laura McGrew aimed at ascertaining the opinions of Cambodians about how Cambodian society can “best be healed after the tragedies that occurred during the Khmer Rouge regime.” An attempt by a local NGO, the Center for Social Development (CSD), to learn about Cambodian views is described later in this chapter. Both these efforts found that most Cambodians surveyed do indeed want accountability regarding the deeds of the Khmer Rouge, but that more public consultation is needed to determine what approaches would meet the needs of the Cambodian public.

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54 L. McGrew, “Truth, Justice, Reconciliation and Peace in Cambodia: 20 Years after the Khmer Rouge,” in Canadian Embassy (Phnom Penh: 2000). This perceptive report documents the results of three months research among key informants and focus groups in Cambodia. In addition to documenting people’s opinions about whether there should be a KR trial, it also canvasses concepts of justice, trust, responsibility, amnesty, religion and justice, confession and truth, apology, forgiveness, punish (including vengeance and reparation), memorialization, trauma and healing, the arts and healing, and reconciliation including trust as well as conflict resolution and peacebuilding.

55 Center for Social Development, The Khmer Rouge and National Reconciliation - Opinions from the Cambodians (Phnom Penh: Center for Social Development, 2001) [hereinafter Khmer Rouge and National Reconciliation].
5.3.3 The idea of a truth commission

From time to time the idea of a national truth and reconciliation commission (TRC) is raised;\textsuperscript{56} therefore, it is important to address this idea briefly. Literature on Cambodia canvasses this idea very sparingly. In a comparative study of how gross violations of human rights have been addressed elsewhere, Klosterman points to some purposes of truth commissions, including creation of an authoritative record of what happened; providing an alternative to normal prosecutions; laying foundations for later prosecution; and promoting institutional change and reconciliation.\textsuperscript{57} While in 1999, in response to a public statement made by Hun Sen, Bishop Tutu and the South African Truth and Reconciliation Commission indicated willingness to assist the Cambodian government with coming to terms with the past, no overtures by the Cambodian government appear ever to have taken place.\textsuperscript{58} Neither has the idea been picked up in earnest by the foreign community; rather the major efforts have been to focus on an international criminal trial process for key Khmer Rouge leaders.

There are several reasons why a high-level national truth and reconciliation process of the South African type may not be feasible in Cambodia. First, it is only recently that the Khmer Rouge insurgency ended, and the government made amnesty deals with key Khmer Rouge leaders, including Ieng Sary to secure the end of armed conflict. These amnesty agreements have also complicated the UN-sponsored effort for a criminal-type trial process and would also complicate any suggestion of a process that involves truth telling, particularly if there were any accountability mechanism attached to a truth commission. Second, no political will for such a


process has been indicated. Third, and possibly the most obstacle that the breadth and penetration of the Khmer Rouge from 1970 to 1975 was such that it would be almost impossible to establish parameters for a national truth commission that would go beyond the demarcations of the inner circle of the Pol Pot regime.\(^5\) Another considerable obstacle to a truth commission is the distressing fact that no Desmond Tutu-like personage is identifiable in Cambodia. It would be exceedingly difficult to find a person with the necessary skill who is sufficiently prominent and sufficiently respected by all those concerned in Cambodia.

That being said, it is important to say that this does not mean reconciliation processes that use restorative justice principles cannot or are not being considered in Cambodia. One of the chief findings of the CSD and Laura McGrew is that Cambodians need and want restorative processes that extend to the community and personal level. But restorative justice efforts have been notably lacking in Cambodia. If restorative processes were to be at all useful for significant healing among the Cambodian population, the design of reconciliation processes would need to be conducted in a participatory fashion, taking into account the needs of Cambodians for measures that would address the broad and deep traumas of most of the population. Instead of a high-level national truth and reconciliation approach, it might be more useful to consider reconciliation processes aimed broadly at the grass roots, but supported centrally and internationally.

5.3.4 National Human Rights Commission or Ombudsman

The Office of the UNHCHR in 1997 attempted, with Cambodian human rights NGOs, to draft legislation for an independent National Human Rights Commission and participated in meetings with NGOs and the Minister of Justice on the issue in early 1998. However, in June 1998, the Hun Sen government created by sub-decree a provisional Cambodian Human Rights

\(^{5}\) Determining who was implicated in the atrocities of the Pol Pot time has been said to be like “small-shrimp soup” referring to a popular soup in Cambodia containing small shrimp whose antennae intertwine, causing them to clump together. This Cambodian expression is the equivalent to Pandora’s box. Khmer Rouge and National Reconciliation, supra note 55 at 7.
One of the mandates of this committee was to draw up a law to create an independent national human rights commission. The Office of the UNHCHR submitted a copy of the 1997 draft to the Cambodian Human Rights Committee. In late 1998, after the formation of the new coalition government, several donors and NGOs expressed interest in renewing discussion on the creation of an independent National Human Rights Commission. The Office of the UNCHR committed to encourage such discussion in coordination with relevant government ministries and civil society organizations.

This chapter questions whether Cambodians are currently in a position to design a national human rights institution that would serve the interests and needs of Cambodians in the short or long term. As already noted, current human rights mechanisms provide no publicly trusted mechanisms for addressing human rights complaints in Cambodia. It seems clear that without the active and sincere support of the “elephants” of the ruling party and elites, a national institution would falter and fail. It is highly unlikely that Cambodian villagers will complain to an institution they cannot trust and which does not deliver just remedies (any more than they currently use the courts.) An institution that does not have a genuine mandate from Hun Sen and other powerful stakeholders is very unlikely to have much success encouraging policies and legislation that will effectively prevent future human rights problems. An institution designed by foreign “elephants” will suit neither local “elephants” nor the local “ants” who are regularly trampled.

On the other hand, Cambodian human rights and civil society organizations, together with the UN and much of the international community are unlikely to support the development of any human rights body that deviates from internationally established principles adopted by the

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General Assembly in 1993 and referred to as the “Paris Principles,” which include principles of public accessibility; pluralist representation; a broad-based and well-defined mandate established by legislation (or preferably in the constitution); juridical, political and financial independence, adequate resources, and otherwise capable of achieving demonstrable results. However, the Paris Principles are quite capable of supporting a variety of institutional models, and within this flexible framework, local design efforts could be facilitated by the international community with assistance from the UN.

Views differ about whether the government should be encouraged move forward towards a national human rights body. There is considerable concern that Cambodia's government does not have the political will to establish an institution that would be truly independent and effective in establishing and monitoring human rights in Cambodia. Some Cambodian human rights workers, including Kem Sokha and Kek Galabru, have within the past year proposed cautious consultation for a national human rights institution in Cambodia. A recently-struck ASEAN committee for the formation of a National Working Group for a National Human Rights Commission is headed by Kem Sokha. However, given the priorities of ASEAN for very limited incursion into national autonomy and its emphasis on economic cooperation, it seems unlikely that ASEAN will press Cambodia for a human rights institution or for improvements in human rights. The ASEAN National Working Group and several local NGOs have been considering consultations and discussions about a national human rights institution. In 2000 Brian Burdekin of the UNHCHR's National Institutions Team was invited to Cambodia for some discussions. This particular office of the UN appears to be quite sensitive to the need for careful assessment in Cambodia to determine whether or not there is an appropriate domestic environment for a national human rights commission that would fit international

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63 Please refer to the discussion of ASEAN in Chapter Three.
standards. The UN response to date has been to keep the issue as a matter of discussion rather than action at the present time.\textsuperscript{64} The UN concern, at the technical assistance level, is to ensure that the right political environment exists for a human rights commission. Broad based consultation with all stakeholders, particularly civil society, is considered essential for an institution to be established with UN support. The UN is concerned that any national human rights institution conform with the Paris Principles.

It is important to emphasize that when Cambodia was being pressed toward a human rights body after the July 1997 conflicts, it responded by creating a clearly partisan National Committee on Human Rights which if anything made the situation more complex than it was. The government may not be ready to engage in serious negotiations on human rights policies and institutions. Stakeholder negotiations without sincere government mandate and support at the highest level may prove counterproductive. It is also unwise to discuss human rights institutions in isolation from other human rights processes, including fairness in policing and law enforcement, administrative matters, labour issues, courts and development of a sufficient cadre of trained and qualified lawyers.

It appears to be too soon to move toward actual negotiations for the development or design of a human rights commission or an ombudsman. But it is not too soon to begin and continue conversations and public dialogue until it emerges that there is both political will and capacity to negotiate the terms of a national commission or ombudsman that meets the standards expressed in the Paris Principles.

5.3.5 Power balancing roles for the international community

It is important to focus some attention on the responsibilities of international financial institutions and donor countries to foster the international standards of international law, international human rights and good governance. For power sharing in Cambodia to occur,

\textsuperscript{64} Electronic communication from Orest Nowasad, National Institutions Team, United Nations Office of the High Commissioner on Human Rights, Geneva (December 13, 2000).
donors need to listen seriously to Cambodian NGOs recommendations for foreign assistance that is carefully targeted at key issues such as civil service reform, anti-corruption legislation, public education about corruption and legislative reform initiatives and a full poverty reduction strategy, which recommendations include stakeholder consultation with Cambodian people including civil society organizations. Monitoring by donors of implementation of human rights strategies is also seen by NGOs as important, including monitoring of the currently stated government priorities of judicial reform, national transparency and anti-corruption. NGOs see particular need for donor leadership on the cross-cutting problem of corruption which is seen as a "log-jam" to the establishment of good governance in Cambodia. NGOs see consistent, sustained and coordinated assistance and monitoring from the donor community as essential for real progress in Cambodia.

In 2001, the donor community pledged US$615 million dollars of aid to Cambodia, up from US$548 million last year. This includes US$55 million specifically earmarked for civil society organizations. Japan remains the largest donor. This was despite noted shortcomings of the government on implementing promised reforms, particularly in areas of judicial reform and natural resource management, but with commitments by Hun Sen to try harder. While in 2001 there were no conditionalities tied to human rights performance, there were strong statements of expectations to government performance and earmarking of funds for anti-corruption, military demobilization, forest protection, land-mine clearance, civil service reform and judiciary reform. One can only hope that the donor community will join with Cambodia's NGOs in following through on donor insistence on reform.

65 All these and more are recommended by NGOs in Cambodia. See NGO Statement to the 2001 Consultative Group, supra note 45.

66 Ibid.


68 "Cambodia Musters over 600 Million Dollars of Donor Aid" Agence France-Presse (13 June 2001); B. Bainbridge, "CG Reaps Direct US Aid for AIDS" Phnom Penh Post (22 June - 5 July 2001).
Also emphasized over and over by NGOs is the need for donors to work with Cambodians through joint missions and joint appointment of consultants and stakeholder consultation. To ensure that the Cambodian people are served well by international aid, donors should insist on effective and participatory development partnerships and put an end to top-down advisory approaches to peacebuilding, legal and human rights development. This would involve more Cambodian involvement in selection of foreign consultants. It may also involve more training and practice for Cambodians and foreign consultants in designing and implementing stakeholder analysis and public consultation processes suited to a variety of Cambodian contexts. It was beyond the scope of this project to study the topic of aid conditionalities, but in closing this chapter I take the lead from respected Cambodian civil society organizations, who know their own context best, that it is essential at this stage for donors to conduct persistent monitoring of the government's progress toward its stated commitments and international obligations to implement international human rights.

5.4 Conflict Resolution, Peacebuilding and Human Rights in Cambodia

Several currents from within the field of conflict resolution might be brought to bear on the question of how Cambodia might move toward sustained public dialogue from the current adversarial approaches where both sides launch verbal (or worse) attacks at one another from their opposite poles. This section draws on ideas about public deliberation from Jürgen Habermas, Seyla Benhabib, Iris Young and John Forester. Also considered is the work of several scholars in the field of mediation including Sara Cobb, Ellen Waldman, Lawrence Susskind and John Forester. In the field of international peacebuilding, some thinking of John Paul Lederach and Harold Saunders is also considered.

At the outset of this discussion, it is important to reiterate the chief criticisms that have been levelled at the field of conflict resolution. Critical theorists have charged that the field of

69 Civil Society Statement to the Consultative Group meeting, supra note 67.

conflict resolution in the West has worked toward preserving the status quo through a combination of harmony ideology, lack of attention to structural causes of conflict and lack of attention to issues of power. Thus, mediation works not for reform of situations of social injustice, let alone radical change, but rather tends to reinforce the status quo and extend state control. The bias toward settlement may lead to pacification and suppression of social conflicts that should be aired and addressed through social change. Finally, dominant conflict resolution practice is based on a framework of utilitarian public policy ethics which has been attacked by legal scholars like John Rawls; economists like Amartya Sen; philosophers as diverse as Nussbaum, Benhabib and Habermas, feminist thinkers including Iris Young; religious thinkers from a variety of perspectives, including Christians and Buddhists; and many international human rights proponents and practitioners. Conflict resolution practitioners in North America tend to ignore these critiques if they are aware of them at all. I believe there is widespread unawareness of limitations on the applicability of mediation – some blinkers that practitioners tend to wear. Just as lawyers tend to see courts as central, conflict resolution specialists in North America tend to place mediation at the centre of their viewfinders.

In the light of the critiques, and especially in considering Cambodia, it is important to move beyond seeing mediation – usually based on the Harvard approach – at the centre of the moral and practical universe. Conflict resolution is not synonymous with mediation, nor is it necessarily the central process of peacebuilding. Notwithstanding the “resolutionary” zeal

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71 For Buddhist views, see the on-line Journal of Buddhist Ethics, online: Journal of Buddhist Ethics <http://jbe.la.psu.edu/> (date accessed: 10 May 2001).

72 This statement is based on my observations of the field over the past decade. Policy makers are often aware of the general shape of critiques. It is being noted that researchers and practitioners in the field of conflict resolution tend not to talk to one another. See C. Honeyman, B. McAdoo, & N. Welsh, “Here There Be Monsters: At the Edge of the Map of Conflict Resolution” in S. Morokuma, ed., Monsters in the Water: Fear and Suspicion in the Field of Conflict Resolution, The Conflict Resolution Practitioner (Atlanta: Georgia Office of Dispute Resolution and Consortium on Negotiation and Conflict Resolution, George State University, 2001).

73 A. Pirie, “Manufacturing Mediation: The Professionalization of Informalism” in C. Morris & A. Pirie, eds., Qualifications for Dispute Resolution: Perspectives on the Debate (Victoria, B.C: UVic Institute for Dispute Resolution, 1994) at 181, note 90 where Pirie notes that he first encountered this expression at the National Conference on Peacemaking and Conflict Resolution in Montreal in 1989 in a plenary session with Christopher Moore and James Laue entitled “Moving Forward: Do We need a Hippocratic Oath for Dispute Resolutionaries?”
many of conflict resolution practitioners have about the shift from adversarial approaches to consensus building, and from positions to interests, the kinds of conflict resolution and mediation processes taught in most thirty- or forty-hour mediation training courses in North America are not necessarily the process-remedy for everything from business disputes and community conflicts, to preventing riots at meetings of the World Trade Organization (WTO), preventing genocidal violence, or reconciliation among the traumatized survivors and perpetrators of such horrible catastrophes. Within the international context, mediation processes of various kinds are better placed among the full range of peacemaking and peacebuilding approaches and processes.

5.4.1 Newer currents in conflict studies and practice in North America

In Cambodia, conflicts involving human rights are not primarily conflicts among individuals over competing interests, although these are certainly almost always involved. Using Moore's and Dugan's typologies, particular conflicts involving human rights in Cambodia are better seen as embedded within relationships that are in turn embedded in structures that involve power, values and culture. Training of middle-level government officials in conflict resolution and mediation, while helpful, may not be the most important peacebuilding approach to take in Cambodia. Structural causes of conflict require interventions aimed at those causes. Cambodian religious leaders see causes of conflict as spiritual in nature, requiring spiritual interventions, such as widespread teaching about Buddhist precepts and peaceful ways of thinking and acting. Relational conflicts require interventions aimed at reconciliation and building trust in the light of relevant histories and other contextual factors. Finally, where the moral legitimacy of governance modes, legal institutions and human rights practices is deeply in question, as it is in Cambodia, conflict theorists and practitioners need to find ways to address moral conflict. The next section addresses several approaches to conflict studies and practice that have emerged from critical theory and social constructionist perspectives to see whether they might to better than the Harvard models in addressing issues of moral conflict, power, impartiality and trust, which I have identified as central problems for Cambodia in human rights conflict.
5.4.1.1 Ways of being in the middle: Non-partisan intervention

The polarized situation in Cambodia requires a great deal of thinking about what it might mean to "be in the middle" of Cambodia's complex and dangerous public conflicts as researchers, educators or non-partisan advocates for peace, social change, political reform or human rights. It may seem natural to look to mediation literature for guidance in navigating these roles, and indeed, the language of "neutrality" is used in Cambodia to discussed the needs of non-partisanship. However, in doing so, one comes up against all the theoretical and practical challenges of dominant Western concepts of neutrality discussed in Chapter Four. These concerns are magnified because of the issues of international human rights that pervade virtually all public conflicts. It is impossible to be "neutral" about human rights conflicts as many mediation practitioners have been troubled to learn. Difficult questions about "being in the middle" remain unanswered including the chief question: How do mediators manage the tension between the power they must wield (sometimes in non-neutral ways) and the fairness and trust they must maintain with all the parties? Forester suggests that answers to this question are found in examination of what practitioners can tell us from their experiences. Since current theory has not helped much, we need to build some theory. It may not be a matter of developing or applying new formulas or models, but rather of learning political judgement about what it means to be in the middle as a person involved in peacebuilding in one way or another.

5.4.1.1.1 Activist mediation

Lawrence Susskind and John Forester have recognized the mediator's dilemma and have proposed what they call "activist" mediation which rejects passive neutrality but retains non-


partisanship. What does this mean? Activist mediators in public policy disputes are concerned with process and outcome. This differs from approaches that favour interventions concerning process, but neutrality (non-intervention) about the outcome. The activist mediation approach acknowledges – instead of hiding – the public dispute mediator's actual political power in the policy deliberation process. Activist mediators concern themselves in non-neutral ways with seeking representatives for affected parties not present and balancing information and participation of parties. Activist mediators, more than neutralist mediators, do risk perceptions of bias when empowering weaker parties.

Much North American mediation training proposes a facilitative approach that shies away from party persuasion and activism. This teaching in part reflects the "myth" of neutrality promoted in much mediation education in North America. But it has been noted by Kolb that far from being non-coercive, many successful American mediators "are inclined to make extensive use of pressure tactics and arm twisting" as well as more subtle approaches, such as non-neutral framing and reframing of party conversation. These practices fly in the face of existing Western myths about mediation which tend to support the idea that a mediator should never be coercive and should always support individual party autonomy. The small bits of literature

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79 "Beyond Neutrality," supra note 76 at 256.

80 Note that here I am not using the term "neutrality" as completely synonymous with "impartiality." Neutrality in this discussion refers to a low degree of mediator activism and little intervention regarding outcome.


83 For discussion, see C. Morris, “The Trusted Mediator: Ethics and Interaction in Mediation” in J. Macfarlane,
that describe rather coercive Cambodian styles of mediation indicate Cambodians may not share this myth; Cambodian mediators may need to be urged in the direction of learning facilitative methods to suit contingencies that call for more individual autonomy. Activist mediation can work in the direction of enhancing the individual autonomy of less powerful parties in settings where neutralist mediation styles might allow more powerful parties to hold sway.

5.4.1.1.2 Social norms in mediation: A multiple model approach

Ellen Waldman has recently provided a helpful typology that addresses the variable function of social norms within mediation. She places mediation models into three categories: “norm-generating,” “norm-educating,” and “norm-advocating.” “Norm-generating” models are used in contexts where the parties need to create their own norms, for example, neighbourhood conflicts in middle-class America which present no pressing public policy issues – such as the proverbial garden fence dispute. In such cases, individualized interest-based approaches may be appropriate. “Norm-educating” models might include divorce mediation where lawyers are involved to explain legal rights to the parties, but parties may decide to choose whether to develop solutions based on their interests or personalized ethics, using legal rights as just one possible standard for a fair settlement. “Norm-advocating” models promote and reinforce particular social norms. Waldman notes that norm-advocating models, while essentially non-neutral, are practised by many mediators in several fields, including environmental mediation. Both norm-educating and norm-advocating models of mediation and conciliation could be considered for use in human rights cases to ensure that legislative mandates or international human rights norms are maintained in any settlement discussions.

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85 None of these three models of mediation necessarily include formal “recommendations” of the mediator as in Stitt’s definition of “rights based” mediation. Please refer to Chapter Four, infra, discussion of “rights-based” mediation which is often conflated with “evaluative” mediation. A separation of the concepts of rights (or norms)
Waldman outlines a framework by which different degrees and types of mediator intervention are called for depending on the context. This framework provides an ethically coherent way for mediators to balance mediator decisions in relation to often competing mediator imperatives to maintain both party autonomy and ethical or legislative mandates.

While Waldman's concept of norm-educating and norm-advocating models of mediation provides a useful construct for consideration in human rights settings, it also provides challenges for existing codes of ethics of Canadian and American mediation organizations, and challenges for training of mediators in ways to meet a variety of ethical contingencies. The specific features of norm-educating and norm-advocating features of mediation and conciliation are not described in the literature, so without observation or documentation of experience it is difficult to see what they look like or how they work in human rights settings. To my knowledge, training modules based on Waldman's conceptual model are not widely available for trainers or educators to consider. Coercive strategies may not be appropriate, nor are they likely to result in any real transformation of parties or social dynamics. Similarly, "evaluative" methods similar to non-binding arbitration may not be sufficiently nuanced. Even if Waldman's article had been available in 1996 when the Canadian team was designing mediation training for Cambodian human rights workers, the team may have been hard pressed within the constraints of the program to develop suitable training modules that considered the rights/interests/transformation conundrum in the Cambodia context. Also, Waldman's approach implies the existence of a domestic legislative framework which does not exist in Cambodia, where the international human rights instruments are relied on in the absence of human rights legislation or reliable official complaint bodies. Waldman's approach contemplates individual cases within institutional or organizational settings that have already reasonably well-developed norm-expectations. It could however, provide guidance for design of conflict resolution

and the degree of coercion in a mediation is enhanced in Waldman's analysis, and allows for more flexibility in the mediation process. A mediator could adopt a norm-advocating style without necessarily making formal recommendations. Norm-advocating methods could also include expanding the purview of discussion beyond the immediate interests of the parties; urging consideration of specific ethical issues raised by the mediator and the parties; raising specific policies, laws or ethical principles for considerations; and raising questions about how particular proposals fit with the various social norms relevant in the context of the mediation.
components within new human rights complaint bodies. Finally, Waldman's approach which
tends to assume settings in which there is some consensus about what norms are applicable,
may not be suited to the resolution of public policy conflicts where the fundamental issue may
include "abnormal" discourse about norms, together with power struggles and deeply
mistrustful relationships among the stakeholders.

5.4.1.2 Deliberative approaches: Transformative possibilities?

Experiments in public participation and public policy dispute resolution in British Columbia
have been theoretically eclectic, drawing largely on Harvard for inspiration. Bearing in mind
some earlier work I have done on mediation ethics,86 I became interested to see whether social
constructionist theories of communicative action might ethically and practically ground or
inform multi-stakeholder public policy dispute resolution. In particular, I wanted to consider
deliberative and narrative approaches to see whether they might provide some theoretically
more satisfying ways to think about the dispute intervener's dilemmas of "being in the middle"
which the current thin theories about "neutrality" do not address very well, particularly in a
place like Cambodia. For this discussion (which I perceive to be quite a preliminary one which
needs to be followed up in other projects) I have taken some ideas of Habermas as they have
been extended into the field of deliberative democracy and refined by Seyla Benhabib and Iris
Young, and as they have considered in the field of public policy dispute resolution by John
Forester.

The term "communicative action" is associated with German philosopher Jürgen Habermas,
who is considered one of the leading philosophers of the twentieth century. His thinking has
penetrated Europe for several decades, but it is only in the past decade or so that his work has
been considered by many lawyers or political scientists in North America. Habermas seemed
attractive because of his association with critical theory and his focus on dialogical processes.
Habermas's corpus is vast, as are the writings about him, so only a few selected works were

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86 “Trusted Mediator,” supra note 78.
Habermas is generally associated with critical theory tradition of the Frankfurt school. While he continues with the Enlightenment's valorisation of rationality, Habermas is not easily slotted into a particular political ideology. Commentators have variously located him within the traditions of leftist critical theory, liberalisms and republicanism. Some place him as a postmodernist thinker with liberal democratic leanings. Unlike many postmodernist thinkers who reject modernity, Habermas has retained a goal of completing the project of the Enlightenment, of which liberalism and Marxism are both creatures. Habermas himself has described his approach to Marxism as one of "reconstructing" Marxian historical materialism, seeing it not primarily as a methodology to be applied, but "as an outline for a theory of social evolution awaiting empirical validation." Thus, he has deliberately moved away from privileging Marxist ideology but has not rejected Marxian social analysis. I will not try to pin down his political ideology any further, except to say that he remains associated with the left and not with the rolling back of the welfare state as are the neo-liberals.

Rather than advancing particular substantive ideological prescriptions, he takes a procedural approach. He does this to try to escape the substantive moral dilemmas posed by the fact of ethical and moral pluralism. Since utilitarianism and relativism have not provided robust solutions to these dilemmas, he tries to move toward universal deontological ethics while still acknowledging, respecting and attending to the particularities of given contexts. Habermas tries to come to terms with the multiplicity of substantive truth-claims within a given context by setting up conditions in which "truth" is validated through consensus. But it is not just any

91 "Future of the Welfare State," supra note 89.
consensus that will be "valid." He recognizes the problems of power imbalance and exclusion that affect any supposed consensus within a given social structure. Therefore, he says that for social norms to be valid, an "ideal speech situation" must exist in which the following conditions are found:

1. Everybody can make statements with equal right and no temporal, factual, and social limitation.
2. Everybody can question and criticize statements with equal right and no temporal, factual, and social limitation.
3. Only the justification of statements by reasons in argumentation determines the acceptance of a statement.
4. For two competing statements, the one that can be justified by better arguments will be accepted. An argument is the better one if it can justify a statement by reasons that everybody holds true. An argument means the logical derivation of a particular statement from a more generally accepted idea, norm, or law under specific conditions.
5. As long as everybody agrees with a statement under conditions 1, 2, 3, and 4, a statement is taken as valid.92

Thus, for Habermas there is no ethical validity in norms created in situations where one group dominates or coerces another into adopting its ethical norms.

Some have suggested that Habermas's ideas can be used as a model for public participation processes,93 so it is important to say that he does not intend this. He has tried to avoid

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92 These are the elements of Habermas's ideal speech situation as set out in R. Münch, "A Theory of Domination and Conflict: Ralf Dahrendorf" in Sociological Theory from the 1850s to the Present (Chicago: Nelson-Hall, 1994) at 247.

93 John Forester, a professor of planning at Cornell University, and one of very few established North American public disputes scholars to have considered Habermas in any depth, has criticized this use of Habermas. "On Not Leaving Your Pain at the Door," supra note 9. For Forester's consideration of Habermas in public policy and planning, see J. Forester, Critical Theory, Public Policy, and Planning Practice (Albany: SUNY Press, 1993).
proposing a universal design for a public dialogue procedure, because, he says, particular procedures need to be developed in their particular contexts. John Forester warns against reading Habermasian ethics as a blueprint for designing public deliberation processes, saying that Habermas's ideal speech situation was never intended as such, and is too general to be used as a design prescription. This is partly because "... planning and policy analysis take place in a political world; planners and analysts need to anticipate and respond to foreseeable relationships of power and domination. ..."\(^{94}\) This, says Forester, is "[h]ardly an ideal form of dialogue, real public deliberation suffers from inequalities of power, poor information, inadequate representation, histories of violence brought to the table, histories that silence the voices of many parties."\(^{95}\) Therefore, Habermas's test cannot tell us how to arrange public dialogue meetings in a given setting where parties inevitably have considerable differences in education, negotiation skill, organizational capacity and resources for participation. There remain many judgments to make about "how to publicize the meeting, whom to invite, how to think about representation, how to pace the meeting, when to speak up and interrupt or not, and so forth, and Habermas's general test does not begin to tell us how to make all these more particular judgments."\(^{96}\)

Habermas's intention is to provide ways to test the validity of substantive norms through evaluating the process of communicative agreement by which the norms were reached. But even though Habermas intended his ethical framework to be used to evaluate policy outcomes rather than as a prescription for process design, it is important to listen to Habermas's tests for validity of norms while setting out to design a particular deliberative process. One is wise to design deliberation processes with a test of its outcomes in mind. For example, Forester suggests that in designing processes "we should anticipate several of Habermas's criteria: Are certain people excluded from, or marginalized in, the conversation? Are certain kinds of


\(^{95}\) Ibid. at 9.

\(^{96}\) Electronic communication from John Forester (21 April 2001).
arguments or data marginalized or excluded?" 97 Thus, “Habermas ... is certainly relevant, but too general to be specifically prescriptive, so people who follow his general guidelines to the neglect of situational particulars like differences in skill, education, access, organizational capacity and so on will be blind to important considerations that Habermas himself would care about a great deal.” 98

By focussing on procedural tests of outcomes, Habermas distances himself from any substantive political ideology or ethical principle. This is why he is seen as ideologically slippery or ephemeral, appearing phantom-like among the critical theorists and the liberals. But Habermas does not easily slip away from substantive principles; he does not depart from several important values: equality, autonomy and freedom of expression. These principles are surely as substantive as they are procedural. Thus, Habermas remains faithful to Western, democratic, rationalist thinking.

Habermas can also be criticized for failing to account for the real problem that consensus may not make something right (even if it meets his test of an ideal speech situation). Conversely, lack of consensus may not make something wrong. Seyla Benhabib illustrates this problem with the hypothetical example of a maxim “Do not inflict unnecessary suffering,” pointing out that sadists or masochists will not agree and the consensus will be spoiled. The insistence on consensus, says Benhabib, leaves Habermas open to the same kinds of attacks suffered by utilitarians. 99 Benhabib points out that communicative ethics may provide less a model for achieving universal morality, than for achieving political legitimacy. 100

Benhabib tries to make moral improvements to Habermas by retaining the dialogical, process-

97 Electronic communication from John Forester (26 June 2001).

98 Ibid.


100 Ibid. at 346
oriented approach to consensus but grounding it with two universal, but (she asserts) non-
foundational substantive rights: first, the “entitlement to universal moral respect,” by which she
means recognition of “the right of all beings capable of speech and action to be participants in
the moral conversation,” and second, “egalitarian reciprocity” by which she means that “each
has the same symmetrical rights to various speech acts, to initiate new topics, to ask for
reflection about the presuppositions for the conversation, etc.”

Habermas also has difficulty sliding away from critiques of masculinism to the extent that
Western Enlightenment rationalist thinking privileges masculinist ways of thinking, being and
doing. Feminist writer, Iris Young, takes concepts of deliberation farther than Habermas or
Benhabib with her conception of “communicative democracy” in which individuals actively
attend to one another’s differences such as class, gender, race and religion. Through discourse,
she says, participants can transcend their original “situated knowledges” and thus move out
of their cultural and ideological bounds. According to Young, this differs from the liberal
approach to deliberative democracy in which people leave behind their particular experiences
and interests (as with Rawls’ veil of ignorance). This communicate approach also differs from

101 Ibid. at 337; see also S. Benhabib, Situating the Self: Gender, Community and Postmodernism in
Contemporary Ethics (New York: Routledge, Chapman and Hall, 1992) at 29; S. Benhabib, “Toward a
Deliberative Model of Democratic Legitimacy” in S. Benhabib, ed., Democracy and Difference: Contesting the
Deliberative Model of Democratic Legitimacy”].

102 Young prefers “communicative democracy” over “deliberative democracy” so as to distance herself from
some of the biases within North American forms of deliberation, discussed later. I. Young, “Communication and
the Other: Beyond Deliberative Democracy” in S. Benhabib, ed., Democracy and Difference: Contesting the
the Other”]. It was not possible in this project to read the considerable body of literature on deliberative
democracy. See for example, J. Elster, ed., Deliberative Democracy (Cambridge, UK: Cambridge University
Press, 1998); S. Benhabib, ed., Democracy and Difference: Contesting the Boundaries of the Political (Princeton:
Princeton University Press, 1996). John Forester is one of the few public disputes academics who has deeply
examined this literature. See the extensive bibliography in J. Forester, The Deliberative Practitioner: Encouraging
Participatory Planning (Cambridge, MA: MIT Press, 1999) [hereinafter Deliberative Practitioner].

103 “Communication and the Other,” supra note 102 at 127.

104 “Communication and the Other,” supra note 102 at 126. Young does not mention, but appears to be
referring to Rawls’s “veil of ignorance,” see J. Rawls, A Theory of Justice (Cambridge, Mass: Belknap Press of
interest-based liberal approaches:

Democratic processes [such as Young's] are oriented around discussing this common good rather than competing for the promotion of the private good of each [as in the liberal utilitarian approach]. Instead of reasoning from the point of view of the private utility maximizer, through public deliberation *citizens transform their preferences* according to public-minded ends, and reason together about the nature of these ends and the best means to realize them. In free and open dialogue others test and challenge these assertions and reasons. Participants are careful to sort out good reasons from bad reasons, valid arguments from invalid. The interlocutors properly discount bad reasons and speeches that are not well argued, and they ignore or discount theoretical flourishes and emotional outbursts. Putting forward and criticising claims and arguments, participants in deliberation do not rest until the 'force of the better argument' compels them all to accept a conclusion.\(^{105}\)

This reasoned approach, she says, is better than a power approach. Nevertheless, Young sees the importance of taking into account and doing something about asymmetrical power. She states:

> Deliberative theorists tend to assume that bracketing political and economic power is sufficient to make speakers equal. This assumption fails to notice that the social power that can prevent people from being equal speakers derives not only from economic dependency or political domination but also from an internalized sense of the right one has to speak or not to speak, and from the devaluation of some people's style of speech and the elevation of others. The deliberative ideal tends to assume that when we eliminate the influence of economic and political power, people's ways of speaking and understanding will

\(^{105}\) "Communication and the Other," *supra* note 102 at 121[emphasis added].

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be the same; but this will be true only if we also eliminate their cultural
differences and different social positions. The model of deliberative democracy,
that is, tends to assume that deliberation is both culturally neutral and universal.
A theory of communicative democracy that attends to social difference, to the
way that power sometimes enters speech itself, recognizes the cultural
specificity of deliberative practices, and proposes a more inclusive model of
communication.106

Young gives examples of what she means by internalized domination or elevation of some over
others: Speech that is “assertive and confrontational” is more valued than “speech that it
tentative, exploratory, or conciliatory. In most actual situations of discussion, this privileges
male speaking styles over female.”107 Also, white, better-educated people may act as though
they have a right to speak and that their words carry authority, where as others groups feel
intimidated by formality and rules of parliamentary procedure. Norms of articulateness, she
says, “must be learned; they are culturally specific, and in actual speaking situations in society
exhibiting such speaking styles is a sign of social privilege. Deliberation thus does not open
itself equally to all ways of making claims and given reasons.”108 Young also points to
American research which suggests that (in American culture) norms of deliberation favour
speakers that are calm and lack emotional expression; such speakers are falsely seen as more
objective and thus more credible than speakers who express anger, hurt, passionate concern or
nervousness.109 She notes that research in the United States has noted African-American and

106 “Communication and the Other,” supra note 102 at 123.

107 Ibid. at 123.

108 Ibid. at 124.

109 Ibid. at 124, citing several authors. Young's concerns mirror worries expressed about ways women and
members of some cultural minorities may be disadvantaged in mediation processes. See T. Grillo, “The Mediation
Alternative: Process Dangers for Women” (1991) 100:6 Yale L.J. 1545 at 1572-81 who discusses the suppression
of women's, particularly black women's, anger in both adjudication and mediation in America. Grillo cites a
number of examples. It is beyond the scope of this project to discuss the literature on emotions and conflict, which
is another neglected area in the field of conflict resolution. See, e.g. the following works: Sybille Artz, Feeling As
a Way of Knowing: A Practical Guide to Working With Emotional Experience (Toronto: Trifolium Books Inc.,
Latino informants' perceptions of Northern European rationalist and non-emotive cultural biases in the dominant conceptions of deliberation. She challenges the notion that emotions are somehow opposite to reason or that emotions impede reason.

Therefore, Young would go beyond reason. She would validate other ways of knowing and other forms of expression, including emotions. She argues it is important to insist that differences in deliberation styles not be ignored or discounted, but perceived and attended to. This is what can enable the transformations in preference that deliberative theorists hope for. Young says that such transformations occurs in three ways:

1) Confrontation with different perspective[s], interests, and cultural meanings teaches me the partiality of my own [meanings], reveals to me my own experience as perspectival. 2) Knowledge that I am in a situation of collective problem solving with others who have different perspectives on the problems and different cultures and values from my own, and that they have the right to challenge my claims and arguments, forces me to transform my expressions of self-interests and desire into appeals to justice. . . 3) Expressing, questioning and challenging differently situated knowledge, finally, adds to the social knowledge of all the participants. . . This greater social objectivity increases their wisdom for arriving at just solutions to collective problems.110

To deal with these issues of asymmetrical power, Young calls for a broadened form of communicative democracy that "equally privileges any forms of communicative interaction
where people aim to reach understanding.”¹¹¹ This, she says, calls for something beyond critical argument.

Young suggests the addition of certain features of discourse, namely greeting, rhetoric and storytelling¹¹² which she believes could help counter rationalist and non-emotive cultural biases. A procedural norm of “greeting” would include preliminaries that establish trust and respect, for example, honorific titles, introductory speeches that acknowledge achievements, and so forth. These would include gestures of politeness and deference, hospitality and appropriate physical gestures.

Young would also specifically include rhetoric among her procedural norms. Actually inviting rhetorical styles of speech counters those who set up processes in which they “... attempt to distinguish rational speech from mere rhetoric and in so doing they usually denigrate emotion and figurative language.”¹¹³ Thus, Young would create a place for rhetorical persuasion and passion. After all, she notes, “… persuasion is partly seduction” referring to Plato's discussion of Socrates. Rhetoric gets and keeps attention: “The most elegant and truthful arguments may fail to evoke assent if they are boring. Humor, wordplay, images, and figures of speech embody and color the arguments, making the discussion pull on thought through desire.”¹¹⁴

Third, Young would create space for storytelling in her model of communicative democracy.¹¹⁵ It is difficult to do justice to other people's perspectives that we do not share and do not understand. Stories help people understand experiences even if they do not share them. I have already mentioned a Cambodian example of the power of storytelling to persuade. In the work

¹¹¹ Ibid. at 125.
¹¹² Ibid. at 129.
¹¹³ Ibid. at 130.
¹¹⁴ Ibid. at 130-31.
¹¹⁵ Ibid. Note that John Forester would also incorporate story telling into public deliberation processes. See “On Not Leaving Your Pain at the Door,” supra note 9, discussed further below.
of the Nobel Peace Prize-winning International Campaign to Ban Landmines, the presence and stories of land mine survivors such as Tun Channareth\textsuperscript{116} and thirteen-year-old Song Kosal\textsuperscript{117} and others have been strongly persuasive features. Stories express and exhibit people's subjective experiences to others. Stories evoke sympathy, breaking down resistance and barriers to important points of view and other experiences. Narrative is better than rational argumentation at explaining to “. . . outsiders what practices, places, or symbols mean to the people who hold them. . . Values, unlike norms, often cannot be justified through argument.”\textsuperscript{118} Storytelling also “tends to be more egalitarian than typical deliberative processes.”\textsuperscript{119} Critical argumentation privileges the educated and the dispassionate, but everyone has a story and can tell it with equal authority.\textsuperscript{120}

Seyla Benhabib criticizes Young's transformative approach, saying that Young does not adequately distinguish between the transforming of partial perspectives, and the communicative agreements that must be reached in deliberation. However, on Young's behalf, I might argue that her approach does not necessarily exclude agreement. Transformation of partial perspectives goes a long way toward opening the doors and creating more hospitable spaces for actual agreements. In some public policy dialogues, transformed relationships may be necessary pre-conditions to eventual agreement on specific policies. And sometimes, what is really required is transformed relationships, such as in ongoing situations where parties must together do much more than make deals. It may be more important for the parties to transform their habitual ways of interacting as leaders and their ways of being together in communities.


\textsuperscript{117} K. Song, Closing Plenary, Hague Appeal for Peace Conference, May 11-15, 1999 (Hague Appeal for Peace, 11-15 May 1999), online: <http://www.haguepeace.org/conference/speeches/closing/closing3.html> (date accessed: 8 May 2001). This conference was attended by more then 10,000 people from at least 100 countries. Song Kosal, a 13 year old Cambodian land mine survivor.

\textsuperscript{118} "Communication and the Other," supra note 102 at 131.

\textsuperscript{119} Ibid. at 132.

\textsuperscript{120} Ibid. at 132.
Creating new habits or “rituals” of interaction may be more important for structural change than creating new agreements.

Habermas has been accused of utopian thinking because the ideal speech situations he describes (or as modified by Benhabib and Young) can never exist. But Habermas acknowledges this, saying that he does not propose that the ideal can be accomplished, but only should be used as a standard of evaluation of norms in a given context. The obvious problem is that it is likely that no substantive norm could ever pass the procedural tests he sets out. This does not mean his tests are valueless, but that they provide aspirational standards.

Benhabib defends deliberative approaches against institutionalist attacks of “utopian irrelevance.”\textsuperscript{121} She says theories of deliberation elucidate existing principles and the logic of existing democratic practices. Thus, she says, deliberation is not a theory in search of a practice, but a practice in search of a theory.\textsuperscript{122} In this she echoes many people in the field of conflict resolution who believe that conflict resolution practice is ahead of theory and that theories need to be built by listening to the stories of practitioners.\textsuperscript{123} The elaboration of this section has been an attempt to propose some theory that might undergird, strengthen and guide practices in public policy conflict resolution, public consultation and other public participation practices. These theories, together with theory about incommensurable moral conflict used in creation of “public conversations” initiatives, seek not agreements or changes of people’s fundamental values, but better relationships among public opponents. Examples include experiments with public conversations in the abortion issue in Boston\textsuperscript{124} and on racism in Hawaii.\textsuperscript{125}

\footnotesize
\begin{itemize}
\item \textsuperscript{121} “Toward a Deliberative Model of Democratic Legitimacy,” \textit{supra} note 101 at 84.
\item \textsuperscript{122} \textit{Ibid}.
\item \textsuperscript{123} \textit{Deliberative Practitioner, supra} note 102 at 9-10.
\item \textsuperscript{124} Public Conversations Project: Project on Abortion, online: Public Conversations Project <http://www.publicconversations.org/Pages/proj.html> (date accessed: 9 May 2001).
\item \textsuperscript{125} P. Adler & e. al, “Race, Culture, Identity: Can We Confront the Truth?” \textit{Honolulu Advertiser} (19 November 2001).
\end{itemize}
Practitioners in shared decision making processes in British Columbia, while not referring to Habermas, seem to have attempted to move toward policy consensus by designing deliberative processes that aim for process goals similar to those outlined in Habermas's ideal speech situation. For example, stakeholders in BC's CORE round table processes were defined by Stephen Owen more broadly than Susskind does. Owen included "youth" as a sector. Activist mediation approaches were used to balance power among sectors by providing some funding to some less financially able stakeholders. CORE made attempts to train round-table negotiators. CORE even established a code of conduct for public participation. The extent to which storytelling approaches were used is not disclosed in literature about CORE. To my knowledge there have been no cultural or feminist critiques of the deliberation processes of CORE.

Did CORE work? As discussed in Chapter Four, many commentators say no. For example, there was not enough funding to equalize the stakeholders ability to participate. There was a need for more training for stakeholders to make CORE's processes work better. The dialogue did not reach the standards of Habermas' ideal speech situation; roundtables did not result in a consensus. The plans produced partly by CORE discussions and partly by recommendations of the Commissioner did not result in a perfection of public legitimacy. However, there were numerous points of general consensus reached in CORE round tables that guided the ultimate recommendations of the Commissioner. There is evidence that existing power structures in favour of big forest businesses were altered, and that the emerging dialogue did modify and improve the ongoing relationships among the stakeholders in BC. It would be interesting to repeat the experiment in the light of its experiences and in the light of knowledge of the theories I have described. Would the brilliant and dedicated practitioners of CORE do things differently? In many respects they worked beyond the theoretical and practice experience they

126 Please refer to Chapter Three, infra, definition of "stakeholders."

127 CORE's Model Code of Conduct for Public Participation is set out at Appendix X.


had at hand. And, as Iris Young might say, it was better than approaches based just on power.

5.4.1.3 Narrative approaches

Many disciplines have considered narrative approaches in recent years, including political science, law, and psychology. The literature on narrative approaches in the field of conflict resolution itself is small and draws largely on psychological approaches in the field of mediation. This literature needs to be more thoroughly examined and better integrated into the thinking on public dispute resolution and public participation. Springing largely from critical theory, feminist or postmodernist perspectives this literature has potential to shed light on the problems of power that structural functionalist and utilitarian liberal approaches to conflict resolution do not seem to have been able to address.

The narrative approach to conflict resolution encompasses several streams including the "transformative" mediation approach of Bush and Folger, "narrative mediation" as articulated by Winslade and Monk and Cobb and a narrow stream of writing within the


132 Narrative Mediation: A New Approach, supra note 130.

133 “Narrative Perspective,” supra note 130.

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field of public deliberation. Narrative approaches (and deliberative approaches) are also used in “public conversations” projects that are currently the subject of experiments in various locations in North America. All these narrative approaches take a social constructionist approach to conflict and social interaction. Interestingly, authors from the “narrative” conflict resolution stream such as Bush and Folger, Winslade and Monk, Cobb, and Pearce and Littlejohn, tend not to cite Habermas or authors from the “public deliberation” stream (and vice versa), or if they do cite them it is only in passing. John Forester is one of the few who consider both streams.

While discussing the role of storytelling in public deliberation, Forester notes that “current accounts of deliberative democracy seem strangely silent about the place of historical trauma and victimization, pain and suffering as elements of deliberative consideration.” He calls for further exploration of “how the working through of historical trauma and processes of political deliberation might coexist, if not be closely intertwined.” Forester sees public deliberation as being involved in helping parties work through past losses through incorporating narrative approaches and rituals of story-telling. He calls for the active incorporation, rather than suppression, of traumatic histories in public deliberation processes. This requires that designing processes for public deliberation “create safe spaces for participation, both for homogenous groups as they articulate and rearticulate needs, and for heterogeneous groups facing each other, listening to and making claims on each other...” This would involve designing specific processes that allow for people to tell stories about both political histories and themselves as people. Such processes would “honor virtues of listening, attentiveness, and

135 Moral Conflict, supra note 13.
137 Ibid. at 211.
138 Ibid. at 217-18.
139 Ibid. at 218.
recognition, respect for differences and for rules protecting parties..."

Writing about “narrative mediation,” Sara Cobb points out that within the field of mediation, “storytelling” is still a metaphor that “does little more than suggest that disputants tell stories, much less a coherent theoretical frame for understanding and evaluating the storytelling process within mediation practice.” But the narrative approach is more than this. The focus of a narrative approach to conflict is on “conjoint storytelling” which is said to escape the dilemmas of mediator “neutrality.” Narrative approaches move away from the Western legal metaphor of intervener as Justitia, toward the idea of third party intervener as a kind of story-weaver. Interveners are no longer blind goddesses or even umpires who blow the whistle to review and refuse the action play by play. Rather, the intervener joins the disputants as active participants while striving to remain unentangled in the threads of the dispute. As a weaver of a tapestry of the parties history, present and future, the intervener can attend to the actors, the culture and the social structure. Metaphorically speaking, she directs attention to the loom (the historic social structure and the culture) acknowledging its features, its age, its component parts, its weaknesses, the places where careless workers or outsiders may have damaged it, its broken parts or ways in which it is not suited to parties' current capabilities and needs. She helps the parties set up the existing loom as well as possible (if it cannot be repaired or replaced in the particular discussion). She identifies all the important threads she can (parties, stakeholders, issues), making sure that all are accounted for and represented (identifying and ensuring representation of actors and those affected). During the dialogical weaving process, she continually tries to ensure that all threads are woven into the new story-tapestry and do not become mangled in the loom during the process. Of course, like all metaphors, this is an incomplete one, but it shows – and allows – things that other metaphors do not.

Cobb's version of the narrative approach is a post-structuralist one in which the narrative "begins to operate as a description of the evolving and reflexive relationship between story

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140 Ibid. at 218.

141 "Narrative Perspective," supra note 130.
There is a blurring of the content and the process which dissolves the possibility of mediator “neutrality,” acknowledging that the intervener’s role is to help the parties build coherence in their stories toward a new joint reality of their making. The intervener becomes a co-participant in constructing and transforming the conflict narratives. The intervener is part of the politics of the process in actively choosing which stories become dominant and which become marginalized as the conjoint story emerges. Specific techniques have emerged as practitioners have experimented with narrative mediation, but detailed discussion of techniques goes beyond the needs of this project.

In Cambodia, and in Thailand, our conferences did take a narrative turn at some points, but not in any deliberate way that might suggest a narrative approach in our work overall. For example, in preparations for the 1995 conference, we suggested that our Cambodian host partner seek out people who were working on conflicts in local situations and to ask them to tell the conference about their work and the issues they faced. The most powerful lessons (to my mind) came from those who departed from analytical or prescriptive approaches to tell the stories of what they did and how it worked. One example is the story by Huy Rumdoul about her work with urban poor people and how they negotiated with the city of Phnom Penh concerning evictions of squatters. Huy Rumdoul’s story provided many encouraging insights about what might be possible in specific settings in the existing political and bureaucratic entanglements of Phnom Penh. Cambodian participants also said they learned best about North American approaches from the dramatization of a hypothetical land use dispute in Canada; in fact they liked this well enough that they recreated the drama with Cambodian actors in a videorecording that included the short analytical explanations of the demonstration role-play provided by the Canadian

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142 Ibid. at 51 [emphasis in original].

143 Ibid. at 52.

144 See ibid; and Narrative Mediation: A New Approach, supra note 130.

visitors.\textsuperscript{146}

It may not be right to contrast "activist" approaches, "contingent social norm" approaches and "narrative" approaches to mediation.\textsuperscript{147} Rather, conveners and interveners in public dialogue processes could attend to structural issues such as power imbalance, inequality, injustice, inadequate training or other resources for parties, inadequate representation or advocacy, as activists might do. Interveners could also take a constructivist perspective by creating opportunities for stories to be fully told, listening to histories and other stories, refining them, learning and helping parties learn from the stories and helping parties create new stories that take into account the activists concerns. Finally, interveners could have a primary concern with building or reconciling relationships as foundations for sustained public dialogue.

5.4.2 New emphasis in international relations on human relationships and reconciliation

At this point in the discussion, it is important to return to Lederach and his emphasis on reconciled relationships as the key focus for sustainable peacebuilding in places that have seen deep-rooted and deeply destructive conflicts. The field of international relations, as it relates to situations where there have been severe and wide-spread human rights abuses, is beginning to focus more attention on concepts like reconciliation, reparations, apologies and forgiveness.\textsuperscript{148} Restorative justice approaches are gaining new currency in international relations. Saunders\textsuperscript{149} recent book places human relationships at the centre of his vision of peace processes. He proposes a staged process for the development of "sustained dialogue" which he sees as crucial


\textsuperscript{147} For the thoughts in this paragraph, I am indebted to John Forester's comments in his gracious correspondence in April and May 2001.


\textsuperscript{149} Public Peace Process, supra note 70.
to changing conflictual relationships. Non-official dialogues among citizens at all levels are not marginalized in his approach, but central: "Peace agreements will not produce peace until they are embedded in a political process for transforming a broadening range of relationships over time – a process planted in the practices of a healthy civil society." After the failures of decades – perhaps centuries – of realpolitik carrot-and-stick approaches to peace, these directions supported by respected scholar-practitioners provide welcome refreshment, and even hope.

5.4.3 Cambodian attempts to increase and improve public dialogue

This section turns to some Cambodian-driven initiatives for participatory dialogical approaches to public policy development related to peacebuilding and conflict resolution. These brief descriptions provide no answers. What they are intended to do is to provide some possible venues for learning from Cambodians about participatory, dialogical, transformative peacebuilding.

Apart from resource issues and the need for people in any country to work with a variety of people from various places, Cambodians do not really need to import experts in order to develop their own praxis. There are several settings where stories of Cambodian public dialogue practitioners can be plumbed for what they can teach other Cambodians (and foreigners). While I have had discussions or correspondence with all of the individuals mentioned in the following examples, the research for this project did not allow in-depth case analysis or in-depth interviews. Therefore, this section can only offer some settings where it is suggested that it would be fruitful to collect in-depth case studies and narratives. I believe this would encourage Cambodian practitioners as well as facilitate their learning from one another (and, if foreigners were involved, it would certainly facilitate the learning of foreigners). Foreign funding and consultants could be directed at facilitative efforts to assist Cambodian researchers develop experience at this kind of participatory research, theory development and

150 Public Peace Process, supra note 70 at xxiii [emphasis in original].

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5.4.3.1 Parliamentary Human Rights Commission 1994-1997

The first example is the practice of Kem Sokha and his colleagues in the Parliamentary Human Rights Commission which operated from 1994 to 1997. Kem Sokha is now the chair of the Senate Human Rights Commission and chair of the ASEAN committee for discussion about a national human rights commission in Cambodia. The example of the Parliamentary Commission under Kem Sokha is useful for what it can teach about designing human rights policies, institutions and systems for Cambodia. The Parliamentary Human Rights Commission...

education.

Each example is chosen for its illustration of particular aspects of public policy dialogue relevant to human rights in Cambodia. Some of these initiatives are intertwined with one another in some ways, much as Canadian conflict studies and practice experiments use various combinations of the ideas and people working on particular issues. All these examples have either used local practitioners and researchers, or focussed on the illumination of local knowledge. It is also important to note that these individuals and programs are not necessarily currently in close conversation with one another; they have differing affiliations and approaches. All of them are dedicated, sincere, thoughtful and reflective practitioners. Some of them are also researchers and scholars. There are one or two examples of foreign initiatives here; these are chosen because their partnerships with local scholars and practitioners stand out. This is not to say that there are not many other fine examples of peacebuilding work by foreigners in partnership with Cambodians; these are chosen for their focus on public participation or conflict resolution. The list is not exhaustive. In discussing these examples, it is important not to lose sight of the persistent, courageous and intelligent work of Cambodian human rights, legal development, women’s development and democratic development NGOs in documenting and making public the many examples of human rights abuses that give rise to the need for fair and efficient investigation, resolution, education and enforcement mechanisms. Cambodians working on human rights are often involved in planning, organizing or participating in the initiatives discussed above.
Commission, as it operated from 1994 to 1997, had successes largely because of the commitment of Kem Sokha. It failed largely for the same reason, since Kem Sokha was a prominent member of the opposition until the unstable 1993-1997 coalition fell apart in July 1997. The parliamentary members of the Commission received over a thousand complaints from the public between 1994 and 1995, including allegations of severe brutality by authorities. This complaint level demonstrated a good deal of confidence and hope on the part of people daring to complain about many things, the large majority of which involved land disputes. But the Commission had few resources and no staff until 1996. A good deal of international development money was spent training staff in 1996. Kem Sokha personally mediated a number of land disputes. Several educational events were sponsored by the Commission, including the Canadian conflict resolution training initiative in late 1996. An evaluation of the work of the Commission until the 1997 coup remains to be done and could be worthwhile (if it were possible). Areas of research might focus on what made the Commission an attractive venue for human rights complaints; its processes and activities; its impacts, its successes and failures in conflict resolution including the reasons.

5.4.3.2 Cambodian Institute for Cooperation and Peace (CICP)

The second example is the round table public policy dialogues and publications of the Cambodian Institute for Cooperation and Peace, led by Kao Kim Hourn, surrounding issues of ASEAN membership, elections, national reconciliation and a number of other issues. The CICP has led numerous workshops on topics ranging from ASEAN to elections to national reconciliation. CICP attempts to engage speakers from a variety of sectors and perspectives in think-tank workshops and symposiums, many of which result in publications in Khmer and English. The CICP has been working to develop relationships and trust among polarized

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152 The publications of CICP are listed at its website, online: CICP <http://www.cicp.org.kh/public.htm> (date accessed: 10 May 2001).
groups as well as trying to build "the pole of neutrality"\textsuperscript{153} in Cambodia.

5.4.3.3 Center for Social Development (CSD)

The third example is the work of Chea Vannath and her colleagues at the Center for Social Development on public dialogues about many issues from garbage collection and public toilets to national reconciliation. In 2000, CSD attempted to gauge public views about what to do about the Khmer Rouge past. CSD held public forums in three localities in which ideas about the trial of the Khmer Rouge were discussed and debated by ordinary Cambodians from all walks of life.\textsuperscript{154} In conjunction with the forum, CSD conducted a poll of 642 persons attending the forums. From these forums, CSD concluded that there is a need for broader public participation in developing a reconciliation process that will address the particular needs of Cambodians in dealing with the past.\textsuperscript{155}

CICP's Kao Kim Hourn and CSD's Chea Vannath and their colleagues could tell numerous stories about different public dialogue processes they have initiated. They can provide opportunities to learn about the design of processes for public dialogue in Cambodia. These efforts might usefully be considered together with the work led by OXFAM on land disputes (discussed above).

5.4.3.4 Center for Advanced Study: Ethnographic research and conflict analysis

The fourth example involves the work of Hean Sokhom and William Collins with Cambodian researchers who conducted ethnographic research about village level conflict resolution\textsuperscript{156} and

\textsuperscript{153} I heard this term in September 1998 and June 2000 from Dr. Kao Kim Hourn, Director of the CICP.

\textsuperscript{154} Khmer Rouge and National Reconciliation, supra note 55. Secret ballot polling done at the forums showed that about two thirds of those polled believe trials of Khmer Rouge leaders would foster national reconciliation.

\textsuperscript{155} Ibid. at 2.

\textsuperscript{156} W. Collins, Dynamics of Dispute Resolution and Administration of Justice for Cambodian Villagers (1997) [unpublished, archived at Cooperation Committee for Cambodia (CCC), Phnom Penh].

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planning processes. The work of Peter Gyallay-Pap, who has conducted ethnographic research in Cambodia is also associated with this Centre. Their stories could provide samples of participatory action research about the analysis and evaluation of community conflict resolution processes, human rights processes and public disputes. This work is important for showing how foreign researchers can work in partnership with Cambodian researchers to facilitate the gathering and dissemination of local knowledge.

5.4.3.5 Mennonite Central Committee, and American Friends Service Committee

The fifth example, is the grass roots work of the Mennonite Central Committee (MCC) and the American Friends Service Committee (AFSC). While the organizations are led by foreign expatriots, much of their work in Cambodia has been led by Cambodian staff using participatory methodology and local knowledge. Examples include the work of Ms. Turn Bunthan and Mr. Thorng Kakada in the AFSC's Local Capacities for Non-Violence (LCN) program, described in Chapter Two. The LCN and MCC have worked together in one village project to address villagers' concerns about security from banditry. The project facilitated local discussion and implementation of villagers' ideas such as locked gates across the roads to stop motorcycles (often used by bandits) from entering the villages at night, a bamboo clapper code to warn of danger, and community-wide agreements amongst village women that they will be bold enough

157 W. Collins, *Grassroots Civil Society in Cambodia: A Discussion Paper Prepared for a Workshop Organized by Forum Syd and Diakonia in September, 1998, Final Report* (Phnom Penh: Center for Advanced Study, 1998). This research discussed the work of village pagoda committees, the stories of whose members could provide useful instruction on participation at the local level. This work could be further contrasted with the stories of Cambodians involved in the work of SEILA led by UNDP, which has also been held out internationally as an example of local public participation in governance.


159 This work could be compared with conflict analysis work led by Alex Grzybowski in 1996 with Cambodian researchers. See A. Grzybowski, “Public Policy Conflict Analysis Framework, Appendix” in A. Grzybowski, *et al.*, eds., *Building Democratic Institutions and Practices in Cambodia: Proceedings from the Cambodia Commission on Human Rights Capacity Building Project* (Victoria, BC: University of Victoria Institute for Dispute Resolution, 1998). Several case studies were conducted in Cambodia by Cambodian researchers testing the conflict analysis framework developed by Grzybowski for the Canadian team's 1996 project. The case studies are unpublished.
to start conversations with strangers to learn why they are in the village. Goals of these projects are to facilitate grass roots peace by helping villages develop their own responses to rebuilding social structures, relationships and trust. Systematic gathering of people's experiences in these local public dialogues could be instructive. Comparisons might be drawn with the work of locally inspired village pagoda committees and the foreign facilitated local SEILA committees.

5.4.3.6 Cambodian Center for Conflict Resolution (now Centre for Peace and Development)

The sixth example is the work of the Cambodian Center for Conflict Resolution (CCCR), recently renamed the Centre for Peace and Development (CPD), which, beginning in 1995, drew together people from government and NGOs to put on the (in part) CIDA-sponsored 1995 conference (discussed in Chapter Four). This was a part of the CCCR effort to develop a centre for training and research in conflict resolution. Since 1998, the CCCR (now CPD) has been headed by Ok Serei Sopheak, formerly a high-ranking official with the Council of Ministers who supported the work of the Canadian team and the formation of the CCCR in 1995. The training program of the CCCR is headed by Huy Rumdoul, previously mentioned in the context of her work in negotiating with the city of Phnom Penh concerning the plight of squatters. The example of the CCCR illustrates the potential role of training and education in the development of public dialogue processes as well as civil service reform. The importance of training has been pointed out in the work of CORE in Canada, and in Cambodian work on local participation in environmental assessment. The importance of training has also been noted in the work of the dhammayietra movement, discussed next. Evaluation of effects of different types of training on the quality of participatory dialogue in Cambodia would be valuable research. Stories of experiences would be a valuable (and valid) qualitative approach to evaluation.

5.4.3.7 Dhammayietra Movement

Seventh, and finally, the example of the dhammayietra movement is briefly discussed for its
work in training at the grass roots level, and its example of coalition building and non-violent
direct action. As has been mentioned, Cambodia has strong traditions of conflict resolution and
mediation. The Buddhist sangha has in the past played central mediating roles in community
disputes. During the past two decades, several monks and many lay Buddhist peace activists
have been involved in peacework. The work associated with Venerable Maha Ghosananda is
the most famous. He and his lay associates worked with other monks including Yos Hut
Khemacaro to encourage leaders to negotiate the 1991 Paris Peace Accords. Maha Ghosananda
and Yos Hut Khemacaro are associated with the founding of the founder of the dhammayietra
movement in Cambodia which held annual dhammayietra walks beginning in 1992, and has
been lauded for its successful contributions to peaceful elections in 1993 and 1998. The
Cambodian Coalition for Peace and Reconciliation (CPR) has sponsored training in conflict
resolution and non-violence for many people including monks and nuns and others preparing
for dhammayietra walks. Leading peace scholars, like Dr. Chaiwat Satha-Anand of
Thammasat University in Bangkok, have been involved in this training. The dhammayietra
movement and monks like Yos Hut Khemacaro have contributed in significant ways to
practical theories of non-partisan engagement that take discourse about political “neutrality”
beyond narrow passive constructions of neutrality and beyond dominant Western legal or ADR
theories of neutrality. However, it must be emphasized that while a number of Buddhist
clergy and lay people have contributed in notable and newsworthy ways to peacebuilding in
Cambodia, the monkhood in general has been quite passive. The concept of “engaged
Buddhism” which has spawned ideas about non-partisan engagement is fairly new in Asia.

It has been generally noted that Buddhist moral traditions of Cambodians generally receive

in Cambodia Development Resource Institute (Phnom Penh: n.d. circa 1992); Y. Moser-Puangsuwan & M. Maure,
One Million Kilometres for Peace: Five Years of Peace Action Walks in Cambodia (Nonviolence International
South East Asia Program, 1996), online: NISEA

161 H.K. Yos, “Steering the Middle Path: Buddhism, Non-Violence and Political Change in Cambodia” in D.
Hendrickson, ed., Safeguarding Peace: Cambodia’s Constitutional Challenge, Accord: International Review of
Peace Initiatives, vol. 5 (London: Conciliation Resources, 1998); see the discussion in C. Morris, “Cases in
Religion and Peacebuilding: Cambodia” in H. Coward & G. Smith, eds., Religion and Peacebuilding (New York:
SUNY) [forthcoming in 2002].
relatively little attention in development projects and in scholarly treatment of Cambodian conflicts. In the Canadian projects highlighted in Chapter Four, Buddhist approaches to governance and conflict resolution were given voice, including recommendations by the Supreme Patriarch that village level mediation mechanisms be developed that are independent of the authorities.\footnote{Venerable Supreme Patriarch Venerable Tep Vong, “Summary of Keynote Address” in E. Mysliwiec & C. Morris, eds., \textit{Dispute Resolution in Cambodia: A Road to Peace and Reconciliation, Proceedings of a Workshop Held November 28-30, 1995, Phnom Penh, Cambodia} (Victoria, BC: UVic Institute for Dispute Resolution and Cambodia Development Resource Institute, 1997) at 19.}

### 5.5 Conclusion: Tapping, drawing and synthesizing local knowledge

What I hope to have demonstrated in this chapter is the considerable inadequacy of currently dominant theory in the field of conflict studies to understand and address public conflict about human rights in Cambodia. Also demonstrated are weaknesses in development practice, which does not match the international rhetoric of participatory development and equality. Finally, the summaries of Cambodian experiments with conflict resolution and multi-stakeholder dialogue illustrates the considerable local knowledge that can assist in developing Cambodian participatory public dialogue about human rights and democratic development.
Chapter VI

6 Step by Step: Suggested Meeting Places Along the Path

...[R]etaliations, hatred and revenge only continue the cycle [of violence] and never stop it... Reconciliation does not mean that we surrender rights and conditions, but rather that we use love. Our wisdom and our compassion must walk together. Having one without the other is like walking on one foot; you will fall. Balancing the two you will walk very well, step by step. – Maha Ghosananda

... in order for our society to stabilize and move forward, and for all people to develop to their full potential, we must work together. Our society is faced with the difficult issue of how to deal with our past. We should discuss it in public: civil society and government should have a dialogue... I want to help our people deal with this tragedy, find the truth and voice their opinions on the trial, on justice and on healing. This is the most important process to deal with justice, national reconciliation, healing, and genuine and lasting peace. – Chea Vannath

The previous five chapters document some learnings that have emerged from rich discussions among a number Canadians and Cambodians interested in peacebuilding and conflict resolution. It is hoped these chapters have demonstrated the need for increased attention to what the field of conflict studies can offer in the development of human rights policies and practices in Cambodia. This concluding chapter reiterates some of the main themes that have cut across all the chapters.

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Three connecting themes emerge. One is the importance of public participation in international development and peacebuilding work. Another is the importance of careful, context sensitive conflict analysis before prescribing processes for addressing conflicts. A third is necessity of seeing peace as a process of sustained dialogue.

6.1 Public participation

This discussion acknowledges and emphasises that a transformation toward broadly participatory public dialogue on human rights, using approaches and skills from the field of conflict resolution, may seem unrealistic given the violence-prone power approaches of Cambodian elites, and the top-down prescriptive approaches of the international community. This must be acknowledged as likely to continue in the short term. However, in Cambodia the desire for power sharing, public participation and for conflict resolution is present at all levels of society, including (in varying degrees) some government officials.

Despite the devastation of the past and many current setbacks and discouragements, many Cambodians, particularly leaders in civil society organizations, are demonstrating talent, skill, dedication and successes in developing non-violent and dialogical approaches to human rights conflicts. While speedy transformation is unlikely, sustained and loyal support of Cambodian experimentation and grassroots education in leadership ethics, conflict resolution and participatory public dialogue may well result in a harvest in another generation. The identification and development of existing levels of Cambodian talent and expertise in conflict resolution and peacebuilding need to be carefully fostered and nurtured in foreign development efforts.

Conflict resolution and peacebuilding efforts are bound to fail Cambodians if they are focussed on the perceived needs of international bodies and powerful nations' agenda of globalization. They are bound to fail if they do not consider the top-down characteristics of Cambodian society and politics before prescribing quick legislative or institutionalist fixes. Above all, efforts will fail if they do not consult broadly and deeply with the people who ought to benefit.
If foreign conflict process specialists are to have any use in Cambodia, it will be when they learn to see their efforts in the broader context of peacebuilding and when they learn to ask Cambodians about their human rights and conflict resolution needs and how to go about addressing them. Conflict resolution approaches to human rights policy discussions are also bound to fail if they are ignored or not consistently tried.

6.2 Conflict Analysis

These chapters aimed to set out a preliminary and incomplete example of the kind of extensive conflict analysis that needs to set the stage for transformative public dialogue about human rights. Analysis must be deeply contextual and needs to consider the issues, the actors, their relationships, the culture and the social structures all in a historical context that considers conflict as both dynamic and constructed through interaction in social relationships.

The importance of careful and comprehensive conflict analysis has been stressed in these chapters. Several conflict analysis frameworks were tested by applying them to the Cambodian human rights context. Chapter Two described and discussed some of the historical, cultural and legal context of current Cambodian human rights conflicts. In Chapter Three, I attempted to create a preliminary list and description of stakeholders in Cambodian human rights conflicts. A number of lessons seemed to emerge from this exercise. First, there are a number of definitions and meanings people ascribe to "conflict," "disputes," conflict "resolution," "peace," "human rights" and "law" all of which are value laden, ideologically shaped and construed variously within specific relationships, contexts and times. Thus, no conflict analysis is going to get at one "correct" assessment; one hopes analysis might illuminate what various stakeholders mean by these terms (or the terms from which these English language terms are interpreted) or any of the other things they might consider or discuss. This is why "conflict" analysis tools need to be tailor-made by the people within each specific context.

This is not to say there are no useful building blocks that might be useful across cultures and contexts. In Chapter Two, I considered and applied several frameworks that could be further
tested for their utility in different contexts and cultures. One was developed by Christopher Moore, who provides a framework that helps illuminate multiple sources of conflict (Appendix III). Another framework is provided by Maire Dugan who shows one way of connecting these various sources of conflict (Appendix IV). John Paul Lederach provides a third tool aimed at assessing the dynamics of conflict in terms of levels of escalation (See also Appendix V).

These need to be used together for comprehensive conflict analysis, and additional tools need to be developed that might better illuminate the history of conflicts within a narrative framework. Also suggested is the further joint development of conflict analysis frameworks and tools in consideration of what has been learned from Alex Grzybowski's useful example of an attempt at participatory design of a comprehensive conflict analysis framework for analysing public conflicts in Thailand and Cambodia. Finally, I emphasized that stakeholders need to be involved not just in conjoint stakeholder analysis but, where possible, in the design of conflict analysis frameworks and tools.

The fourth chapter contains a critique of the dominant North American theories and models of conflict resolution that have been applied and taught in many places in the world, including Cambodia. Specifically critiqued was the Harvard approach to interest-based negotiation and dispute resolution. While valuable in the contexts for which it was intended, the Harvard approach is not universally applicable. In prescribing an actor-oriented, a-historic approach, it obscures structural, cultural or historical factors that are important in many conflicts, particularly conflicts involving human rights or past wrongdoing, and conflicts among those who do not share the culture or ethical assumptions of the Harvard authors. Perhaps the Harvard approach was never intended to be used for negotiation in conflicts that have sources in structural inequalities, injustices and deep wrongs that have resulted in widespread trauma and ongoing violence. I also questioned whether the Harvard assumption of utilitarian ethics is suited to those who have duty-based, rights-based approaches to social morality. Finally, I questioned whether the Harvard approach can help much with incommensurable moral

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conflicts, in which category I see some aspects of the "Asian Values" dispute and other conflicts over international human rights.

6.3 Sustained dialogue: Addressing the key issues of moral conflict, power, impartiality and trust

Finally, given the Cambodian human rights situation and stakeholders, and given the critiques of various approaches tried in foreign development projects, I queried what might be appropriate to address Cambodian human rights conflicts. I suggested that the usual international human rights talk of lawyers and human rights advocates, while important, may not be enough. I offered descriptions of some newer currents being considered in the field of conflict resolution that might address four key problems in Cambodia, including issues of moral conflict, power, concerns about lack of impartial courts and other bodies, and trust. The currents suggested for consideration include deliberative and narrative approaches to public dispute resolution, activist mediation and other models for "being in the middle" as a mediator or decision maker in public policy issues. Also suggested are newer works on peacebuilding that emphasise relationships and reconciliation. The development of local knowledge is stressed, with particular emphasis on what could be learned from the experiences of dhammayietra movement.

After considering the Cambodian conflicts and the polarized power dynamics among the stakeholders, I came to the conclusion that it may not be the right time for negotiation of specific human rights legislation and institutions. However, this does not mean that no talk is possible. There could be more, and more sustained, experimentation with multi-stakeholder dialogue that does not aim at specific settlements, but aims only for more, better and more sustained dialogue among the stakeholders. Transformative approaches are suggested for experimentation, with an emphasis on trying out narrative approaches that are being tried in intractable conflicts in several places in the United States and Canada, including in dispute contexts in Hawaii and Canada that involve indigenous peoples. I offered some evidence that experimentation with transformative dialogue might be feasible in Cambodia; several
Cambodian organizations have been experimenting with multi-sectoral research, conflict resolution training, and public dialogues on issues ranging from public sanitation to the traumatic Khmer Rouge past. Foreign support of local public consultations that involve multi-sectoral information sharing and relationship-building is another way to encourage transformative public dialogue. These local efforts could be evaluated, assisted, expanded and better supported by international donors and foreign partners. Much could be learned from these experiments that might enhance world-wide knowledge.

It also seems important to find creative ways to encourage the government toward transformative dialogue aimed at building more trustful relationships with opposition parties and human rights NGOs. This may be necessary to build a sufficient ethos of power-sharing to allow good faith negotiations about specific human rights policies, legislation and institutions that will be fruitful in the long term. Who should intervene toward this end? Local NGOs cannot do it all. As has been seen in other situations where governments have called the shots and refused to budge, such as South Africa, it may take significant time, international pressure, building of internal NGO capacity and strength, and many dialogical processes at grass roots and middle levels to build sufficient local challenge to existing hegemonic ways of thinking, and also to create a climate for significant shifts at the level of central leadership.

To be successful, the design of dialogical processes must carefully consider relative power in selecting those who should participate in what kinds of dialogues. Therefore, it may be fruitful to spend some increased effort to introduce and model concepts of power other than zero-sum concepts so as to reduce fear and build confidence in the idea of power sharing among powerful leaders. As Buddhist leaders suggest, moral education may also assist in the building of broad support at all levels for the kinds of mutual responsibility and accountability that are present within both the liberal model "on the books" and traditional Buddhist governance ethics and morality. Facilitation of independence of civil society organizations could strengthen them against co-optation.

It is not sufficient to put all the responsibility for transformation on NGOs and on oppressed
groups, some of whom may not be sufficiently organized even to represent themselves. Children are one example. Unorganised poor people are another. Cambodian leaders need also to be the targets of education about alternative conceptions of power and governance. However, my experience suggests that leaders often choose to send middle-managers or designates to conferences and training events rather than attending themselves. Have there been attempts to hold multi-country workshops aimed exclusively at members of parliament, ministers and deputy ministers from a variety of countries?

In the quotation selected for the beginning of this chapter, the Venerable Maha Ghosananda cautions against naivety. A paradigm shift in the ways leaders conceive of power will not, in itself, necessarily transform the ways power is being exercised. However, without an adequate concept of "power with," there may never be a reason to move in its direction let alone to make a commitment to power sharing as an ideal. If alternative ways of seeing and using power are not even envisioned, there is no possibility at all of transformation toward that vision.

Further, the identification and encouragement of moral courage is needed to address the Aung San Suu Kyi's point that it is "not power that corrupts but fear." Examples and stories about fearless impartiality and refusal to be corrupted might encourage more incidents of fearless impartiality.

To add a realist approach to Cambodia's seemingly intractable issues concerning power and power abuse, it also seems crucial to persist with foreign pressure towards accountability in matters of international human rights, and to provide intelligent aid and technical assistance to this end. It seems clear that without sustained foreign pressure, Cambodian leaders are unlikely to make serious or sustained changes. Another caution against naivety is in order here. It is

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4 This suggestion is not aimed not just at "those countries" where authoritarianism is a concern. Observations of Canadian politics suggest that Canadian leaders and heads of powerful institutions could benefit from seeing some alternatives to realist paradigms of power.

important to recognize the presence of significant foreign assistance from countries that are not very concerned with international human rights. Given the lack of unity of countries concerning human rights practices together with seemingly fickle actions of those countries who say they are concerned, it may be that internal hegemonic change, led by local expertise, may be the only real long-term hope. Sustained grass-roots efforts, including approaches addressed to school children and families may provide Cambodians with the hope that the next generation of leaders will be better equipped to make fundamental change in human rights policy and practice.

Some specific ideas have suggested themselves to me throughout the research and writing for this project. These ideas include:

- evaluative research of conflict resolution training initiatives undertaken to date;
- narratives of selected peacebuilders in Cambodia, emphasizing details of their methodology and results. Peacebuilders of particular interest are Thida Khus, Chea Vannath, Yos Hut Khemacaro, Liz Bernstein, Sr. Denise Coghlan, Huy Rumdoul, and of course, Maha Ghosananda and his colleagues. Some of this research could be focussed on local stories about non-partisanship.
- elicitive training for purposes of learning about what is useful in existing conflict processes in Cambodia; using what is learned in development and refinement of training methodology useful for persons from a variety of sectors, including high level public officials, middle level civil servants, NGO leaders and workers village leaders, pagoda communities, churches, teachers and (perhaps most importantly) school children.
- focussed story-oriented workshops allowing opportunity to give examples of conflict resolution and non-partisan work by various of people at various levels of society, including people at high levels in government who are not necessary currently trusted. Purposes of such workshops could be to build empathy among participants, and draw from speakers their own self-reflection about the work they feel they are most proud of in terms of its peacebuilding or justice effects. Selected stories could be videotaped, transcribed and made available in Khmer and English.
international workshops held in Cambodia aimed at international comparisons of what has been done in other post-conflict countries, e.g. reconciliation in post-conflict countries, ombudsman experiments, religious approaches, educational approaches and grass roots efforts.

6.4 Restorative Justice and National Reconciliation

Largely omitted from this project have been discussions of restorative justice approaches, which to date do not appear to have been explored much in Cambodia. Brief comments about restorative justice approaches to national reconciliation have been made from time to time, such as suggestions for a truth and reconciliation commission, but these discussions have tended to be swamped by UN-led discussions about criminal-type trials of former Khmer Rouge leaders.

Therefore, I conclude with a reminder that most adults in Cambodia have been traumatized more deeply than most foreigners can even imagine. The factor of human pain and trauma must not be underestimated in any analysis or dialogue. This point can be illustrated by the description of one Canadian development worker about the reaction of Cambodian staff in her organization when Pol Pot died on April 15, 1998:

The faces staring at me were a mix; some were so very angry; some had that lost, glazed look and were somewhere else in their maze of memories: one said, “I cannot see,” another tuned out the world by being deaf. We had started a meeting about the reports of Pol Pot’s death. The thirteen staff had unanimously agree that is was not true. My response was to ask them to pretend it was true, what then. The emotions in the room swirled, the responses varied; some were sorrowful for not learning why he had done it, others said it doesn’t matter, “I don’t want to think about it anymore,” said one and then the memories started flowing and anger and hurt became the norm. Sambath was very angry, “there were 18 children in my family, only 3 of us survived – my grandparents, my aunts and uncles are all gone, my parents are too old, they don’t feel anymore.”
The others were nodding and then it started “I am of no value, I am of no value.” It was the phrase Pol Pot used to destroy them, “you are of no value.” It was horrible in its intensity, horrible to watch the refrain being picked up by everyone; it was horrible to see them being metamorphosised into emotionless, monotone robots.\(^6\)

Cambodians are persons of inestimable value – each one of them. Therefore, it seems crucial that attempts to facilitate public dialogue about human rights must go hand in hand with serious and sustained attention to the wide and deep traumas that have been experienced by most Cambodians, including key leaders.

True reconciliation, I suggest, is one of the keys to addressing problems of power abuse in Cambodia. Leaders will likely be unable to share power until they are no longer afraid to give up their current perceptions that their strategies keep them in control. They may refuse to give up power voluntarily until they have a sense of trust that their interests will not be irreparably harmed. Trust will be impossible to achieve without the building of relationships. In Cambodia, relationships, trust and uses of power are all bound up in the needs of people at all levels for reconciliation. Reconciliation will not be achieved by “forgetting” because forgetting is not yet possible for most Cambodians. If other holocausts are an indication, mere passage of time will not heal. Reconciliation will require sustained, restorative dialogue.

These chapters have asked and explored a number of questions. In concluding one needs to be reminded of the call of Buddhist and Christian leaders in Cambodia for responsibility and humility, recognizing that “we are all implicated, intentionally or unintentionally.” Therefore, I close with a final question: There is still a long way to go for people in Cambodia on their dhammayietra. Who will walk with Cambodian peacebuilders patiently, on their terms, step by step?

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Appendix II

Glossary of Some Dispute Processing Terms

**Negotiation:** a process in which two or more participants attempt to reach a joint decision on matters of common concern in situations where they are in actual or potential disagreement or conflict. Common styles of negotiation include "hard bargaining" or "positional" bargaining, "soft" bargaining, or "problem-solving" or "interest-based" bargaining.

**Mediation:** a process in which an impartial third party helps disputants resolve a dispute or plan a transaction, but does not have the power to impose a binding solution. Mediators use a variety of processes. Some mediators use "interest-based" processes,\(^1\) while others use "rights-based" approaches. Some mediators are "facilitative," providing only process assistance for negotiation and using interest-based approaches. Facilitative, interest-based mediation is taught widely in North America for the purposes of community, family and commercial mediation and tends to foster the avoidance of mediator recommendations or suggestions in order to preserve mediator neutrality and to encourage party control over outcomes. Other mediators, including many labour mediators and commercial mediators, may use an "evaluative" style, providing suggestions or recommendations. Evaluative, rights-based mediation processes are similar to adjudicative processes such as non-binding arbitration. Other mediators may be "activist," intervening to ensure all parties are represented and that power balances are redressed,\(^2\) but activist mediators may not necessarily make specific recommendations. Other mediators consider themselves to be "transformative" mediators, working less toward settlements and more toward transformation of relationship.\(^3\) Still others foster "narrative" mediation processes in which the mediator is more of a joint participant with the parties in the joint creation of new possibilities for the future.\(^4\) There is considerable debate in the field of conflict resolution about these differing approaches and styles of mediation. Many mediators are familiar with all these approaches and design mediation processes to suit the particular parties and the situation.\(^5\)

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A typical approach to interest-based mediation taught in North America involves a problem-solving approach in which the needs and interests underlying parties' positions are identified with a view to developing solutions that address as many of those needs as possible. Also, attempts are made to meet party needs by exploring available resources to test whether a perceived "fixed pie" or a "zero sum" can be expanded. A staged model emphasizing face-to-face mediation is common, involving introduction and commitment to the process; identification of issues and generation of an agenda; exploration of the parties positions for underlying interests; design or solutions; and formal agreement.

**Conciliation:** Many authors distinguish carefully between "mediation" and "conciliation," but there is no universal consensus as to what precisely is meant by each of these terms. The term "conciliation" has often been used interchangeably with "mediation." In Canada, the term "conciliation" generally refers to a process of dispute resolution in which "parties in dispute usually are not present in the same room. The conciliator communicates with each side separately using "shuttle diplomacy."" The term "mediation," by contrast, is generally used in Canada to describe third-party intervention in which the parties negotiate face to face. The distinction between "mediation" and "conciliation" often breaks down, since in "mediation" separate caucuses are often held with the parties, whereas in "conciliation" some face-to-face meetings may be held.

**Facilitation:** a process by which a third party helps to coordinate the activities of a group, acts as a process facilitator during meetings, or helps a group prevent or manage tension and move productively toward decisions. The facilitation role can be placed on a continuum from simple group coordination and meeting management to intensive multi-party dispute mediation.

**Adjudication:** a term that can include decision making by a judge in a court, by an administrative tribunal or quasi-judicial tribunal, a specially appointed commission, or by an arbitrator. An adjudicator determines the outcome of a dispute by making a decision for the parties that is final, binding and enforceable. The parties present their case to the adjudicator (or tribunal, commission or arbitrator) whose role is to weigh the evidence and make a decision that is final, binding and enforceable. Arbitration differs from courts and quasi-judicial tribunals in a number of respects. For example, many arbitrations are voluntary in that both parties agree to submit the dispute to arbitration, and the parties often agree on the selection of the arbitrator and the procedural rules. Generally, rules of evidence and procedure are more relaxed than the rules of court. Arbitration can also be ordered by a court or be compelled by a statute. In such cases, the arbitrator is usually appointed by a judge or government official. An arbitrator has limited jurisdiction that is strictly determined by the construction of the relevant arbitration agreement or statute. During the early 1970s, the "rent-a-judge" concept was initiated in the US in which retired judges hired themselves out as private arbitrators. In Canada, a number of arbitrators are retired judges, although arbitrators may come from a variety of occupations, such as law, engineering, real estate valuation, or construction. They are often sought for their substantive expertise in a particular area. In Canada, the climate for both international and domestic arbitration was made considerably more welcoming through significant legislative changes in the mid-1980s.
Non-binding arbitration: In non-binding arbitration, the disputing parties put their case before an impartial third party who renders an opinion or recommendation, which the parties may choose to accept or not. Thus, the process is adjudicative, but not binding. In a “mini-trial,” counsel for the disputing parties, and possibly the parties themselves, appear before a judge or expert lawyer who hears the case for both sides and renders an opinion as to what a judge might award in the case. In a “summary jury trial,” an informal “jury” is convened to make non-binding findings of fact or recommendations to the parties. Non-binding methods such as these can be effective as part of the traditional method of resolving disputes through litigation. If the resulting recommendation does not result in settlement, the parties usually go on to trial.

Facilitated policy dialogue, regulation-negotiation (reg-neg) and shared decision-making:
These terms refer to negotiated approaches to the formulation of public policies or regulations. In “policy dialogue,” “reg-neg,” and “shared decision-making,” representatives of affected parties and sectors of the public (termed “stakeholders”) work together with government officials to develop policies or regulations. These complex processes utilize impartial process facilitators—often people who are experienced mediators. These participatory public decision-making processes differ from two conventional approaches to government decision-making. First, in traditional decision-making processes government (or the civil service working under a legislative, regulatory or policy framework) makes decisions based on the advice of selected experts, and with the influence of lobby groups. A second conventional model is more broadly consultative: government consults with a representative group of people through advisory councils, public hearing processes and lobby groups and then independently makes a decision. Public dissatisfaction with these conventional approaches has led to increased demand for citizen participation in public decisions by a growing number of interest groups (stakeholders). Conflict over public decision making has become a significant concern, especially when it comes to environmental issues. British Columbia has experimented with public participation processes that invite government to share the decision-making power with groups of citizens using consensus-based, decision-making processes. A leading experiment was the shared decision-making processes of the Commission on Resources and Environment (CORE). This ambitious project used regional and local “round-tables” to attempt to build broad consensus among the various stakeholders. In this model of decision-making, government participates as a stakeholder at the negotiating table. The theory underlying this method of public participation is that, to the extent that consensus is reached by the table, government has no reason to do anything other than adopt the consensus decisions of the round-table, since government interests are reflected in the consensus outcome. Thus, while the legitimate authority of government remains intact, the consensus decisions of a representative group in which all interests have been accommodated will be irresistible to government policy makers. The thinking behind shared decision-making is that with this high level of public participation, the quality of information brought to the table will be more balanced and of a higher quality, leading to a better quality decisions. Furthermore, with a decision reached by a process that fosters a high level of consensus, there should be less public conflict about decisions that are made.

Ombudsman: The term “ombudsman” is Swedish in origin and is said to be etymologically gender inclusive. In the English language, however, the term has often been modified as
“ombudsperson” or “ombuds” office. A “classical” ombudsman is an independent high-level public official responsible to the parliament or legislature and appointed by constitutional or legislative provisions to monitor the administrative activities of government. The ombudsman has the power to investigate citizen complaints of maladministration and administrative injustice, as well as act on his or her own motion. The ombudsman may issue public reports and recommend changes to prevent further administrative injustices. There are several other forms of ombudsman office, but their common characteristics are impartiality, the power to investigate and the power to recommend. The traditional ombuds role within educational or corporate institutions has been one of an impartial authority that investigates a case and makes recommendations to remedy valid complaints. The ombudsperson's ability to investigate, persuasiveness and ability to make situations public are his or her sources of power. To be effective, the ombudsman should have sufficient security of office to ensure independence. In many institutions, the ombudsperson's power is backed up by the possibility of support from the governing body or the administration. In a “classical” ombudsman model, the ombuds office is separate from the executive body or administration, and reports directly to the governing body of the institution. Another common model, particularly within corporations, is an “executive ombudsman” who reports directly to the chief executive officer of the institution. Corporate ombuds offices generally follow the executive ombudsman model. An institutional or corporate ombudsman has been defined as an “impartial manager within the organization who may provide informal and confidential assistance to managers and employees in resolving work-related concerns; who may serve as a counsellor, informal go-between and facilitator, formal mediator, informal fact-finder, upward-feedback mechanism, consultant, problem prevention device and change agent; and whose office is located outside ordinary line management structures.” Whether “classical” or “executive,” ombudspersons share the characteristics of impartiality, investigative authority and recommendatory powers. Some ombuds offices use mediation and conciliation; others focus on exclusively investigation and recommendation.

Non-violent direct action: Non-violent direct action refers to the coordinated actions of people to influence or change government policy or legislation through non-violent means, such as public demonstrations and protests, lobbying and media campaigns. While non-violent in philosophy, methods are competitive and non-collaborative: techniques used are non-violent coercion such as sit-ins, blockades, persuasion, arousal of public sympathy for the particular cause and in some cases civil disobedience.

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Appendix III

Sources of Conflict

Facts, Data, Information: lack of information, misinformation, differing methods of assessing or emphasizing or interpreting information.

Interests, Needs: security, welfare, identity/relationship, freedom/choice needs, either tangible or intangible, including substantive or procedural needs.

Values and Ideology: religion, ideology, ethics, world views, lifestyles

Relationships: personalities, behaviour (methods, styles, procedures), stereotypes, communication.

Structure: patterns of power use, inequalities in distribution/control of resources, patterns of interaction, external factors such as time or physical setting.

Appendix IV

Maire A. Dugan's Nested Model of Conflict

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Appendix V

Stages of Conflict Escalation

Incipient or unmanifest conflict
- conflict privately experienced as dissonance, tension or antagonism.
- may take the form of private discontent, grumbling or gossip
- may not come to the attention of the other party
- not the subject of a complaint or grievance and does not come to attention of a formal third party or a public body
- offended parties may decide to "lump it"
- if conflict does not abate or become resolved, it may escalate

Open or manifest conflict
- conflict may remain generalized and unspecific, e.g. random acts of frustration.
- conflict may emerge as a "dispute" when it manifests around a particular issue.
- manifest conflict may remain peaceful
- if not addressed conflict may escalate.
- articulation of positions or needs; expressions of conflict influenced by group leaders.
  - Discussion stage: parties focus on the issues; acceptable solutions are possible.
  - Polarization stage:
    - conflict escalates to the point where there is only indirect communication
    - mutual perceptions of other party harden into caricatures or stereotypes
    - relationship deteriorates
    - polarized groups may form
    - social structures may shift toward segregation of groups.
- Segregation stage
  - communication restricted to threats
  - perceptions of own group as good and "them" as "evil."
  - mistrust and disrespect
  - issues at stake may be core needs and values of each group
  - outcomes may be perceived as zero-sum
  - interaction characterised by defensive competition
  - methods include nonviolent direct action, law suits or civil disobedience
  - negotiation difficult to establish
  - parties may refuse negotiation without capitulation on important points by other party
  - could be triggered to a stage of being out of control

- Out of control stage
  - conflict may be characterized by destruction

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1 Based on material in [Felstiner, 1980-81 #248; Harris, 1998 #247; Kelman, 1997 #249; Lederach, 2000 #245]
• communication is by direct violence
• rounds of violence trigger reciprocal volleys
• perceptions of the other are nonhuman or psychopaths
• relationship seen as hopeless
• issue becomes survival
• perceived outcomes are “lose-lose”
• method of conflict management is destroying the opposition.

• Examples of triggers
  • provocative acts by political leaders
  • uncertainties around elections
  • crackdowns on demonstrations
  • party perceptions of threat
  • distortion of intention
  • expectations that opponents will do harm unless defensive or offensive action is taken

• Stages of de-escalation
  • recognition of “mutually hurting stalemate”
  • informal prenegotiation stages
  • formal negotiation
  • implementation or peacebuilding
### Appendix VI

**Abbreviations and Khmer Terms**

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>anukret</td>
<td>a sub-decree (see Cambodian hierarchy of laws, Appendix V)</td>
</tr>
<tr>
<td>ASEAN</td>
<td>Association of South East Asian Nations</td>
</tr>
<tr>
<td>BAKC</td>
<td>Bar Association of the Kingdom of Cambodia</td>
</tr>
<tr>
<td>BLDP</td>
<td>Buddhist Liberal Democratic Party</td>
</tr>
<tr>
<td>CCC</td>
<td>Cooperation Committee for Cambodia, Phnom Penh</td>
</tr>
<tr>
<td>CCCR</td>
<td>Cambodian Centre for Conflict Resolution, Phnom Penh (now Centre for Peace and Development)</td>
</tr>
<tr>
<td>CDP</td>
<td>Cambodian Defenders Project</td>
</tr>
<tr>
<td>CDRI</td>
<td>Cambodia Development Resource Institute, Phnom Penh</td>
</tr>
<tr>
<td>CICP</td>
<td>Cambodian Institute for Cooperation and Peace, Phnom Penh</td>
</tr>
<tr>
<td>CIDA</td>
<td>Canadian International Development Agency</td>
</tr>
<tr>
<td>CIHR</td>
<td>Cambodian Institute for Human Rights, Phnom Penh</td>
</tr>
<tr>
<td>COHCHR</td>
<td>Cambodia Office of the UN High Commissioner for Human Rights</td>
</tr>
<tr>
<td>CORE</td>
<td>British Columbia Commission on Resources and Environment, 1992-1996</td>
</tr>
<tr>
<td>CPD</td>
<td>Centre for Peace and Development, Phnom Penh (formerly CCCR)</td>
</tr>
<tr>
<td>CPP</td>
<td>Cambodia People’s Party (known as the People’s Revolutionary Party until 1991)</td>
</tr>
<tr>
<td>CSD</td>
<td>Center for Social Development, Phnom Penh</td>
</tr>
<tr>
<td>dhammaraja</td>
<td>righteous ruler (in Theravada Buddhist thought)</td>
</tr>
<tr>
<td>dhammayietra</td>
<td><em>dhamma</em> walk, peace walk, or “pilgrimage of truth”</td>
</tr>
<tr>
<td>DK</td>
<td>State of Democratic Kampuchea (1975-79)</td>
</tr>
<tr>
<td>FUNCIPEC</td>
<td>Front Uni National pour un Cambodge Indépendant, Neutre, Pacifique et Coopératif (United National Front for an Independent, Peaceful and Cooperative Cambodia)</td>
</tr>
<tr>
<td>HDI</td>
<td>Human Development Index</td>
</tr>
<tr>
<td>INGO</td>
<td>International Non-Governmental Organization</td>
</tr>
<tr>
<td>IO</td>
<td>International Organization</td>
</tr>
<tr>
<td>kar phsas</td>
<td>process in which a person in authority resolves a dispute, more akin to arbitration than to Western approaches to mediation</td>
</tr>
<tr>
<td>khum</td>
<td>commune</td>
</tr>
<tr>
<td>KID</td>
<td>Khmer Institute for Democracy, Phnom Penh</td>
</tr>
<tr>
<td>KPNLF</td>
<td>Khmer People's National Liberation Front</td>
</tr>
<tr>
<td>kram</td>
<td>a law (see the Cambodian hierarchy of laws, Appendix V)</td>
</tr>
<tr>
<td>kret</td>
<td>a decree enacted by the Executive under its regulatory powers (see the Cambodian hierarchy of laws, Appendix V)</td>
</tr>
<tr>
<td>LAC</td>
<td>Legal Aid Cambodia</td>
</tr>
<tr>
<td>LICADHO</td>
<td>La Ligue Cambodgienne pour la Promotion et la Défense des Droits de l’Homme</td>
</tr>
<tr>
<td>Acronym</td>
<td>Full Form/Description</td>
</tr>
<tr>
<td>---------</td>
<td>----------------------</td>
</tr>
<tr>
<td>NGO</td>
<td>Non-Governmental Organization</td>
</tr>
<tr>
<td>NUFK</td>
<td>National United Front of Kampuchea (1970-1975)</td>
</tr>
<tr>
<td>PDK</td>
<td>Party of Democratic Kampuchea (successor to Khmer Rouge of the 1970s)</td>
</tr>
<tr>
<td>PRK</td>
<td>Peoples Republic of Cambodia (1979-89)</td>
</tr>
<tr>
<td>Prakas</td>
<td>a regulation adopted by a Minister (see the Cambodian hierarchy of laws, Appendix V)</td>
</tr>
<tr>
<td>Sarachor</td>
<td>a Ministerial circular (see the Cambodian hierarchy of laws, Appendix V)</td>
</tr>
<tr>
<td>SNC</td>
<td>Supreme National Council</td>
</tr>
<tr>
<td>srok</td>
<td>District</td>
</tr>
<tr>
<td>SRP</td>
<td>Sam Rainsy Party</td>
</tr>
<tr>
<td>UN</td>
<td>United Nations</td>
</tr>
<tr>
<td>UNDP</td>
<td>United Nations Development Program</td>
</tr>
<tr>
<td>UNTAC</td>
<td>United Nations Transitional Authority Commission</td>
</tr>
<tr>
<td>USAID</td>
<td>United States Agency for International Development</td>
</tr>
</tbody>
</table>
Appendix VII

Cambodian Hierarchy of Laws

<table>
<thead>
<tr>
<th>Law Type</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constitution</td>
<td>A western-style constitution, the supreme law of Cambodia, which was adopted by the Constituent Assembly in 1993 and proclaimed by the King.</td>
</tr>
<tr>
<td>Constitutional Law</td>
<td>An amendment to the Constitution, adopted by the National Assembly with a two-thirds majority of all Members</td>
</tr>
<tr>
<td>Kram (Law)</td>
<td>This term refers to both a promulgated Law, and to the act of Promulgation of a Law by the King. A kram is signed by the King or, in His absence, by the acting Chief of State; and countersigned by the Prime minister and the Minister of the relevant department.</td>
</tr>
<tr>
<td>Kret (Decree)</td>
<td>This is the highest form of law that may be enacted by the Executive under its regulatory powers. A kret is signed by the King or, in His absence, by the acting Chief of State; and is usually countersigned by the Prime Minister and the Minister of the relevant department.</td>
</tr>
<tr>
<td>Anukret (Subdecree)</td>
<td>A regulation adopted by the Prime Minister and countersigned by the relevant Minister.</td>
</tr>
<tr>
<td>Prakas (Regulation)</td>
<td>A regulation adopted by a Minister (or in the case of banking issues, the Governor of the National Bank)</td>
</tr>
<tr>
<td>Sarachor (Circular)</td>
<td>A Ministerial implementation measure</td>
</tr>
</tbody>
</table>

Appendix VIII

Chronology of Selected Political Events Cambodia History

<table>
<thead>
<tr>
<th>Year</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>9th - 15th cent</td>
<td>Angkor period</td>
</tr>
<tr>
<td>15th - 19th cent</td>
<td>Kingdom is gradually eroded</td>
</tr>
<tr>
<td>1853-1954</td>
<td>French protectorate</td>
</tr>
<tr>
<td>1941</td>
<td>Prince Norodom Sihanouk crowned King of Cambodia-age of 18 years old</td>
</tr>
<tr>
<td>1942</td>
<td>France Arrest Hem Chieu, “Umbrella war”</td>
</tr>
<tr>
<td>1945</td>
<td>King Norodom Sihanouk proclaims Cambodia an independence, sovereign state while Japanese under occupation</td>
</tr>
<tr>
<td>1945</td>
<td>France returns to try and restore the former &quot;Protectorate&quot; status to Cambodia, resisted by King Norodom Sihanouk</td>
</tr>
<tr>
<td>1946</td>
<td>Son Ngoc Minh and Tou Samouth, both of whom were monks, joined the communists working in cooperation with the Vietnamese communist movement</td>
</tr>
<tr>
<td>1951</td>
<td>A separate Khmer People’s Revolutionary Party (KPRP) was formed under Son Ngoc Minh and Tou Samouth</td>
</tr>
<tr>
<td>1953</td>
<td>King Norodom Sihanouk proclaims independence from France.</td>
</tr>
<tr>
<td>1955</td>
<td>Sihanouk abdicates in favour of his father Norodom Suramarit, to go into political life; announces the formation and becomes leader of Sangkum Reastr Niyum (Popular Socialist Community).</td>
</tr>
<tr>
<td>1955</td>
<td>Internationally supervised elections confirmed Sihanouk’s power</td>
</tr>
<tr>
<td>1962</td>
<td>Pol Pot becomes leader of the Cambodian communist party.</td>
</tr>
<tr>
<td>1965</td>
<td>Prince Norodom Sihanouk breaks diplomatic relations with the US.</td>
</tr>
<tr>
<td>1966</td>
<td>Cambodia's first general election in which Sangkum Reashnium leadership did not pre select the electoral candidates; a new Government under Lon Nol is approved by the right wing National Assembly that emerged from the elections.</td>
</tr>
<tr>
<td>1969</td>
<td>Lon Nol becomes Prime Minister of Cambodia.</td>
</tr>
<tr>
<td>1970</td>
<td>Lon Nol ousts Prince Sihanouk as head of state while Sihanouk is overseas.</td>
</tr>
<tr>
<td>1970</td>
<td>Sihanouk appeals for formation of Khmer National United Front, joins with communists (“Khmer Rouge”) to fight Lon Nol government.</td>
</tr>
<tr>
<td>1975</td>
<td>Khmer Rouge seize Phnom Penh, purge all elites, and form radical communist, nationalist, isolationist regime.</td>
</tr>
<tr>
<td>Dec. 1978</td>
<td>Vietnam invades Cambodia</td>
</tr>
<tr>
<td>Jan 1979</td>
<td>Vietnam occupies Phnom Penh on January 7, 1979, driving Khmer Rouge to the Thai border.</td>
</tr>
<tr>
<td>1979</td>
<td>The beginning of a decade of international isolation by Western bloc countries of Vietnamese sponsored People’s Republic of Cambodia regime; Cambodia is supported by Soviet Union of which Vietnam is a client country.</td>
</tr>
</tbody>
</table>
1982 With US and ASEAN pressure, the Khmer Rouge, Sihanoukists and republican Khmer People’s National Liberation Front (KPNLF) form a coalition government in exile, headed by Sihanouk and recognized by UN.
1985 Hun Sen becomes Prime Minister under the PRK regime.
1987 Sihanouk holds first meeting with Phnom Penh government premier, Hun Sen, in France.
1988 The four factions meet for the first time at the Jakarta Informal Meeting (JIM) in Indonesia, endorsed by ASEAN.
1989 The US government announces it will no longer support the Khmer Rouge’s holding of Cambodia’s UN seat; China reduces its aid to the Khmer Rouge; the four factions accept a framework for settlement proposed by the Security Council five permanent members. The Cambodian factions form a Supreme National Council (SNC) to be the legitimate authority in Cambodia during a transitional period.
1990 The factions declare a ceasefire in June, 1991. Sihanouk becomes the president of the SNC.
1992 UNTAC is deployed in March, 1992 under the leadership of Yasushi Akashi, the UN Secretary General’s special representative for Cambodia. Demobilization of the factions begins, but the Khmer Rouge refuses to participate. An electoral law is developed with the SNC and promulgated by Akashi. Registration of political parties voters begins in August and September, 1992. The Khmer Rouge refuses to participate and launches a campaign of intimidation against the UN.
1993 Voter registration is completed. Intimidation of FUNCINPEC by the SOC increases. In April, a six-week election campaign formally begins. In May, there is a peaceful UN-run national election with a proportional representation (PR) formula. FUNCINPEC wins 58 of 120 seats. CPP refuses to cede power. Norodom Ranarridh agrees to power-sharing coalition with CPP’s Hun Sen.
1994 Multiparty Parliamentary Commission on Human Rights formed, chaired by Kem Sokha, a Member of Parliament from the minority Buddhist Liberal Democratic Party (BLDP).
1995 Sam Rainsy, FUNCINPEC Minister of Finance is ousted from FUNCINPEC and from National Assembly.
1998 New liberal democratic constitution is passed.
1993-97 Increasing factional tensions within the government.
March 1997 Grenade attack at rally led by government critic Sam Rainsy, ousted from
FUNCINPEC and from National Assembly in 1995.

July 1997  Second Prime Minister Hun Sen ousts First Prime Minister Ranariddh after two
days of armed fighting in Phnom Penh.

July 1997  Pol Pot is denounced at a Khmer Rouge show trial at Anlong Veng after a split
within Khmer Rouge leadership.

1997  In the wake of the CPP takeover, several Western donors withdraw bilateral aid;
Parliamentary Commission on Human Rights no longer functioning.

March 1998  Prince Ranariddh returns to Phnom Penh under international arrangement, after
conviction and pardon by the King for security offences that led to his 1997
ouster.

April 1998  Pol Pot dies.

July 1998  General election. Hun Sen's CPP wins 64 seats, Ranariddh's FUNCINPEC 43
and the Sam Rainsy Party (SRP) 15. International observers say the vote is
adequately fair; opposition parties reject the results and call protests about
irregularities in vote-counting. Violence occurs as demonstrations are put down
by the CPP.

Sept 1998  In wake of election and demonstrations, many former Members of Parliament
from opposition parties go into hiding, including Kem Sokha, who is charged
with offences during demonstrations.

October 1998  CPP forms National Committee on Human Rights, headed by CPP appointee,
Om Yien Tieng

Nov 1998  New coalition is formed between CPP and FUNCINPEC, led by Prime Minister
Hun Sen. SRP becomes official opposition.

Nov 1998  "Group of Experts" visits Cambodia under UN auspices to investigate and make
recommendations concerning the possibility of proceedings against Khmer
Rouge leaders.

Dec 1998  The last Khmer Rouge fighters surrender to the government, including field
commanders and top leaders Khieu Samphan and Nuon Chea.

March 1999  National Assembly passes a law to set up upper house of parliament; Senate has
advisory function. Senate Commission on Human Rights is formed, headed by
Kem Sokha, now a FUNCINPEC appointee.

March 1999  Ta Mok is arrested when crossing Cambodia border from Thailand and put in
military prison in Phnom Penh. Government says Ta Mok to be tried in a
military court under Cambodian law.

April 1999  Kang Khek Ieu ("Duch") a chief of the Khmer Rouge's security service is found
and arrested.

April, 1999  Cambodia formally joins ASEAN.

Sept, 2000  Agreement with the UN concerning a trial of Khmer Rouge leaders after about
two years of difficult negotiations.

Jan, 2001  January 2, National Assembly unanimously passes law concerning UN
sponsored trial of Khmer Rouge leaders. January 15, Senate approves law
concerning UN sponsored trial of Khmer Rouge leaders.

Jan, 2001  Hun Sen announces first ever commune elections to be held January 2002.

Feb, 2001  UN rejects Cambodian law as not complying with agreement. Constitutional
Council considers draft; rejects on technicalities. Negotiations with UN resume.
Appendix IX

Principles Relating to the Status of National Institutions - 'Paris Principles'

Competence and responsibilities

1. A national institution shall be vested with competence to promote and protect human rights.

2. A national institution shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence.

3. A national institution shall, inter alia, have the following responsibilities:

   a) To submit to the Government, Parliament and any other competent body, on an advisory basis either at the request of the authorities concerned or through the exercise of its power to hear a matter without higher referral, opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights; the national institution may decide to publicize them; these opinions, recommendations, proposals and reports, as well as any prerogative of the national institution, shall relate to the following areas:

   i. Any legislative or administrative provisions, as well as provisions relating to judicial organizations, intended to preserve and extend the protection of human rights; in that connection, the national institution shall examine the legislation and administrative provisions in force, as well as bills and proposals, and shall make such recommendations as it deems appropriate in order to ensure that these provisions conform to the fundamental principles of human rights; it shall, if necessary, recommend the adoption of new legislation, the amendment of legislation in force and the adoption or amendment of administrative measures;

   ii. Any situation of violation of human rights which it decides to take up;

   iii The preparation of reports on the national situation with regard to human rights in general, and on more specific matters;

   iv. Drawing the attention of the Government to situations in any part of the

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country where human rights are violated and making proposals to it for initiatives to put an end to such situations and, where necessary, expressing an opinion on the positions and reactions of the Government;

a) To promote and ensure the harmonization of national legislation regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation;

b) To encourage ratification of the above-mentioned instruments or accession to those instruments, and to ensure their implementation;

c) To contribute to the reports which States are required to submit to United Nations bodies and committees, and to regional institutions, pursuant to their treaty obligations and, where necessary, to express an opinion on the subject, with due respect for their independence;

d) To cooperate with the United Nations and any other organization in the United Nations system, the regional institutions and the national institutions of other countries that are competent in the areas of the promotion and protection of human rights;

e) To assist in the formulation of programmes for the teaching of, and research into, human rights and to take part in their execution in schools, universities and professional circles;

f) To publicize human rights and efforts to combat all forms of discrimination, in particular racial discrimination, by increasing public awareness, especially through information and education and by making use of all press organs.

Composition and guarantees of independence and pluralism

1. The composition of the national institution and the appointment of its members, whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the promotion and protection of human rights, particularly by powers which will enable effective cooperation to be established with, or through the presence of, representatives of:

a) Non-governmental organizations responsible for human rights and efforts to combat racial discrimination, trade unions, concerned social and professional organizations, for example, associations of lawyers, doctors, journalists and eminent scientists;

b) Trends in philosophical or religious thought;

c) Universities and qualified experts;
d) Parliament;
e) Government departments (if these are included, their representatives should participate in the deliberations only in an advisory capacity).

2. The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence.

3. In order to ensure a stable mandate for the members of the national institution, without which there can be no real independence, their appointment shall be effected by an official act which shall establish the specific duration of the mandate. This mandate may be renewable, provided that the pluralism of the institution's membership is ensured.

Methods of operation

Within the framework of its operation, the national institution shall:

a) Freely consider any questions falling within its competence, whether they are submitted by the Government or taken up by it without referral to a higher authority, on the proposal of its members or of any petitioner;

b) Hear any person and obtain any information and any documents necessary for assessing situations falling within its competence;

c) Address public opinion directly or through any press organ, particularly in order to publicize its opinions and recommendations;

d) Meet on a regular basis and whenever necessary in the presence of all its members after they have been duly convened;

e) Establish working groups from among its members as necessary, and set up local or regional sections to assist it in discharging its functions;

f) Maintain consultation with the other bodies, whether jurisdictional or otherwise, responsible for the promotion and protection of human rights (in particular ombudsmen, mediators and similar institutions);

g) In view of the fundamental role played by the non-governmental organizations in expanding the work of the national institutions, develop relations with the non-governmental organizations devoted to promoting and protecting human rights, to economic and social development, to combatting racism, to protecting particularly vulnerable groups (especially children, migrant workers, refugees, physically and mentally disabled persons) or to specialized areas.
Additional principles concerning the status of commissions with quasi-jurisdictional competence

A national institution may be authorized to hear and consider complaints and petitions concerning individual situations. Cases may be brought before it by individuals, their representatives, third parties, non-governmental organizations, associations of trade unions or any other representative organizations. In such circumstances, and without prejudice to the principles stated above concerning the other powers of the commissions, the functions entrusted to them may be based on the following principles:

a) Seeking an amicable settlement through conciliation or, within the limits prescribed by the law, through binding decisions or, where necessary, on the basis of confidentiality;

b) Informing the party who filed the petition of his rights, in particular the remedies available to him, and promoting his access to them;

c) Hearing any complaints or petitions or transmitting them to any other competent authority within the limits prescribed by the law;

d) Making recommendations to the competent authorities, especially by proposing amendments or reforms of the laws, regulations and administrative practices, especially if they have created the difficulties encountered by the persons filing the petitions in order to assert their rights.
Appendix X

Public Participation: A Model Code of Conduct

This code sets out the basic responsibilities expected of those involved in public participation processes.

General Communication

Effective Communication. The objective of these provisions is to maximize the exchange of information between parties and to minimize misunderstandings.
- Speak clearly, listen carefully and ask for clarification if a point is not understood.
- Share information related to the issues at hand.
- State your concerns about other participants or the process openly and directly.
- Explain your interests and why they are important to you.

Balanced Communication. The objective of these provisions is to ensure that all participants have the opportunity to speak and all perspectives are clearly expressed.
- Ensure participation of all interests.
- Provide opportunities for all perspectives to be expressed before making a decision or moving on.

Civil Communication. The objective of these provisions is to maintain a respectful atmosphere.
- Treat others with respect by avoiding stereotyping, accusatory language and rude behaviour.
- Wait for others to finish speaking and listen to what they have to say.
- Seek a better understanding of other perspectives with an open mind.

Negotiating Agreement

Consensus Building. The objective of these provisions is to facilitate agreements across the full spectrum of interests.
- Negotiate in good faith, building as much agreement as possible.
- Avoid participating in activities that may undermine the negotiation process.
- Focus on underlying interests or objectives rather than positions and seek to understand the interests of others.
- Recognize the legitimacy of all interests.
- Treat issues as problems to be solved not as personal or sectoral conflicts.

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1 This is the Code of Conduct developed by the British Columbia Commission on Resources and Environment. *The Provincial Land Use Strategy: Public Participation*, Vol. 3 (Victoria, BC: Commission on Resources and Environment, 1995), online: Province of British Columbia, Land Use Coordination Office <http://www.luco.gov.bc.ca/lrmp/plus/vol3/index.htm> (date accessed 7 April 2001)
• Allow participants the freedom to test ideas without prejudice to future discussion or negotiations - do not hold tentative suggestions or agreements against those who made them.
• Seek creative solutions that accommodate all interests.

**Accountability.** The objective of these provisions is to ensure that negotiated agreements are broadly supported within constituencies and by the general public.
• Establish clear lines of accountability with other participants, with the general public and with those who are directly represented.
• Act in accordance with the authority granted by those you represent and ensure that other participants understand this authority.
• Communicate progress in the negotiations to those who are directly represented and to the general public seeking feedback and gauging support.
• Ensure that descriptions of the negotiations and the views of other participants are accurate and acceptable to all participants before communicating them to the general public or the media.
• Act quickly to raise and resolve any concerns regarding the accountability of the process or any of the participants.