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CAMBODIAN CONSTITUTIONAL
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CONSTITUTIONAL EVOLUTION BEYOND
RHETORIC

Kuong Teilee | Nagoya University

Cambodian Constitutional Provisions on Treaties: A Story of Constitutional Evolution Beyond Rhetoric

Kuong Teilee*

Abstract

By applying a revised version of the “transformative moments” theory of constitutional changes, this research examines the Cambodian constitutional provisions and practices in regulating the relationship between domestic and international laws. The paper argues that the constitutional provisions of 1993 came as a result of interactions between the idealism and rhetoric of post-civil-war Cambodian politics. But the subsequent development of legal institutions under strong domestic and external political influences has removed some of these provisions from pure rhetoric and introduced a more pragmatic structure of implementation by means of legislative initiatives and judicial practices. The limited experiences and piecemeal nature of these initiatives and practices suggest, however, that the issue of clarity and predictability in the constitutional relationship between domestic and international law requires further attention in Cambodia’s continuous pursuit of rule of law and constitutional reform.

* Associate Professor, Nagoya University Center for Asian Legal Exchange. Comments can be sent to teilee@law.nagoya-u.ac.jp

Introduction

When did modern written constitutional law begin in Cambodia? How is the Cambodian legal system connected to a continuously developing system of international law or global norms? From a legal perspective, in which direction is the country moving in its recent effort to integrate into regional and international communities?

Prompted by these questions, this chapter seeks to examine the legal significance and functional development of Cambodian constitutional provisions on international treaties since 1993, by presenting two main arguments. First, when the Constitution of the Kingdom of Cambodia was adopted in 1993, its provisions regarding observance and respect for international treaties were included for two obvious reasons - political rhetoric and idealistic purposes. Second, although in the course of over 15 years, institutional weaknesses of the new constitutional order may have led to deterioration of the constitutional idealism, the desires and the efforts to gain international trust in recent years have added new dimensions to the significance and function of these provisions of the Cambodian constitution.

Using the concept of “Constitutional moments”, the chapter starts with the observation that two historical periods in Cambodia, one from 1991 to 1993 and the other starting in 2003, contributed to the conceptualization and practical application of the Constitutional provisions on international treaties.

At the inauguration of the Constituent Assembly in June 1993, a motion by Prince Norodom Ranariddh, then the First Prime Minister, was unanimously approved by the Assembly to denounce the “unconstitutional coup d’etat in 1970”.¹ Through this motion, the status of the then Prince Norodom Sihanouk as the Chief of State² under the pre-1970 constitutions was restored.³

¹ See “For the Record: The Assembly”, *Phnom Penh Post*, July 16-29, 1993.

² Norodom Sihanouk was enthroned on 28 October 1941. Then in order to be fully involved in politics, he resigned by handing over the throne to his father in March 1955. However, his father’s death in 1960 did not bring Sihanouk back to the throne but simply resulted in the latter being chosen by a referendum to be the Head of State in June 1960, after the Constitution was amended. He held this office until he was deposed by the 18 March 1970 coup. See chronological data in Raoul M. Jennar, *Les Cles du Cambodge*, Maisonneuve & Larose, 1995.

³ MacAlister Brown and Joseph J. Zasloff, *Cambodia Confronts the Peacemakers 1970-1998*, Cornell University Press, 1998, p. 174.

Denunciation of the 1970 coup by the 1993 Constituent Assembly is significant in two ways. First, it traces not only the beginning but also the continuity of the written modern constitutions of the country to the first Constitution of 1947, which established the Kingdom of Cambodia under the auspices of the French colony. Second, it denotes that apart from this continuity, a difference exists between the two generations of the statehood, due to the interruptions triggered off by the 1970 incidents. The motion adopted unanimously by a Constituent Assembly should not be understood as re-introducing the previous Constitution after 23 years of civil wars had ended, but it implied that a new Constitution would be written with new concepts and contents.

The latter point will be discussed in this short paper. The first question of when modern constitutional law developed in Cambodia will not be reviewed here. However political continuity is assumed following my simplified introductory comments above, in order to bring the focus of this paper to the more specific question of how to evaluate the relationship between the current Cambodian Constitutional Law and developing international law and global norms, especially when related to the protection of human rights and economic interactions in the international marketplace. The presumption of continuity is not meant to be an essential argument here, but is used as a convenient start for applying the transformative constitutional moments theory as will be elaborated in the following section.

The Theory of Transformative Moments

Some recent studies on constitutional change have attempted to apply the theory of transformative moments promoted by Professor Bruce Ackerman in his well-known analyses of the development of Constitutional Law in the US.⁴ He breaks constitutional law development in the US into three transformative moments, namely the founding period, the Reconstruction moment and the New Deal. Ackerman's use of analytical framework of transformative

⁴ Ackerman develops his theory in two well-known volumes *We the People – Foundations* and *We the People – Transformations*, published by the Harvard University Press in 1991 and 1998 respectively. For a review of Ackerman's theory, see Maria Seferian "Recent Publication: We the People: Transformations, Bruce Ackerman", 34 *Harvard Civil Rights – Civil Liberties Law Review*, Winter 1999, pp. 311-327.

moments enables him to present the development of the US Constitution in a chronological political order in order to elaborate the internal elements leading to Constitutional changes at a higher legal level. This allows him to avoid referring to the development of constitutional law doctrines in the UK or any other older constitutions of the world to explain the evolution of constitutional law in the US.

Cambodia has a very different political, constitutional, and legal background from that of the US. This section does not solicit the application of Ackerman's theory in elaborating Constitutional development in Cambodia. Rather, Ackerman's theory is considered relevant to the extent that constitutional law development in Cambodia can be best explained by identifying key moments in the chronological political history, and next, narrating the constitutional changes associated with these transformative moments. This exercise is helpful for at least two reasons. First, it enables narration on constitutional development to overlap with domestic political and legal developments. In addition, this way of framing a country's constitutional history will enhance understanding and be more useful for future legislative and policy making purposes. A second strength to this approach lies in the different way that historical transformative moments are defined by different people and within different countries. A mainly chronologically narrative version of transformative moments will be suitable for inducing dynamic explanations about the backgrounds and contexts of important constitutional changes, especially in countries where a new constitutional culture is just about to develop.

Based on the presumption of the constitutional continuity mentioned earlier, the following section will start with a brief review of the constitutional change in Cambodia, introduced by the 1993 Constitution, with regard to the relationship between domestic law and international treaties. Skipping detailed elaboration of this first Constitutional moment, i.e, the transformative moment that followed the 1991 Paris Peace Agreements and subsequent events leading to the promulgation of the 1993 Constitution,⁵ the following section will only examine details of the provisions on

⁵ Many books and articles have been written, from different perspectives, about this period of political and constitutional transformation in Cambodia. In addition to those appearing in the following footnotes, one can also consult Hughes Caroline, *UNTAC in Cambodia: The Impact on Human Rights*, Institute of Southeast Asian Studies, Singapore, 1996; *The United Nations and Cambodia, 1991-1995*, United Nations, New York, 1995.

international treaties. It will point out the provision's inherently rhetorical nature due to the shortage of necessary clarity for implementation and the particular political context in which they emerged. Subsequent sections will examine how the two constitutional moments have resulted in the emergence of legislative and judicial practices, which seem to have brought these constitutional commitments away from their pure rhetoric origin in the 1990s.

The New Commitment to International Law

Despite the continuity mentioned in the introduction, one of the important aspects making the 1993 Constitution discontinuous from its past is the new importance it gives to the status of international law in the issue of human rights. This is provided in Chapter 3 of the Constitution in which the issue of “rights and duty” is stipulated in detail. The Chapter starts with Article 31 stipulating Cambodia’s commitment to human rights norms provided for by the UN Charter and human rights covenants and conventions. It says:

The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women’s and children’s rights.

Every Khmer citizen shall be equal before the law, enjoying the same rights, freedom and fulfilling the same obligations regardless of race, colour, sex, language, religious belief, political tendency, birth origin, social status, wealth or other status.

The exercise of personal rights and freedom by any individual shall not adversely affect the rights and freedom of others. The exercise of such rights and freedom shall be in accordance with law.⁶

This Article binds Cambodia to the obligation to “respect” the provisions of human rights treaties adopted by the UN. But how can Cambodia fulfill this obligation? The answer should be found in the constitutional question of relationship between international treaties and the domestic laws of Cambodia. But there is no

⁶ In this paper, unless indicated otherwise, the unofficial English translation of the Khmer legal provisions prepared and printed by the Cambodia Office of the UN High Commissioner for Human Rights, in *A Selection of Laws Currently in Force in the Kingdom of Cambodia*, second edition, 2002, is used.

provision in the Constitution, which defines the status of international treaties within the hierarchical order of Cambodian laws. The only constitutional provision that seems to ensure the integrity of international treaties within the Cambodian domestic legal system may be found in Article 8 that reads “the King shall be the protector of rights and freedom for all citizens and the guarantor of international treaties”.⁷ This provision is ambiguous on two grounds. First, the role of a “guarantor” of international treaties is not clearly defined. Second, due to the mere symbolic existence of the King, as stipulated in Articles 7 and 8,⁸ one doubts whether this guarantee has any practical usage in securing a clear place for international law in the legal hierarchy.

Nonetheless, international human rights treaties seem to occupy a special position under the Constitution⁹ by virtue of the Article 31. When compared to domestic laws, the obligation to observe these international human rights treaties may arguably supersede domestic laws which are found to be substantially contradicting these treaty contents. But Article 49 of the Constitution only explicitly requires that “All Khmer citizens shall abide by the Constitution and abide by the law”, leaving the obligation to “abide by” international human rights treaties undeclared. Therefore, an interpreter will need to conclude that by means of a simple transformation, all international (human rights) treaties become part of the domestic law and will thus be “abided by”. In this case, any conflicts between a treaty-converted piece of law related to the protection of human rights and another piece of legislation initiated locally may have to be solved by the authoritative interpretation of the Constitutional Council established under Chapter X.¹⁰

⁷ The second paragraph of Article 8 of the 1993 Constitution.

⁸ Article 7: The King of Cambodia shall reign but shall not govern. Article 8: The King of Cambodia shall be a symbol of unity and eternity of the nation.

⁹ The provisions of this Article in fact seem to be going too far by stipulating that Cambodia “shall recognize and respect human rights as stipulated in” the United Nations Charter, “the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women’s and children’s rights”. It will be absurd if this provision is intended to cover all international human rights treaties including those not yet ratified by the Cambodian legislative branch. The only reasonable interpretation should be that Cambodia commits itself to respect all international human rights treaties to which it is a party.

¹⁰ The Constitutional Council was established in 1998, pursuant to Article 117, Chapter X of the 1993 Constitution. After the amendment in 1999, this Article becomes Article 136 of Chapter XII. The new Article 136 reads: “The Constitutional Council shall have the duty to safeguard the respect for the Constitution, to interpret the Constitution, and the laws passed by the Assembly

The courts of Cambodia and the Constitutional Council have not ranked the international human rights treaties and the Constitutionally defined laws in hierarchical terms. The process of incorporating international treaties is completed by the National Assembly's ratification of these treaties and the issuance of a Royal Decree by the King to promulgate them as part of the domestic law. This should give international treaties the same validity and applicability as any national law adopted by the National Assembly, with approval by the Senate, and promulgated by the King. Article 31 serves as a general commitment by Cambodia to respect human rights as stipulated in the UN Charter and all conventions adopted by the UN. However since these instruments are incorporated as part of the national law the problem of *lex posterior* may sometimes create a dubious situation if a new domestic legislation is alleged to be inconsistent with the provisions of a human rights treaty referred to in Article 31. The constitutionality issue may have to be solved by a Constitutional Council review regarding the compatibility of the later legislation with the norms of the human rights treaties, which are explicitly guaranteed by Article 31 of the Constitution. This approach accords a higher hierarchical order to international human rights treaties than the related domestic human rights law. In practice, this approach will require that the Constitutional Council not only refer to specific provisions of these international instruments but also consult legal interpretations of these treaty provisions made by specialized international courts or treaty bodies as grounds for decisions. This will completely change the way business is currently conducted by the Constitutional Council.

One can also argue that specific disputes regarding the normative conflicts between domestic and international human rights laws can be referred to the courts of Cambodia and the Constitutional Council in order to discover whether newer legislation is in violation of human rights guaranteed by articles 32 to 50 of the Constitution¹¹, without having to bother about the question of international standards stipulated in Article 31. Although a lot of the provisions found in Articles 32 through 50 are derived from provisions of international human rights treaties mentioned in Article 31, they are nonetheless specific constitutional provisions.

and examined by the Senate. The Constitutional Council shall have the right to examine and decide on contested cases involving the election of Assembly members and Senate members”.

¹¹ Articles 32-50 of the 1993 Constitution listed specific freedom and human rights to be protected, similar to the Bill of Rights adopted by some constitutions.

Compliance with these provisions is not a result of international human rights treaties having a dominant status vis-à-vis the domestic legislation, but is simply an issue of legislative implementation of specific constitutional provisions. Provisions of any international human rights treaties that are subsequently ratified by Cambodia and are not elucidated in Articles 32 through 50 will not be covered by these constitution provisions. In theory, compliance with these ratified human rights treaty provisions may not be similarly guaranteed by this approach.

Other provisions related to international treaties are found in Articles 48, 49, 53, 55, 90, 150, 152 and 153. However, most of these provisions define the institutional arrangements and procedures for ratification of international treaties. The status of other international treaties not considered relevant to human rights protection is left even more uncertain, with only the meager promise of the Article 8 mentioned above.

In the long run, the need to declare a clear hierarchical relationship between international treaties (human rights treaties in particular) and domestic laws is inevitable as Cambodia integrates itself deeper into the international community. Usually, this can be realized either by means of a constitutional amendment or by development of judicial decisions and practices. But since current judicial practice in Cambodia is short of consistency and coherence due to the lack of means to publish and follow precedents, decisions made by the judicial bodies may not bring forth change within a reasonable period of time.¹² Theoretically, decisions made by the Constitutional Council will bear much authority, but this institution has indicated its tendency to interpret its own mandate very narrowly for many years since its establishment.¹³ Despite these institutional problems, Cambodia's efforts to uphold its commitment to international law have not been completely rhetorical. At times, legislative and judicial practices have given hierarchical dominance to international law in cases of a supposed conflict between the domestic and international norms. By applying the "transformative moments" theory introduced above, the

¹² Although recently selected court cases have been compiled for limited distributions by the Supreme Court and the Supreme Council of Magistracy, the selection standard is not clear and there has not been any indication that they are being used as any form of court precedents in practice.

¹³ See Teilee Kuong, "Development of the Post-Conflict Constitutionalism in Cambodia (1993-2003)", *Asia Law Review*, vol.3, no.2, December 2006, pp. 73-99.

following section will explain how these constitutional commitments are brought to real practices.

Two Historical “Moments” of Accepting International Legal Norms

Although Cambodia became a member of the United Nations in 1955, the then existing Constitution contains no provision on the legal status of the UN Charter or any international legal instruments adopted by the UN in relation to domestic laws of Cambodia. Subsequent Constitutional amendments and changes in constitutional politics did not lead to any legal considerations of this issue. It was only in 1993, when the new Constitution was drafted by the Constituent Assembly elected under the auspices of the United Nations, that provisions were written to consider international human rights laws. Unlike parallel provisions in most other constitutions,¹⁴ these provisions refer almost exclusively to the UN conventions and treaties, ignoring other international treaties. Despite the clear constitutional commitment to observing the rights and freedoms incorporated in these UN treaties, there is nothing within the Constitution that specifies a course of action whenever conflicts between domestic laws and international treaties occur.

Soon after the adoption of the 1993 Constitution, Cambodia was confronted with criticisms as a result of specific politically sensitive measures taken by the judiciary and the legislative branches, which sent out a negative image of the country's real commitment to observe international human rights law. Serious weaknesses of institutionalization before, during and after the over-heated first constitutional moment led to critical failures in terms of implementing the new idealistic political system based on international norms.¹⁵ For instance, criminal sentences for journalists charged of defaming some political leaders were

¹⁴ For an overview of the constitutions adopted by Central and Eastern European countries after the Cold War, see Andrew Valden S. Vereshchetin, “New Constitutions and the Old Problem of the Relationship between International Law and National Law”, *European Journal of International Law*, 7(1), 1996, pp. 29-41.

¹⁵ For extensive empirical observations, see Sorpong Peou, *International Democracy Assistance for Peacebuilding: Cambodia and Beyond*, Palgrave Macmillan, 2007.

criticized for not conforming with Article 19 of the International Covenant on Civil and Political Rights (ICCPR). Many argued that the controversial removal of outspoken members of the National Assembly as a result of their loss of membership in the political party was against the spirit of freedom of expression guaranteed by the 1993 Constitution itself.¹⁶ However, not only were these criticisms negatively received by Cambodian politicians, they also failed to provoke the kind of general discussion regarding whether or not these actions violated international human rights treaties and the Constitution that committed to observing them.¹⁷

Although criticisms may not always be credible, the lack of interests, capacity or preparedness of majority Cambodian legal professionals and lawmakers to debate about such issues in a legally and logically convincing way suggests that there was a technical failure at the time to enable most Cambodians to understand the conflict of relationship between international treaties and domestic laws and regulations as a serious problem in the establishment of a post-conflict rule of law.¹⁸ Had serious debates been provoked by any powerful domestic community of legal professionals at that time, they would have however involved highly complicated questions, and perhaps the ambiguous constitutional provisions and the then non-existence of the Constitutional Council could only have resulted in leaving the decisions to be made by politicians at the highest level. But the lack of technically critical domestic debates on these problems itself testified to a form of constitutional failure to promote the healthy practice of a new democracy. In hindsight, the constitutional provisions with respect to international human rights treaties, while laudable for their historical significance and details, may indeed merely represent a sentimental political promise and a constitutional rhetoric responding to the political idealism at the end of tragic and enduring wars.

¹⁶ See *Report of the UN Secretary General on Human Rights Questions*, submitted to the General Assembly, UN Doc A/50/681, dated 26 October 1995, paras. 47-52, and Sorpong Peou, *Intervention and Change in Cambodia – Towards Democracy?* ISEAS, 2000, pp. 191-199.

¹⁷ Domestic discussions then were rather confined to a few opinions made by leading NGO activists and opposition newspapers with limited circulations at the time.

¹⁸ Although the political climate at the time may not have made such debates easy, the argument presented here is that technically those debates might not have been possible given the kind of political sentiments involved in the issues and the society's lack of a genuine academic capacity to debate these issues.

These provisions were originally mandated by the 1991 Agreement on a Comprehensive Political Settlement of the Cambodia Conflict.¹⁹ Article 23 of the Agreement provides that basic principles regarding basic human rights and fundamental freedoms shall be incorporated in the new Cambodian Constitution. The contents of these principles are specified in Annex 5 to this Agreement. The Annex 5 states:

..... the constitution will contain a declaration of fundamental rights, including the rights of life, personal liberty, security, freedom of movement, freedom of religion, assembly and association including political parties and trade unions, due process and equality before the law, protection from arbitrary deprivation of property or deprivation of private property without just compensation, and freedom from racial, ethnic, religious or sexual discrimination. It will prohibit the retroactive application of criminal law. The declaration will be consistent with the provisions of the Universal Declaration of Human Rights and other relevant international instruments.”²⁰

As a result of the successful general elections in 1993, this Annex serves as part of the blue print for the 1993 Constitution regarding provisions on human rights. It stands as proof of Cambodia’s first explicit political attempt to bridge the gap between the Cambodian Constitutional legal order and international human rights law.

It is interesting to note that the political promises made in Annex 5 became one of the important rhetorical methods that political parties used at electoral campaigns in the 1993 elections.²¹ The rhetoric finally found its way into the 1993 constitution. However, the wording of the constitution did not allow these provisions to

¹⁹ Hereinafter Paris Peace Agreements or simply Agreement. A brief review of the drafting process of the 1993 Constitution and the impacts of the Agreement on the human rights provisions can be found in MacAlister Brown and Joseph J. Zasloff eds., *Cambodia confounds the peacemakers 1979-1998*, Cornell University Press, pp. 190-210, and Stephen Marks “New Cambodian Constitution: From Civil War to Fragile Democracy”, 26 *Columbia Human Rights Law Review*, pp. 45-110, 1994-1995.

²⁰ *Agreement on a Comprehensive Political Settlement of the Cambodia Conflict*, Annex 5: Principles for a New Constitution for Cambodia, para. 2. For detail introduction to the Agreement and some information on the political background, see Steven R. Ratner, “The Cambodian Settlement Agreements”, *American Journal of International Law*, vol. 89, Issue 1, January, 1993, pp. 1-41.

²¹ Grant Curtis, *Cambodia Reborn? The Transition to Democracy and Development*, Brookings Institution Press, 1998, p. 19.

move away from earlier rhetorical objectives. The first transformative moment, which began with the warring factions' acceptance of the Paris Peace Agreements and culminated with the promulgation of the 1993 Constitution, has added to the birth of new Cambodian constitutional politics that feature explicit constitutional recognition of the role international human rights law must have in shaping domestic human rights norms and practices. However, it was only one decade later that a second Constitutional moment came to bring these political commitments one step away from purely rhetorical existence. The following section will look into the coming of this second moment.

Going Beyond Rhetoric

Cambodia's accession to the World Trade Organization in 2003 and the establishment of the Extraordinary Chambers in the Court of Cambodia in 2004 are two important incidents marking the second transformative moment that enabled Cambodia to move forward in its commitment to implementing international laws and standards. Although Cambodia acceded to the WTO as a least developed country and enjoyed favorable terms of concession, Cambodia nonetheless had to take several legislative measures to clarify the hierarchical legal order defining the relationship between its domestic law and relevant international commercial treaties. This was particularly necessary in the field of intellectual property law.

Cambodia's accession to the World Trade Organization (WTO)

In 1999, when the WTO started its reviews of Cambodia's application for membership submitted five years earlier, Cambodia was preparing draft laws on patent and industrial design, marks protection, copyright and geographical indicators.²² In response to the Memorandum on the Foreign Trade Regime submitted to the WTO by the Government of Cambodia, WTO Members submitted detailed questions to Cambodia inquiring about its legislative

²² WTO Document, *Working Party on the Accession of Cambodia*, WT/ACC/KHM/2, 22 June 1999 (99-2515), para. 47.

measures on the protection of intellectual property rights. The questions concerned not only draft legislations or enacted laws related to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), but also the details of mechanisms needed to address violations of these laws.²³ Following discussions at the WTO, Cambodia carefully prepared domestic laws related to intellectual property rights to avoid conflicts with the TRIPS and other relevant international treaties. The government presented the Working Party with a list of legislative articles, provisions, and summaries thereof. The members of the Working Party were satisfied that these laws would be in conformity with the TRIPS requirements.²⁴ Despite the lack of explicit constitutional provisions on the status of international economic treaties, the Law on Trademarks and Law on Patents stipulate that in the event of conflict with international economic treaties related to intellectual property, the provisions of international treaties prevail.²⁵ It remains to be seen how these laws will be implemented by the courts, including the newly enacted Civil and Criminal Codes which drew much attention at the Working Party discussions but were not enacted at the time of Cambodia's accession. However, the process of accession to the WTO has contributed to remarkable legislative efforts to ensure that international laws are given clear legal priority over Cambodian domestic laws, with intellectual property and trade rights in particular.

Establishment of the Extraordinary Chambers in the Court of Cambodia

²³ WTO documents, *Working Party on the Accession of Cambodia*, WT/ACC/KHM/3, 4 January 2001 (01-0023), particularly questions 157-160 and 164-167; WT/ACC/KHM/6, 11 December 2001 (01-6271), questions 94 and 97-103; WT/ACC/KHM/12, 29 July 2002 (02-4181), questions 84-89; WT/ACC/KHM/20, 3 March 2003 (03-1214), questions 63-85.

²⁴ *Checklist of TRIPS Requirements and Implementation by the Kingdom of Cambodia* (Revision), WT/ACC/KHM/7/Rev.1, 31 July 2002 (02-4236).

²⁵ Article 60 of the *Law Concerning Marks, Trade Names and Acts of Unfair Competition* promulgated on February 7, 2002 states "The provisions of any international treaties in respect of industrial property to which the Kingdom of Cambodia is a party shall apply to matters dealt with by this Law and, in case of conflict with provisions of this law, shall prevail over the latter", English translation available at <http://www.gocambodia.com/laws/copyright3.asp> (access date: November 7, 2009). Article 129 of the 2002 *Law on Patents, Utility Models and Industrial Designs* contains similar provisions.

Another incident which happened at almost the same time as Cambodia's accession to the WTO and should be taken into account when analyzing the hierarchical relationship between Cambodian and international laws was the establishment of the Extraordinary Chambers in the Courts of Cambodia (ECCC). These chambers were established to try senior leaders of the Democratic Kampuchea, or the Khmer Rouge, and persons most responsible for the heinous crimes against humanity committed in Cambodia from 17 April 1975 to 6 January 1979. The establishment was based on a law adopted and amended by the National Assembly on 27 October 2004,²⁶ in implementation of a bilateral agreement between the Government of Cambodia and the United Nations.²⁷ This process has brought the issue of trying individuals for past atrocities committed in Cambodia beyond mere promises and political rhetoric. The law provides material jurisdictions to the Chambers to try crimes set forth in the 1956 Penal Code regarding "homicide", "torture" and "religious persecution",²⁸ crimes of genocide "as defined in the Convention on the Prevention and Punishment of the Crimes of Genocide of 1948";²⁹ crimes against humanity;³⁰ grave breaches of the Geneva Convention of 12 August 1949;³¹ and, acts of destruction of cultural property during armed conflict pursuant to the 1954 Hague Convention for Protection of Cultural Property in the Event of Armed Conflict.³²

Regarding the "trial proceedings" of the Chambers, Article 33 (new) of the Law states:

The Extraordinary Chambers of the trial court shall ensure that trials are fair and expeditious and are conducted in accordance with existing procedures in force, with full respect for the rights of the accused and for the protection of victims and witnesses. If these

²⁶ *Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea*, available at <http://www.eccc.gov.kh> (last access date: 1 November, 2009)

²⁷ *Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea*, signed on 6 June 2003.

²⁸ *Ibid.* Article 3.

²⁹ *Ibid.* Article 4.

³⁰ *Ibid.* Article 5.

³¹ *Ibid.* Article 6.

³² *Ibid.* Article 7.

existing procedure (sic) do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standard, guidance may be sought in procedural rules established at the international level.

The Article also explicitly refers to “international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights” as standards for the Extraordinary Chambers of the trial court to exercise their jurisdiction.³³

Starting with an early decision regarding the defendant’s application for the disqualification of a sitting judge, the Pre-Trial Chamber did not hesitate to consult decisions made by other international courts. The Chamber cited the Judgment made by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) in applying the appropriate test for bias.³⁴ There are many other examples of the Chamber’s continual reference to international treaties, judgments of other international courts and recommendations made by international treaty bodies as the grounds for its decisions. All of these cases point to the serious attention to international law and practices that the Pre-Trial Chamber used during criminal court sessions. Although these Chamber practices should not lead us to forget the highly international character of these chambers both in terms of their statutory mandates and multinational personnel structure,³⁵ the fact that Cambodian judges are in the majority and that the Chambers have been created by a Cambodian law are significant and deserve being taken into consideration when reviewing Cambodia’s commitment to international law.

Conclusions

³³ *Ibid.* Article 33, second paragraph.

³⁴ See footnotes 4 and 5 and the relevant paragraph 15 of the *Public Decision on the Co-Lawyers’ Urgent Application for Disqualification of Judge Ney Thol Pending the Appeal against the Provisional Detention Order in the Case of Noun Chea*, Pre-Trial Chamber criminal case file no.002/19-01-2007-ECCC/OCIJ (PTC 01),

³⁵ Although the ECCC is established as a domestic court, the bench is composed of Cambodian and international judges, with the former being the majority.

This paper suggests that the relationship between domestic law and international law in Cambodia can also be examined by applying the structural model of the Ackermanian transformative moments theory. It enables the analyses to be based on more than mere observations of formal constitutional structure of a hierarchical order, and reveals the political background of different stages of constitutional development. This political background is important for understanding how constitutional norms have been formed at specific levels with respect to particular legal issues. The constitutional relationship between domestic and international law normally defines a nation's mode of interaction with other nation or group of nations in the form of an abstract international community or an organized international institution, in normative formation and communication of legal and normative values. But the interactions may take many different forms. Historical, political and cultural backgrounds all determine the specific forms of interaction.

The emergence of the two constitutional moments in Cambodia during the last two decades shows that Cambodian politics reflect both strong intervention by foreign powers and international organizations involved in peace-building and economic development, and the complex interaction among different internal factors. These factors include Cambodia's recent political history, the way that Cambodians perceive an appropriate direction for re-building the nation after many destructive years, the way Cambodia wants to structure its own stance in the existing international context, and the way Cambodia accepts technical and political solutions to duck normative conflicts between domestic legal realities and the international practices demanded of it when seeking international recognition and facilitation of its integration into the "international community". As the Speaker for the Constituent Assembly noted in 1993, the Constitution "still needs further amendments until it meets the aspirations of the people."³⁶ The same has to be said regarding the constitutional definition of a technical relationship between domestic laws and international treaties. A well-defined rule of law is increasingly needed to govern this relationship, to let the nation and its people know how to sail their way safe in the shoreless ocean of the "international standards" to which they have committed their observance.

³⁶ Ker Munthit, "Constitution Ratified", *Phnom Penh Post*, 24 September 1993.