

UNTAC in Cambodia – from Occupation, Civil War and Genocide to Peace

*Lucy Keller**

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I. Introduction

The conflict in Cambodia¹ consists of different intertwined components.² Since its emergence from the French protectorate in the 1950s, Cambodia has suffered not only from side-effects of the war in Vietnam in the 1960s and 1970s, including massive bombardment by US forces, it also endured devastating civil conflicts and the destructive totalitarian

¹ Since its independence from French colonialism, Cambodia's official designation changed repeatedly, the different terms standing for the respective political change: "Kingdom of Cambodia" (1954-1970), "Khmer Republic" (1970-1975), "Democratic Kampuchea" (1976-1979), "Peoples Republic of Kampuchea" (1979-1989), "State of Cambodia" (1989-1993); in 1993, the constituent assembly decided upon the renaming of "Cambodia"; cf. P. Hazdra, *Die UNO-Friedensoperationen in Kambodscha*, 1997, 34. In order to maintain a uniform terminology and as "Kampuchea", albeit being the original country designation in the Khmer language, is occupied with negative connotations, the term "Cambodia" will be used as the state's name throughout the following study.

² Cf. A. Rapp/ C. Philipp, "Conflicts Cambodia/Kampuchea", in: R. Wolfrum (ed.), *United Nations: Law, Policies and Practice*, Vol. I, 1995, 200 et seq.

*Khmer*³ *Rouge* regime under Pol Pot, under which approximately one million Cambodian people perished.⁴ The intervention of Vietnamese troops in 1979 brought the Pol Pot regime to an end and initiated a period in which several hundred thousand Cambodians fled the country. Others became internally displaced as the newly installed government and the opposition coalition fought for control of the country. Until the 1980s, Cambodia was kept in a state of war causing not only death to countless persons but also the state's isolation from the rest of the world.

The United Nations had been searching for a peaceful solution since 1978, when the Sub-Commission on Prevention of Discrimination and Protection of Minorities investigated Cambodia's human rights situation during the period of the *Khmer Rouge* regime.⁵ From the first involvement of the UN until today, the international community made immense efforts to help Cambodia to overcome its desperate situation and establish a solid peace plan. The following study first offers a historical overview of Cambodia (II.), then studies the peace process and the Paris Peace Agreements (III.), followed by an analysis of the United Nations territorial administration of Cambodia (IV.), and then an analysis of Cambodia's post-conflict situation (V.) finally leading to conclusions (VI.).

II. Historical Overview

Cambodia is located in Indochina; this is not only a geographical characterisation, but also refers to the region's historical past. The country is situated both geographically and historically in the area between the two ancient cultures of India and China. Throughout history, the region of Indochina was highly influenced from both sides in many enriching but also oppressive ways.⁶

³ The word "Khmer" describes the ethnic group of Cambodia's indigenous and predominant people and moreover the indigenous Cambodian language; cf. Hazdra, see note 1, 34.

⁴ See B. Boutros-Ghali, *The United Nations and Cambodia 1991-1995*, The United Nations Blue Book Series, Vol. II, 1995, 5.

⁵ Cf. under II. 4.

⁶ Report of a Finnish Inquiry Commission, "Kampuchea: Decade of the Genocide", in: K. Kiljunen (ed.) 1986, 1 et seq.

In the early days of Cambodian history, from the first to the sixth century AD, Cambodia belonged largely to the Southeast Asian kingdom of Funan, which played a fundamental role in developing the political institutions and culture of the later Khmer state. It was the subsequent Angkorian era, beginning in the eighth century, which transformed Cambodia into a powerful kingdom. Forces of the Thai kingdom sacked Angkor in 1431. The four centuries from the desertion of Angkor to the establishment of a protectorate under the French in 1863 are historically not well researched. Evidence from the period largely consists of Chinese references to Cambodia.⁷

1. Union Indochinoise Française and Cambodia's Independence from France

In 1863, France established a protectorate and controlled the *Union Indochinoise Française* (French-Indochina Union), i.e. the three modern-day states Vietnam, Laos and Cambodia.⁸ France's purpose for the control of Cambodia was strategic; given the political competition with the British in the region, France wanted a buffer zone between their main interests in Vietnam and Thailand.⁹ The *Union Indochinoise* was a political and administrative entity headed by a French Governor-General. Under the protectorate system, Cambodia became a peripheral area, widely uncared for by France as economic benefits from Cambodia were negligible. Hence, the traditional society remained to a large extent intact. Under the protectorate treaty concluded in 1863, even the Cambodian monarchy was preserved intact. Until the beginning of World War II and apart from a peasant uprising in 1916, the protectorate's condition can be described as relatively peaceful.¹⁰

In the ensuing period of French rule, Cambodian nationalism and opposition to French rule – arising from the initiative of a few, influential urban-based elites of educated Cambodians – began to develop.¹¹ In

⁷ See D.P. Chandler, *A History of Cambodia*, 1996, 81.

⁸ Chandler, see note 7, 137 et seq.

⁹ L. Fernando, "Khmer Socialism, Human Rights and the UN Intervention", in: A. Tay (ed.), *East Asia: Human Rights, Nation-Building, Trade*, 1999, 449 et seq.

¹⁰ Chandler, see note 7, 153 et seq.

¹¹ M.F. Herz, *A Short History of Cambodia*, 1958, 69 et seq.

order to exert control on the protesting Cambodian factions, France supported the accession of nineteen-year-old Prince Norodom Sihanouk to the throne. From the French point of view, Sihanouk was an ideal candidate because of his youth, his lack of experience and his pliability.¹² This turned out to be a major miscalculation as Norodom Sihanouk would go on dominating national politics for the subsequent years before being overthrown by a *coup d'Etat* in 1970.¹³

In 1945, Japan disarmed the French forces, occupied the whole territory of Indo-China, declared Cambodia independent and changed the state's name to the Khmer "Kampuchea".¹⁴ After World War II, several Cambodian factions continued to fight for independence and partially reached this goal in 1946 when Cambodia attained inner autonomy.¹⁵ France, newly regaining control over Cambodia, kept Sihanouk on the throne and held elections for a Constituent Assembly to advise the King on a constitution. This 1947 constitution – remaining in force until 1970 – stipulated *inter alia* Cambodia to be a monarchy, Cambodian to be the official language and enumerated the freedoms, rights and duties of all Cambodians.¹⁶

2. The First Indo-China War and the Geneva Conference

The first Indo-China War (1946-1954) was a war of independence, i.e. a war in which Cambodia fought against France for deliverance of its status as a protectorate.¹⁷ After having attained inner autonomy from France, the opposition movements began to encroach on the entire Cambodian people. In accordance with its will, Sihanouk declared Cambodia's absolute independence in 1953. France accepted the Kingdom of Cambodia's full autonomy and confirmed it at the Geneva Conference on Indo-China in 1954.¹⁸

¹² Chandler, see note 7, 169 et seq.

¹³ Herz, see note 11, 65.

¹⁴ Hazdra, see note 1, 37.

¹⁵ Hazdra, see note 1, 37.

¹⁶ S.P. Marks, "The new Cambodian constitution: From civil war to a fragile democracy", *Colum. Hum. Rts L. Rev.* 26 (1994), 45 et seq.

¹⁷ J. Cable, *The Geneva Conference of 1954 on Indochina*, 1986, 9 et seq.

¹⁸ Cf. Cable, see note 17, 146 et seq.

The main purpose of the Geneva Conference was to re-establish peace in the Indo-Chinese region which concerned first of all the Vietnamese and French hostilities. The participants to the conference – the three states of Indo-China, France, the United Kingdom, the Soviet Union, the United States and the People’s Republic of China – recognised furthermore the independence of Vietnam, Laos and Cambodia.¹⁹ Thus, the French protectorate came to an end in 1953 and France subsequently had to remove its troops from the former Indo-China region.²⁰ One year after its independence, Cambodia became a member of the United Nations.²¹ The UN played no part in this process of independence nor played a role in the peace negotiations. One reason for the UN absence might have been that France refused to involve the United Nations. Another is that decolonisation and state’s independency issues in general were not a specific concern of the UN at this time.²²

3. The Second Indo-China War and Cambodia’s Way into Civil War

The period from 1954 to 1970 was characterised by the controversial figure of King Norodom Sihanouk. Although Sihanouk was considered by the majority of the Cambodian people a genuine patriot, having liberated the country from the French protectorate, his totalitarian and autocratic style of government provoked vast antagonism both by the right and the left groups in the country, i.e. the military forces and the communist *Khmer Rouge*.²³ Sihanouk’s principal opponents at the beginning of this post-colonial reign, the Democrats, were driven violently from the political field. His suppression of internal political dissent also held the country’s communist forces in check. Hence, from 1955 until 1970 no opposition to the Sihanouk regime existed in the

¹⁹ Cable, see note 17, 146 et seq.

²⁰ Rapp/ Philipp, see note 2, 200.

²¹ Cf. A/RES/995 (X) of 14 December 1955.

²² Decolonisation became a general issue in the UN with the “Declaration on the Granting of Independence to Colonial Countries and People”, A/RES/1514 (XV) of 14 December 1960; Rapp/ Philipp, see note 2, 201.

²³ Hazdra, see note 1, 38.

Kingdom of Cambodia.²⁴ The Sihanouk years can moreover be described as an era of corruption, nepotism, and of an economic and political system that was rapidly falling apart.²⁵

During the second Indo-China War (1970-1975), Cambodia's status was to be one of neutrality, given that the Geneva peace treaty had defined its international political status as neutral.²⁶ However, by the middle of the 1960s, Cambodian neutrality turned out to be a farce: Sihanouk authorised the presence of large-scale North Vietnamese bases on Cambodian territory and their use of the Cambodian port Sihanoukville as well as over-flights by South Vietnamese and US troops.²⁷ Cambodia became involved in the war in 1970 when the U.S. dispatched troops to South Vietnam and bombed alleged communist base camps in Cambodia.²⁸

In the same year, while Sihanouk stayed abroad, a *coup d'Etat* brought Lon Nol to power and established the "Khmer Republic".²⁹ After the National Assembly cast a vote of no confidence against Sihanouk, Lon Nol abolished the monarchy and proclaimed the constitution of the Khmer Republic.³⁰ Lon Nol waged the second Indo-China War on the side of South Vietnam and permitted the U.S. and South Vietnam forces officially to operate on Cambodian territory against Vietnamese communists. The east of the country, where numerous North Vietnamese rebels sought refuge, was repeatedly and heavily bombed by U.S. bombers and in Cambodia's centre, civil war dominated by the *Khmer Rouge* guerrillas prevailed.³¹ In 1975, the war in Vietnam ended with South Vietnam's capitulation and the removal of U.S. troops from Indo-China. Hence, communist troops were victorious in both Vietnam and Cambodia.

²⁴ Cf. Chandler, see note 7, 191 et seq.

²⁵ Hazdra, see note 1, 38 et seq.

²⁶ Cable, see note 17, 83.

²⁷ Cf. Hazdra, see note 1, 39.

²⁸ Rapp/ Philipp, see note 2, 201.

²⁹ Cf. Hazdra, see note 1, 41.

³⁰ Marks, see note 16, 45 et seq.

³¹ An estimated number of 400,000 persons fell victim to the U.S. bombardments; cf. Rapp/ Philipp, see note 2, 201.

4. The Third Indo-China War: The Khmer Rouge Regime

After five years of great internal conflict, Lon Nol was removed from power in April 1975 by the Communist Party of Kampuchea (CPK), also known as *Khmer Rouge*. The communist regime directed by Pol Pot renamed the country “Democratic Kampuchea”. In May 1975, the *Khmer Rouge* promulgated the Democratic Kampuchea’s new constitution providing for a People’s Representative Assembly as the supreme national policy-making body.³² The People’s Representative Assembly was responsible for electing a government, a state presidium and the judges. Sihanouk, returning to Cambodia in 1975, served as formal head of state at the regime’s beginning, but by 1976, he “retired” and was held under house arrest for the rest of the *Khmer Rouge* regime.³³ Democratic Kampuchea’s institutions were minimal and usually charged with maintaining compliance with the party’s decisions and doctrine. Apparently, the People’s Representative Assembly held its first and only plenary session for three days in 1976 and no judges were appointed. The constitution and affirmation of rights were irrelevant to the CPK’s endeavour to transform Cambodia into a distorted communist social order. In fact, no legal system existed in Cambodia during the *Khmer Rouge* regime.

The Democratic Kampuchea’s policies were aimed at radically transforming Cambodia into a new society, breaking completely with its past. Not only were traditions, beliefs and earlier ways of life forbidden,³⁴ the regime abolished money, markets, formal education, Buddhism, books, private property and freedom of movement as well.³⁵ Despite the CPK’s plan to build a classless, uniform Khmer society, the Cambodian people was divided into different social categories. Those who had lived in the territory before 1975 were considered “base people”, while those who lived in the country after that time were considered “new people”. Base people enjoyed more privileges; new people were considered politically suspect and were thus reduced to labour in the rice fields.³⁶ To achieve the aim of a growing economy, approximately three million people were evacuated from the cities throughout

³² Marks, see note 16, 45 et seq.

³³ B. Kiernan, *The Pol Pot Regime*, 1996, 54.

³⁴ Kiernan, see note 33, 54.

³⁵ Chandler, see note 7, 209.

³⁶ Kiernan, see note 33, 159 et seq., 251 et seq.

the country, and were forced to work in the countryside and labour camps. The tragic result of the destructive *Khmer Rouge* regime is that one to two million³⁷ people died through execution in the “killing fields”, through torture, starvation and disease. In addition to the *Khmer Rouge* terror, several armed incidents such as border disputes between Cambodia and Vietnam occurred. The CPK accused Vietnam of sabotaging the Cambodian revolution by infiltrating their agents into the party.³⁸ As a result of this mistrust, the *Khmer Rouge* forces launched attacks into Vietnamese territory and killed hundreds of civilians. Vietnam responded with counter attacks. In December 1978, Vietnamese troops invaded Cambodia and took control of Phnom Penh in January 1979.³⁹

The first international reaction to the Cambodian conflict was in 1978, when the UN considered Cambodia’s human rights situation during the period of the *Khmer Rouge* regime for the first time. After examining the human rights situation in Cambodia, the Sub-Commission on Prevention of Discrimination and Protection of Minorities adopted Resolution 4 B (XXXII) of 5 September 1978.⁴⁰ In the resolution, the Sub-Commission considered an analysis of the Sub-Commission’s Chairman and made its own observations on the human rights situation in Cambodia. As a result of the analysis, the Sub-Commission invited the Government of Democratic Kampuchea to collaborate with the United Nations and to present the information it possesses on of human rights violations which have taken place in Democratic Kampuchea in the recent past.⁴¹ The Sub-Commission also urged the Government to take urgent measures to restore full respect for human rights, as well as to prevent such violations in the future.⁴² In the resolution, the existence of genocide in Cambodia was not addressed by the Sub-Commission. It must be said that genocide committed by the *Khmer Rouge* did not attract particular attention and the in-

³⁷ Estimations of the exact number of dead vary – at any rate, one million people killed in a population of seven million is one of the highest rates of mass killing in the world’s history.

³⁸ Hazdra, see note 1, 41 et seq.

³⁹ Kiljunen, see note 6, 22 et seq.

⁴⁰ Doc. E/CN. 4/1350 – E/CN. 4/Sub. 2/435, 47.

⁴¹ Ibid., para. 3.

⁴² Ibid., para. 2.

ternational reaction was very feeble.⁴³ With Vietnam's invasion of Cambodia in 1978 and its control since 1979⁴⁴ the Sub-Commission merely limited itself to observing the human rights situation. In Resolution 24 (XXXIII) of 12 September 1980⁴⁵, the Commission recommended keeping the human rights situation in Cambodia under continuous review. It furthermore recommended inviting the Secretary-General to designate a Special Representative to assist in restoring full respect for human rights and fundamental freedoms in Cambodia.⁴⁶

5. Vietnam's Invasion of Cambodia: The "People's Republic of Kampuchea"

After invading Cambodia in December 1978 and taking control of Phnom Penh in January 1979, Vietnam overthrew the *Khmer Rouge* regime and installed a communist regime under the rule of Hun Sen and Heng Samrin, known as the "People's Republic of Kampuchea" (PRK). In 1989, the regime changed its name into "State of Cambodia". The newly established government in Cambodia, styled itself the "Khmer People's Revolutionary Party".

For the first time since the end of the French protectorate in the 1950s, Cambodia was controlled by a foreign power. The state's situation was similar to the final years of the French protectorate insofar as Vietnam took responsibility for Cambodia's defence, internal security and foreign affairs, leaving less crucial areas – from their point of view – in Cambodian hands. The new regime's leading officials were *Khmer Rouge* military officers – (there were approximately 140,000 regulars and militia)⁴⁷ – who had defected to Vietnam in 1978 and Cambodians who had lived in Vietnam since the 1950s.⁴⁸ Out of the devastation inherited from the *Khmer Rouge*, the Vietnamese faction developed a dic-

⁴³ H. Hannum, "International Law and Cambodian Genocide: The Sounds of Silence", *HRQ* 11 (1989), 82 et seq.

⁴⁴ Compare under II. 5.

⁴⁵ Doc. E/CN. 4/1413 – E/CN. 4/Sub. 2/459, 80.

⁴⁶ *Ibid.*, para. 3.

⁴⁷ M.W. Doyle, *UN Peacekeeping in Cambodia: UNTAC's Civil Mandate*, 1995, 17.

⁴⁸ Chandler, see note 7, 228.

tatorial but, nevertheless, effective authority over more than 80 per cent of the territory. What it lacked was legitimacy, international recognition outside the Soviet bloc and internal support.⁴⁹ In 1981, the Khmer People's Revolutionary Party promulgated a constitution according to the model of socialist states, placing the real power in the party while affirming limited rights and declaring progressive state policies in the interests of workers and peasants.⁵⁰ No elections were held until 1981, and even those were not contested by opposing parties.⁵¹

Vietnam's invasion of Cambodia and the PRK's rule constituted a challenge on both the national and international political level. On the national level, the Khmer People's Revolutionary Party's rule gave rise to a guerrilla movement of three major resistance groups – the FUNCINPEC, the KPLNF and the PDK – which all held dissenting perceptions concerning the purposes and modalities of Cambodia's future.

The FUNCINPEC faction (*Front Uni National pour un Cambodge Indépendant, Neutre, Pacifique, et Coopératif*), was a non-communist, royalist opposition party, founded and led by Prince Sihanouk, drawing upon the forces that supported the government during the period of its reign (1954-1970).⁵² During the peace process, the armed forces of FUNCINPEC consisted of roughly 10,000 combatants and controlled a small area in Cambodia's North West.⁵³ Opposition by the conservative and rightist movement was formed by the "Khmer People's National Liberation Front", KPLNF. This faction emerged from the republican opposition to Sihanouk comprising the warlords and remnants of the Lon Nol regime (1970-1975).⁵⁴ The KPLNF's military was decreasing and was composed of about 5,000 warriors.⁵⁵ The PDK, or the *Khmer Rouge*, was under the nominal presidency of Khieu Samphan,

⁴⁹ Doyle, see note 47, 18.

⁵⁰ Marks, see note 16, 45 et seq.

⁵¹ Chandler, see note 7, 228.

⁵² Doyle, see note 47, 17.

⁵³ Hazdra, see note 1, 56.

⁵⁴ Institute of Policy Studies (IPS) of Singapore and the United Nations Institute for Training and Research (UNITAR) (eds), *The United Nations Transitional Authority in Cambodia (UNTAC): Debriefing and Lessons*, 1995, 7.

⁵⁵ Doyle, see note 47, 17.

but Pol Pot was still considerably involved in the background.⁵⁶ The *Khmer Rouge* military forces of almost 30,000 disciplined troops controlled the Cambodian territory on the Thai border.⁵⁷

Despite those varying interests and encouraged by the Association of South-East Asian Nations (ASEAN)⁵⁸, the People's Republic of China and the United States, the three Cambodian rebel factions formed the Coalition Government of Democratic Kampuchea (CGDK) in 1982. The coalition government in exile was headed by Sihanouk, Khieu Samphan of the *Khmer Rouge* who acted as vice-president and Sonn San of the KPLNF as prime minister.⁵⁹ Vietnam's offensive against Cambodia formed a political obstacle to the peace processes on the international level, too. Apart from Vietnam and the Cambodian factions, the United States, the ASEAN member states, the People's Republic of China and the Soviet Union were in one way or another involved in the conflict. As a matter of course, each of those states had different interests; the only common objective of this coalition was Vietnam's withdrawal from Cambodia. Vietnam and the pro-Vietnamese faction considered the Cambodian conflict to be an internal one and as such only resolvable by its regime. The anti-Vietnamese resistance, on the other hand, focussed more on the fact of Vietnam's illegitimate invasion and occupation of Cambodia.⁶⁰

The Soviet Union's and the People's Republic of China's ostensible interest was to affirm solidarity and to give support to the Indo-Chinese peoples, communistically oriented like themselves.⁶¹ Even though the Soviet Union was advocating a peace agreement for Cambodia, they supported Vietnam's regime in many ways. China's decision to cease its long-lasting support for the *Khmer Rouge* and to change allegiance, i.e. to support Vietnam, was based on economic reasons. The PDK began to appear as an unwelcome burden in China's

⁵⁶ IPS/ UNITAR, see note 54, 7.

⁵⁷ Doyle, see note 47, 17.

⁵⁸ I.e. Brunei Darussalam, Indonesia, Malaysia, the Philippines, Singapore and Thailand.

⁵⁹ Doyle, see note 47, 19.

⁶⁰ Cf. L. Salmen, *Kambodscha und die UNO: Der Krieg und seine Eingrenzung von 1978 bis 1993*, 1999, 103 et seq.

⁶¹ Hessische Stiftung für Friedens- und Konfliktforschung (HSFK) (ed.), *Friedensanalysen*, 1978, 21 et seq.

quest for access to the world market.⁶² Conversely, the ASEAN member states assumed the leading role in the opposition to Vietnam and supported Sihanouk's FUNCINPEC. The U.S.' chief motive for their resistance to the Hun Sen regime was of political and ideological nature. The U.S., pursuing the ideology of the Cold War era, wanted to prevent any communist movement.⁶³ Apart from that, the promotion of political stability of the ASEAN states was of interest due to their growing economy.⁶⁴

Another problematic issue must be mentioned. As outlined above⁶⁵, Cambodia became a member of the United Nations in 1955. After the Vietnamese invasion, the question of the legitimate representative of Cambodia – either representation by the exiled Coalition Government of Democratic Kampuchea or by the Vietnamese People's Republic of Kampuchea – in the UN came to the fore. The General Assembly referred the question to the Credentials Committee.⁶⁶ Hereinafter, the General Assembly passed four resolutions.⁶⁷ In all resolutions, the General Assembly approved the examinations and reports of the Credentials Committee stating that the Coalition Government of Democratic Kampuchea is the legitimate representative of Cambodia. A number of states doubted the legitimacy of the coalition government due to the involvement of the *Khmer Rouge*. They brought forward the argument that a coalition government comprising a faction which committed genocide and vast human rights abuses could not represent Cambodia in the United Nations.⁶⁸ The majority of states, on the other hand, referred to the fact, that the Coalition Government of Democratic Kampuchea exercised effective control over the territory and that the Vietnamese regime derived from a breach of the principle of the prohibition of the use of force as provided for in Article 2 para. 4 of the UN

⁶² Doyle, see note 47, 23 et seq.

⁶³ HSFK, see note 61, 15 et seq.

⁶⁴ Salmen, see note 60, 44.

⁶⁵ Cf. under II. 2.

⁶⁶ Cf. S. Ratliff, "UN Representation Disputes", *California Law Review* 87 (1999), 1207 et seq.

⁶⁷ A/RES/34/2 of 21 September 1979; A/RES/35/4 of 13 October 1980; A/RES/36/2A of 18 September 1981; A/RES/37/5A of 26 October 1982; cf. also Rapp/Philipp, see note 2, 205.

⁶⁸ Ratliff, see note 66, 1207 et seq.

Charter.⁶⁹ The Vietnamese faction abstained from any vote on this question and refused to recognise the resolutions passed by the General Assembly.⁷⁰

In a situation of vast political entanglement between all the involved parties – some of them permanent members of the UN Security Council – the international community, and especially the UN, were facing multiple difficulties with regard to concurring on the beginning of a Cambodian peace process.

6. The Conflict before the Security Council and the General Assembly

In January 1979, due to Vietnam's invasion of Cambodia, the UN Security Council reviewed the Cambodian situation. The Council attempted to draft two resolutions calling on all parties to cease combat and to withdraw all foreign troops from Cambodia.⁷¹ For the first resolution, no majority among the members could be found and the second resolution was vetoed by the Soviet Union. A two-week long campaign by China against Vietnam in February 1979 resulted in discussing again Cambodia's situation. A draft resolution⁷² called again on all parties to the conflict, i.e. Vietnam and the People's Republic of China, to withdraw their forces. Again, the Soviet Union blocked the resolution.

While the Security Council unsuccessfully tried to find a peaceful solution for Cambodia, the ASEAN member states demanded in August 1979 that "the Situation in Kampuchea" be included on the agenda of the General Assembly's 34th session. As a result of the ensuing debate, the General Assembly adopted Resolution 34/22⁷³ calling for the immediate withdrawal of all foreign forces from Cambodia. The fact that the General Assembly adopted the resolution and thus acted at the same time and on the same subject as the Security Council, raises a legal question: Article 12 para.1 of the UN Charter establishes a temporary ban on recommendations by the General Assembly with regard to dis-

⁶⁹ Ratliff, see note 66, 1207 et seq.

⁷⁰ Rapp/ Philipp, see note 2.

⁷¹ Doc. S/13022 of 11 January 1979 and Doc. S/13027 of 15 January 1979.

⁷² Doc. S/13162 of 13 March 1979.

⁷³ A/RES/34/22 of 14 November 1979.

putes or situations being dealt with by the Security Council unless the Security Council requests the General Assembly to issue a recommendation.⁷⁴ The primary *ratio* of this provision is to guarantee the Security Council's primacy in the area of the maintenance of international peace and security.⁷⁵ In addition, Article 12 para. 1 aims at preventing that the efficient maintenance of international peace and security is jeopardised by the two organs drawing differing conclusions from the same situation, due to their different structure and composition.⁷⁶

The Security Council's primacy in matters of the maintenance of international peace and security as described above can be limited by Arts 11 para. 2 and 35 UN Charter. According to Article 10 of the Charter, the General Assembly is vested with a general power to discuss any questions or any matters within the scope of the Charter.⁷⁷ More specifically, Article 11 para. 2 states that the General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by a member of the UN, by the Security Council, or by a state which is not a member of the UN. The General Assembly may also make under certain provisions recommendations to the state concerned, to the Security Council or to both.

Article 12 para. 1 does not restrict the General Assembly's power to discuss questions relating to the maintenance of international peace and security; the reservation refers only to recommendations. In Resolution 34/22, the General Assembly stresses "that the armed conflict in Kampuchea has escalated and is seriously threatening the peace and stability of South-East Asia". Moreover, it expresses the apprehension that "the present conflict may spill over the neighbouring countries and increase the danger of further involvement by outside Powers". Thus, the General Assembly refers explicitly to a question relating to the maintenance of international peace and security as required by Article 11 para. 2 of the Charter. The resolution must materially be qualified as a recom-

⁷⁴ K. Hailbronner/ E. Klein, "Article 12", in: B. Simma (ed.), *The Charter of the United Nations: A Commentary*, 2002, Vol. I, MN 2.

⁷⁵ Cf. E. Jiménez de Aréchaga, "United Nations Security Council", in: R. Bernhard (ed.), *EPIL*, 2000, Vol. IV, 1168; J. Delbrück, "Article 24", in: Simma, see note 74, MN 3 et seq.

⁷⁶ Hailbronner/ Klein, see note 74, MN 1.

⁷⁷ Cf. Sir F. Vallat, "United Nations General Assembly", in: Bernhard, see note 75, 1122; K. Hailbronner/ E. Klein, "Article 10", in: Simma, see note 74, MN 1 et seq.

mendation⁷⁸, and as the Security Council was acting as well, it is assumed that the General Assembly did not act within the scope of Article 11 para. 2. Thus, the legality of Resolution 34/22 is very doubtful. From a political perspective, given the situation in the Cold War era characterised by vast dissensions among the aligned states, the fact that the General Assembly drafted Resolution 34/22 helped to approach the Cambodian situation. Otherwise, the Soviet Union could keep blocking the process by using its veto power.⁷⁹

As one of the means for implementing Resolution 34/22, the General Assembly requested the Secretary-General in para. 12 to explore the possibility of holding an international conference on Cambodia. By Resolution 35/6⁸⁰, the General Assembly decided to convene early in 1981 “an international conference on Kampuchea which should involve the participation of all conflicting parties in Kampuchea and others concerned”, with the aim of finding a comprehensive political settlement of the Cambodian conflict. In July 1981, the “International Conference on Kampuchea” was held in New York. Vietnam, the Soviet Union and other states from the former eastern bloc declined to take part, basing their protest on the ground that the conference’s mandate illegally interfered with Cambodia’s internal affairs. Due to vast dissensions between the different Cambodian factions and among all parties, the conference participants could not entirely agree on what solution should be proposed and the conference ended with a *communiqué* expressing the need for a political and peaceful solution.⁸¹ The conference also created an *ad hoc* committee to undertake peace efforts on behalf of the conference.⁸² The committee met subsequent to the conference throughout the 1980s but made little progress toward a peace settlement. The General Assembly kept the situation in Cambodia on its

⁷⁸ Compare only the formulation in paras 4-7, in which the General Assembly *inter alia* “urges all parties to cooperate with the humanitarian relief efforts” and “calls upon all parties to the conflict to cease all hostilities”.

⁷⁹ For a detailed account of this subject matter compare the discussion on the so called “Uniting for Peace Resolution”, A/RES/377 (V) of 3 November 1950, adopted on the occasion of the Korean conflict, see B. Nolte, “Uniting for Peace”, in: Wolfum, see note 2, Vol. II, 1341 et seq.

⁸⁰ A/RES/35/6 of 22 October 1980.

⁸¹ Report of the International Conference on Kampuchea, Doc. A/CONF.109/5, annex 1.

⁸² *Ibid.*, annex II.

agenda and, passing annual resolutions on this issue⁸³, identified the withdrawal of the foreign forces as the first component of any durable peace in Cambodia. Furthermore, the Secretary-General dispatched his Special Representative to the region in order to guarantee meetings and deliberations with regional actors.⁸⁴

In 1987 and again in 1988 Prince Sihanouk and Hun Sen met for informal discussions in France, fostered by India and Indonesia.⁸⁵ With Sihanouk's advancing age, Hun Sen's desire to attain international recognition for his regime and owing to military exhaustion throughout the whole country, the Cambodian factions began to demonstrate willingness to discuss peace.⁸⁶ The process of dialogue and negotiation began to gather momentum when a good offices mission undertaken by the Secretary-General's Special Representative for Humanitarian Affairs in South-East Asia succeeded in fostering a dialogue between the various Cambodian factions. Encouraged by Indonesia, the four factions convened two meetings in Indonesia (called the "Jakarta Informal Meetings", JIMs), attended by the four factions and Vietnam, Laos and the ASEAN member states.⁸⁷ At the first JIM in July 1988, the positions of the parties differed mainly on two questions, namely on the embodiment of Cambodia's rule during the transitional period and on whether the *Khmer Rouge* should play a role in Cambodia. The conference was concluded with a *communiqué* emphasising the need for a comprehensive settlement of the Cambodian conflict.⁸⁸ The fundamental dissensions between the Cambodian factions also overshadowed the second JIM, which took place in February 1989; thus, the conference ended without achieving a comprehensive settlement.⁸⁹

⁸³ See, e.g. A/RES/43/19 of 3 November 1988.

⁸⁴ S.R. Ratner, "The Cambodia Settlement Agreements", *AJIL* 87 (1993), 1 et seq.

⁸⁵ Cf. Boutros-Ghali, see note 4, 6.

⁸⁶ Doyle, see note 47, 21.

⁸⁷ T. Findlay, *Cambodia: The Legacy and Lessons of UNTAC*, 1995, 4.

⁸⁸ Letter from the permanent representative of Indonesia to the United Nations addressed to the Secretary-General, Doc. A/43/493-S/20071 of 28 July 1988, annex 1.

⁸⁹ Letter from the permanent representative of Indonesia to the United Nations addressed to the Secretary-General, Doc. A/44/138-S/20477 of 22 February 1989.

III. Peace Negotiations

1. The Paris Peace Conference in 1989

At the initiative of the French and Indonesian government, perceiving an opportunity to break the stalemate that had emerged at both the national and international level, the “Conference on Peace in Cambodia” – more often referred to as the “Paris Peace Conference” or the “Paris Conference” – was convened.⁹⁰ The Paris Conference, which lasted from July to August 1989, was the culmination of years of considerable effort in the Cambodian peace process, marked alternately by hope, frustration and, as described above, impasse. An optimistic mood prevailed among the conference’s participants, *inter alia* due to the fact, that the preceding phase of diplomatic efforts generated a considerable willingness among the opposing parties to reach a settlement.⁹¹ Another reason for an optimistic position with regard to the settlement of peace in Cambodia was Vietnam’s decision to withdraw its troops.⁹² Apart from that, the Cambodian conflict became onerous in many ways: the parties directly involved had realised that their objectives could not be achieved by military force; furthermore, they had come to the conclusion that the costs of continuing the conflict were higher than the costs of a political settlement.

Among the conference’s participants were all belligerent Cambodian factions, nineteen states – among them the permanent members of the UN Security Council, the members of ASEAN and representatives of the non-aligned states.⁹³

Progress was made in two ways. The conference’s participants reached agreement on the withdrawal of foreign forces, neutralization and the return of refugees.⁹⁴ Furthermore, the presence of the five permanent members of the UN Security Council marked a shared interest in achieving a negotiated solution for peace, following the post cold-war *rapprochement* between the United States and the Soviet Union and

⁹⁰ Boutros-Ghali, see note 4, 7.

⁹¹ Cf. A. Acharya/ P. Lizée/ S. Peou (eds), *Cambodia: The 1989 Paris Peace Conference*, 1991, Introduction 23.

⁹² Findlay, see note 87, 5.

⁹³ Cf. A. Acharya/ P. Lizée/ S. Peou, see note 91, 45.

⁹⁴ Doyle, see note 47, 22.

an improvement in relations between the People's Republic of China, the ASEAN member states and Vietnam.⁹⁵

Despite this progress, the Paris Conference was to fall far short of providing a decisive breakthrough towards the resolution of the Cambodian conflict.⁹⁶ The crucial obstacles proved to be the formula for power sharing among the four Cambodian factions during the interim period and the *Khmer Rouge's* participation in the peace process. The conference thus ended with mapping out a broad strategy for peace but was suspended without achieving a comprehensive settlement.

2. The Way to the Paris Agreements

With the adjournment of the Paris Conference, intensive efforts were made by the five permanent members of the Security Council (hereinafter “the Five”), as well as Australia, Indonesia and Japan to restart the negotiations. The common proposal was to design some form of UN trusteeship over Cambodia instead of establishing a quadripartite power-sharing arrangement between the local factions.⁹⁷ After the withdrawal of Vietnam's troops in 1989, the Five held a series of high-level meetings in New York and Paris addressing the Cambodian situation.⁹⁸ At their sixth meeting in August 1990, the Five announced that they had reached a consent on a Framework for a Comprehensive Political Settlement of the Cambodian Conflict (hereinafter “Framework Agreement”).⁹⁹

The Framework Agreement emphasised at the outset the need for the comprehensiveness of the future settlement and covers five sections: the transitional arrangements regarding the administration of Cambodia

⁹⁵ Cf. Boutros-Ghali, see note 4, 7.

⁹⁶ Acharya/ Lizée/ Peou, see note 91, 23.

⁹⁷ Findlay, see note 87, 6.

⁹⁸ Cf. Rapp/ Philipp, see note 2, 206.

⁹⁹ Cf. “Statement of the Five Permanent Members of the Security Council of the United Nations on Cambodia”, in: Letter dated 30 August 1990 from the permanent representatives of China, France, the USSR, the United Kingdom and the United States to the United Nations addressed to the Secretary-General transmitting statement and framework document adopted by their representatives at a meeting in New York, 27-28 August 1990; Doc. A/45/472-S/21689 of 31 August 1990.

during the pre-election period (section 1); the military arrangements during the transitional period (section 2); the elections under United Nations auspices (section 3); human rights protection (section 4); and international guarantees (section 5).

The transitional arrangements regarding the administration of Cambodia during the pre-election period aim at restoring and maintaining peace in Cambodia, the promotion of national reconciliation and at the realisation of national self-determination through free and fair general elections. Therefore, the framework provided the establishment of a Supreme National Council (SNC) as the “unique legitimate body and source of authority in which, throughout the transitional period, national sovereignty and unity would be enshrined”.¹⁰⁰ On condition that the members of the SNC are committed to the holding of free and fair elections, the SNC’s composition should be decided by the Cambodian factions through consultation.¹⁰¹ Apart from its embodiment of Cambodia’s internal sovereignty, the SNC should represent Cambodia externally and occupy the seat of Cambodia at the United Nations.¹⁰²

With respect to the military arrangements during the transitional period, the Framework Agreement provides for the establishment of a United Nations Transitional Authority in Cambodia (UNTAC) with military as well as civilian components.¹⁰³ The function of the military component was to carry out the peace-keeping aspects of the comprehensive political settlement.¹⁰⁴ The Five emphasised a ceasefire as an indispensable element of a comprehensive agreement and called on all parties to the conflict to exercise maximum self restraint.¹⁰⁵ Once a ceasefire was in place, the UN Transitional Authority would verify the withdrawal of all foreign forces from Cambodia, monitor the cessation of outside military assistance and undertake mine clearance and awareness training programmes.¹⁰⁶

National self-determination was considered to be the basic principle behind the Five’s approach. This objective was to be achieved through

¹⁰⁰ Framework Agreement, section 1, paras 1 and 2.

¹⁰¹ Framework Agreement, section 1, paras 3 and 4.

¹⁰² Framework Agreement, section 1, para. 7.

¹⁰³ Framework Agreement, section 2, para. 13.

¹⁰⁴ Framework Agreement, section 3, para. 14.

¹⁰⁵ Framework Agreement, section 2, para. 17.

¹⁰⁶ Framework Agreement, section 2, para. 15.

free and fair elections under United Nations auspices.¹⁰⁷ The provisions for the elections should include the establishment of a system of laws, procedures and administrative measures.¹⁰⁸ After an electoral period which should be as short as possible, the elected constituent assembly should draft a constitution and transform itself into a legislative assembly which would create the new Cambodian government.¹⁰⁹ With the above-mentioned procedure – elections for a constituent assembly, the elaboration of a constitution by the constituent assembly and the transformation of the assembly into the legislative body which would create the new Cambodian government – the Five provided for a process which may be considered as characteristic for the restoration of national self-determination (compare e.g. the proceedings in Afghanistan¹¹⁰ and Iraq¹¹¹). As Cambodia's history is marked by grave human rights violations, the settlement should commit Cambodia to comply with the obligations of the relevant international human rights instruments.¹¹² All fundamental rights and freedoms therefore formed part of the constitutional principles within the settlement. The UN should develop and implement a programme of human rights education and provide for investigation of human rights complaints.¹¹³

A principle aim of the international guarantees in the Framework Agreement was to protect the independent and neutral status of Cambodia and to prevent foreign aggression.¹¹⁴ Therefore, the states participating in the Paris Conference would conclude a multilateral agreement to recognise and respect the independence, sovereignty, territorial integrity and inviolability, neutrality and national unity of Cambodia. In the event of violations or threat of violation with respect to these guarantees, the parties to the future agreement should undertake appropriate measures. These measures may include reference to the UN Security Council or recourse to the means for the peaceful settlement of disputes as provided in Article 33 of the UN Charter.¹¹⁵

¹⁰⁷ Framework Agreement, section 1, para. 1 and section 3, para. 20.

¹⁰⁸ Framework Agreement, section 3, paras 21 and 22.

¹⁰⁹ Framework Agreement, section 3, para. 23.

¹¹⁰ For details compare E. Afsah/ A. Guhr, in this Volume.

¹¹¹ For details compare R. Wolfrum, case study Iraq, in this Volume.

¹¹² Framework Agreement, section 4, para. 24.

¹¹³ Framework Agreement, section 4, paras 26 and 27.

¹¹⁴ Framework Agreement, section 5, para. 31.

¹¹⁵ Framework Agreement, section 5, paras 33-36.

On the occasion of a further informal meeting in Jakarta, the four Cambodian factions accepted the Framework Agreement.¹¹⁶ They even agreed to form together the SNC under the chair of Prince Sihanouk.¹¹⁷

In Resolution 668, the Security Council endorsed the framework.¹¹⁸ The Five then called upon France and Indonesia, having served as Co-Chairmen at the Paris Conference, to negotiate the framework into a definitive peace-agreement.

The final round of negotiations began in the summer of 1991. In four more meetings, the Five, the Cambodian factions attending as the SNC and Indonesia made revisions to the 1990 framework in order to respond to the concerns of the state of Cambodia and other members of the Paris Conference.¹¹⁹ After several negotiations and the presentation of drafts to the four Cambodian factions, to Thailand and Vietnam, after the conclusion of the first cease-fire in 12 years and after more than ten years of diplomatic efforts, the “Agreements on a Comprehensive Political Settlement of the Cambodia Conflict (hereinafter referred to as “Paris Agreements”)¹²⁰ were signed in October 1991. Among the signatory states were Cambodia represented by the SNC, the Five, the ASEAN member states, Cambodia’s neighbours (i.e. Vietnam and the Lao People’s Democratic Republic) and Australia, Canada, India, Japan and furthermore the Socialist Federal Republic of Yugoslavia as representative of the non-aligned states. The UN signed the Paris Agreements as a witness. On 31 October 1991, the Security Council expressed its full support for the Paris Agreements in Resolution 718¹²¹ and called on all Cambodian factions to comply with the cease-fire and to cooperate fully with the UN. With Resolution 46/18¹²², the General

¹¹⁶ Doyle, see note 47, 24.

¹¹⁷ For details to the SNC see under III. 3. c. aa.

¹¹⁸ See S/RES/668 (1990) of 20 September 1990.

¹¹⁹ Cf. Communiqué issued on 30 August 1991 by the Co-Chairman of the Paris Conference on Cambodia and the Five Permanent Members of the Security Council, in: Letter dated 3 September 1991 from the representatives of China, France, Indonesia, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations addressed to the Secretary-General, Doc. A/46/418-S/23011 of 3 September 1991.

¹²⁰ Doc. A/46/608-S/23177 of 30 November 1991.

¹²¹ S/RES/718 (1991) of 31 October 1991.

¹²² A/RES/46/18 of 20 November 1991.

Assembly followed the Security Council calling on all parties to respect the rights and freedoms of the Cambodian people.

3. The Paris Agreements – Contents and Objectives

a. Structure of the Paris Agreements

The Paris Conference reached an agreement on four documents: the Final Act of the Paris Conference on Cambodia (hereinafter “Final Act”); the Agreement of a Comprehensive Political Settlement of the Cambodia Conflict (hereinafter “Comprehensive Settlement Agreement”); the Agreement Concerning the Sovereignty, Independence, Territorial Integrity and Inviolability, Neutrality and National Unity of Cambodia (hereinafter “Guarantees Agreement”); and the Declaration on the Rehabilitation and Reconstruction of Cambodia (hereinafter “Declaration”). The parties to the Final Act, the Comprehensive Settlement Agreement, the Guarantees Agreement and the Declaration are the nineteen states that participated in the Paris Conference.¹²³

b. The Final Act and the Declaration

The Final Act gives a review of the Paris Conference in general terms and outlines the subject matter negotiated on the occasion of the two sessions of the conference, i.e. the Comprehensive Settlement Agreement, the Guarantees Agreement and the Declaration.¹²⁴ Moreover, the parties to the Paris Conference pledge to fully cooperate in the fulfilment of the Paris Agreements, to foster the implementation and to promote and encourage respect for human rights in Cambodia.¹²⁵ These obligations are included in both the Comprehensive Settlement Agreement and the Guarantees Agreement.

The Declaration outlines the measures to be taken with respect to the rehabilitation and reconstruction of Cambodia. According to para. 6 of the Declaration, the UN system will play an important role. As to the reconstruction, “the main responsibility for deciding Cambodia’s

¹²³ Compare under III. 1.

¹²⁴ Final Act, para. 10.

¹²⁵ Final Act, para. 12.

reconstruction needs and plans should rest with the Cambodian people and the government formed after free and fair elections".¹²⁶ Paras 3 to 5 and 11 to 13 outline several principles that should be considered during the reconstruction phase, especially the need to coordinate the international and regional assistance to Cambodia.¹²⁷ For the process of rehabilitation, the Secretary-General is requested to help coordinate the programme.¹²⁸

c. The Comprehensive Settlement Agreement

The Comprehensive Settlement Agreement is the principal document of the Paris Agreements and contains all essential elements already provided for in the Framework Agreement. It also includes the provisions of the Guarantees Agreement and the Declaration. The agreement consists of a main text, subdivided into nine parts and again into sections, and five annexes on the mandate of UNTAC (annex 1), on the military arrangements during the transitional period (annex 2), on the elections (annex 3), the repatriation of refugees and displaced persons (annex 4) and on the principles for a new Cambodian constitution (annex 5). The subsequent analysis will comprise remarks on the provisions with respect to the SNC, to the elections, the issue of human rights and to the constitutional principles. UNTAC's mandate will be outlined under IV. 2.

aa. The Supreme National Council

As pre-designed in the Framework Agreement, the SNC forms the exclusive sovereign body representing Cambodia during the transitional period.¹²⁹ Under the Comprehensive Settlement Agreement, the four Cambodian factions forming the SNC were to support the holding of free and fair elections organised and conducted by the UN.¹³⁰ As the crucial point with regard to the SNC's powers, article 6 states that "the SNC (...) delegates to the United Nations all powers necessary to ensure the implementation of this Agreement, as described in annex 1 [i.e.

¹²⁶ Declaration, para. 2.

¹²⁷ Declaration, para. 3.

¹²⁸ Declaration, para. 9.

¹²⁹ Comprehensive Settlement Agreement, part 1, section 3, arts 3 and 5.

¹³⁰ Comprehensive Settlement Agreement, part 1, section 3, article 4.

in the provisions describing UNTAC’s mandate]”.¹³¹ This delegation of power has to be effected “to ensure a neutral political environment conducive to free and fair general elections (...)”. In addition, “administrative agencies, bodies and offices which could directly influence the outcome of the elections will be placed under direct United Nations supervision and control. In that context, special attention will be given to foreign affairs, national defence, finance, public security and information.¹³² With respect to the precise relationship between the SNC and UNTAC, part 1, section 3, article 7 refers to annex 1, where UNTAC’s mandate is outlined.

bb. Elections

The Comprehensive Settlement Agreement provides for the establishment of a constituent assembly whose members are to be elected by the Cambodian people in free and fair general elections. This reflects the underlying principle that the Cambodian people have the right to determine their own political future. The elections were to be held under UN auspices “in a neutral political environment with full respect for the national sovereignty of Cambodia”.¹³³ UNTAC was to determine the exact timetable for the electoral process, which should *in toto* not exceed nine months.¹³⁴ UNTAC’s task was to create a system of voter registration¹³⁵ and to facilitate the presence of foreign election observers.¹³⁶ At the end of the electoral process, UNTAC would determine if the elections were free and fair.¹³⁷ The constituent assembly should consist of 120 members and should draft and adopt a new Cambodian constitution within a period of three months from the date of the elections. After the elections and the adoption of the constitution, the assembly would transform itself into a legislative assembly which would form the new Cambodian government.¹³⁸ According to the agreement, all Cambodians, “including those who at the time of signature of this

¹³¹ Comprehensive Settlement Agreement, part 1, section 3, article 6, para. 1.

¹³² Comprehensive Settlement Agreement, part 1, section 3, article 6, para. 2.

¹³³ Comprehensive Settlement Agreement, part 2, article 12.

¹³⁴ Comprehensive Settlement Agreement, annex 1, section D, para. 5.

¹³⁵ Comprehensive Settlement Agreement, annex 1, section D, para. 3, lit. d.

¹³⁶ Comprehensive Settlement Agreement, annex 1, section D, para. 3, lit. i.

¹³⁷ Comprehensive Settlement Agreement, annex 1, section D, para. 3, lit. l.

¹³⁸ Comprehensive Settlement Agreement, annex 3, para. 1.

Agreement are Cambodian refugees and displaced persons, will have the same rights, freedoms and opportunities to take part in the electoral process".¹³⁹ During the electoral process, the freedom of speech, assembly and movement will be fully respected.¹⁴⁰

Annex 3, para. 5 sets forth that political parties may be formed by any group of five thousand registered voters. The party platforms must be consistent with the principles and objectives of the Comprehensive Settlement Agreement and UNTAC is meant to confirm that the parties and candidates meet the established criteria. According to annex 3, para. 7, adherence to a code of conduct established by UNTAC in consultation with the SNC constitutes a condition for such participation.

cc. Human Rights

Although resolutions of other conflicts may require only reference to human rights, the terror of the Democratic Kampuchean regime necessitated the inclusion of detailed sections on human rights in the Paris Agreements.¹⁴¹ Due to Cambodia's history, special measures to assure the protection of human rights are required. Therefore, the peace plan states that "the constitution will contain a declaration of fundamental rights, including the rights to life, personal liberty, security, and freedom of movement, freedom of religion, assembly and association (...)". Furthermore, the fundamental rights provisions have to comprise "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. Aggrieved individuals will be entitled to have the courts adjudicate and enforce these rights".¹⁴² Part 3, article 15, para. 1 of the Comprehensive Settlement Agreement states that "All persons in Cambodia and all Cambodian refugees and displaced persons shall enjoy the rights and freedoms embodied in the Universal Declaration of Human Rights and other relevant interna-

¹³⁹ Comprehensive Settlement Agreement, annex 3, para. 3.

¹⁴⁰ Comprehensive Settlement Agreement, annex 3, para. 9.

¹⁴¹ Ratner, see note 84, 1 et seq.

¹⁴² Comprehensive Settlement Agreement, annex 5, para. 2.

tional human rights instruments”. To this end, Cambodia is called to adhere to relevant international human rights instruments and to take measures to ensure that the policies and practices of the past will never return.¹⁴³

In order to guarantee an environment in which respect for human rights is ensured, the UN Transitional Authority is required to foster human rights during the transitional period, i.e. the period between the entry into force of the Paris Agreements and the adoption of the constitution by the constituent assembly.¹⁴⁴

dd. Constitutional Principles

Annex 5 of the Comprehensive Settlement Agreement outlines principles for the new Cambodian constitution, representing the supreme law of the Cambodian state. It can only be amended by a process involving legislative approval, popular referendum or both. The constitution is adopted by a two-thirds majority of the members of the constituent assembly.¹⁴⁵ Cambodia’s status will be declared as sovereign, independent and neutral.¹⁴⁶ The constitution will state that “Cambodia will follow a system of liberal democracy, on the basis of pluralism. It will provide for periodic and genuine elections. It will provide for the right to vote and to be elected by universal and equal suffrage. It will provide for voting by secret ballot, with a requirement that electoral procedures provide a full and fair opportunity to organise and participate in the electoral process”.¹⁴⁷ In order to enforce the constitutional rights, an independent judiciary will be established.¹⁴⁸

d. The Guarantees Agreement

The Guarantees Agreement reproduces the provisions included in the Comprehensive Settlement Agreement with respect to human rights. Apart from this, it comprises obligations regarding the sovereignty, in-

¹⁴³ Comprehensive Settlement Agreement, part 3, article 15, para. 2, lit. a.

¹⁴⁴ Comprehensive Settlement Agreement, part 3, article 16.

¹⁴⁵ Comprehensive Settlement Agreement, annex 5, paras 1 and 6.

¹⁴⁶ Comprehensive Settlement Agreement, annex 5, para. 3.

¹⁴⁷ Comprehensive Settlement Agreement, annex 5, para. 4.

¹⁴⁸ Comprehensive Settlement Agreement, annex 5, para. 5.

dependence, territorial integrity and inviolability, neutrality and national unity of Cambodia to be fulfilled by both Cambodia and the other parties to the Paris Agreements. Cambodia is called upon to refrain from any action “that might impair the sovereignty, independence and territorial integrity and inviolability of other States”;¹⁴⁹ and “(...) from entering into any military alliances or other military agreements with other States that would be inconsistent with its neutrality (...) without prejudice to Cambodia’s (...) inherent right of self-defence and of the maintain law and order”.¹⁵⁰ In addition, Cambodia has to terminate treaties and agreements that are incompatible with its sovereignty, independence, territorial integrity and inviolability, neutrality, and national unity.¹⁵¹

According to the Guarantees Agreement, all parties to the agreement have to, *inter alia*, refrain from direct or indirect interference in the internal affairs of other states respectively of Cambodia;¹⁵² they are urged to refrain from the threat or use of force against the territorial integrity or political independence of any state respectively of Cambodia;¹⁵³ and the parties are called to settle disputes with other states respectively with Cambodia by peaceful means.¹⁵⁴

IV. The Territorial Administration of Cambodia

1. The UN Advance Mission in Cambodia

During the final negotiations leading to the Paris Agreements, the leader of the SNC, Prince Norodom Sihanouk, requested the UN to send observers to Cambodia in order to sustain the impetus of the peace process and monitor the fragile ceasefire. The Secretary-General therefore recommended that the Security Council establish the United Nations Advance Mission in Cambodia (hereinafter UNAMIC).¹⁵⁵ Ac-

¹⁴⁹ Guarantees Agreement, article 1, para. 2, lit. a.

¹⁵⁰ Guarantees Agreement, article 1, para. 2, lit. b.

¹⁵¹ Guarantees Agreement, article 1, para. 2, lit. d.

¹⁵² Guarantees Agreement, article 1, para. 2, lit. c and article 2, para. 2, lit. b.

¹⁵³ Guarantees Agreement, article 1, para. 2, lit. e and article 2, para. 2, lit. c.

¹⁵⁴ Guarantees Agreement, article 1, para. 2, lit. f and article 2, para. 2, lit. d.

¹⁵⁵ Cf. Doc. S/22945 of 14 August 1991.

According to the Secretary-General's recommendation, UNAMIC was intended to operate under UN command. The Security Council thus passed Resolution 717¹⁵⁶ and decided that, in order to ensure the required conditions for UNTAC's deployment, UNAMIC should be sent to Cambodia immediately after the signing of the Paris Agreements.¹⁵⁷ The principal goal of UNAMIC was to help maintain the cease-fire.¹⁵⁸ In addition, UNAMIC was to serve as liaison between the SNC and the UN during the period preceding UNTAC's establishment. Finally, UNAMIC was enlarged by Security Council's Resolution 728¹⁵⁹ in order to start a mine-awareness programme. With the formation of UNTAC in 1992, the UNAMIC mission came to an end.

2. The UN Transitional Authority in Cambodia

By 1992, the Secretary-General had submitted an operation plan for UNTAC to the Security Council.¹⁶⁰ In the operation plan, the following seven distinct components of UNTAC were outlined: human rights, elections, military, civil administration, police, repatriation and rehabilitation. The Security Council adopted the Secretary-General's operation plan and created UNTAC in February 1992 by Resolution 745.¹⁶¹

a. Resolution 745 (1992) – Legal Basis of UNTAC

In Resolution 745, the Security Council approved the report of the Secretary-General on Cambodia containing the plan for implementing UNTAC's mandate envisaged in the Paris Agreements.¹⁶² Resolution

¹⁵⁶ S/RES/717 (1991) of 16 October 1991.

¹⁵⁷ *Ibid.*, para. 2.

¹⁵⁸ Cf. http://www.un.org/Depts/dpko/dpko/co_mission/unamicbackgr.html.

¹⁵⁹ S/RES/728 (1992) of 8 January 1992.

¹⁶⁰ Report of the Secretary-General on Cambodia containing his proposed implementation plan for UNTAC, including administrative and financial aspects; Doc. S/23613 of 19 February 1992.

¹⁶¹ S/RES/745 (1992) of 28 February 1992.

¹⁶² Para. 1 of Resolution 745, see note 161.

745 thus refers to the Paris Agreements and the agreements at the same time authorise the Security Council to establish UNTAC.¹⁶³

Resolution 745 is brief in terms of UNTAC's mandate and formulates it in a general way. In para. 2, the resolution provides that UNTAC "shall be established under its authority (...) for a period not to exceed 18 months"; and, in para. 4, the Security Council "requests the Secretary-General to deploy the Authority as rapidly as possible" and that the deployment and implementation needs "to be done in the most efficient and cost-effective way". Apart from these statements relating to the mandate's personal direction, to its time period and the way the mandate should be accomplished, the resolution contains no concrete reference concerning UNTAC's mandate as the Paris Agreements deal with these details.

In contrast, the resolution refers to the Paris Agreements in five of its eleven paras: the Security Council approves the report of the Secretary General "for implementing the mandate envisaged in the agreements on a comprehensive political settlement of the Cambodian conflict";¹⁶⁴ it invites the Secretary-General to review the mandate's operation continuously, "bearing in mind the fundamental objectives of the agreements;"¹⁶⁵ furthermore, the SNC is called to uphold its responsibilities set out in the agreement¹⁶⁶ and all parties concerned are to comply with the terms of the agreement.¹⁶⁷

The administration of territories by the United Nations raises a widely discussed legal question: it concerns the issue of whether the UN has the competence to administer a territory, and if so, on what legal basis. At the outset of the following considerations it is emphasised that the power of the UN to administer a territory is not mentioned in the UN Charter.¹⁶⁸ Although various types of territorial administration bear resemblance to the trusteeship system provided for by Chapter

¹⁶³ Comprehensive Settlement Agreement, part 1, section 2, article 2.

¹⁶⁴ Para. 1 of Resolution 745, see note 161.

¹⁶⁵ Para. 4 of Resolution 745, see note 161.

¹⁶⁶ Para. 5 of Resolution 745, see note 161.

¹⁶⁷ Para. 6 of Resolution 745, see note 161.

¹⁶⁸ Compare E. Suy, "United Nations Peacekeeping System", in: Bernhard, see note 75, 1144; S. Chesterman, *You, the People: The United Nations, Transitional Administration and State-Building*, 2004, 48.

XII UN Charter¹⁶⁹, Article 78 of the Charter states that the trusteeship does not apply to territories that have become members of the United Nations. Moreover, Article 77 para. 1 limits the applicability of the system to three categories of territories: those now held under mandate; territories detached from enemy states as a result of World War II and territories voluntarily placed under the system by states responsible for their administration. Hence none of those categories apply to the different modern-day mandates, including UNTAC in Cambodia.¹⁷⁰

Some of the most recent international territorial administrations – UNMIK in Kosovo¹⁷¹, UNTAES in Eastern Slavonia and UNTAET in East Timor¹⁷² – were established by a resolution of the Security Council acting under Chapter VII of the Charter. The Security Council emphasised in all respective resolutions that the situation in Kosovo, Eastern Slavonia and East Timor constituted a threat to peace and security.¹⁷³ Resolution 745 on the establishment and implementation of UNTAC contains neither a reference to a threat to peace and security nor a declaration that the Security Council is acting under Chapter VII. It refers only to the Paris Agreements. As a matter of fact, each reference to an agreement indicates at the same time a reference to the parties' consent: the constituent element of each treaty in each legal domain is to be found in the consent of the parties to the treaty.¹⁷⁴ In the Paris Agreements, the parties even categorically authorised the Security Council in Part 1, section 2, article 2 of the Comprehensive Settlement Agreement to establish UNTAC with civilian and military components under the

¹⁶⁹ For details of the trusteeship system see N. Matz, in this Volume; D. Rauschnig, "Chapter XII. International Trusteeship System", in: Simma, see note 74, Vol. II, MN 1 et seq.

¹⁷⁰ Cf. E. De Wet, "The Direct Administration of Territories by the United Nations", in: A. von Bogdandy/ R. Wolfrum (eds), *Max Planck UNYB* 8 (2004), 306 et seq.

¹⁷¹ For details to UNMIK see J. Friedrich, in this Volume.

¹⁷² For details to UNTAET see M. Benzing, in this Volume.

¹⁷³ S/RES/1244 (1999) of 10 June 1999 (UNMIK in Kosovo); S/RES/1037 (1996) of 15 January 1996 (UNTAES in Eastern Slavonia); S/RES/1272 (1999) of 25 October 1999 (UNTAET in East Timor).

¹⁷⁴ Answering the important material questions of the genesis of a treaty, i.e. the mode of the negotiations leading to a treaty, which parties are involved in the treaty-making procedure and the issue of whether a consent represents a real accord between the parties, would go beyond the scope of the present analysis.

direct responsibility of the Secretary-General. Hence, with Resolution 745, the Security Council – referring to the Paris Agreements and consequently to the authorisation in article 2 as well – based the establishment and implementation of UNTAC on the consent of the parties to the agreement.¹⁷⁵

In the course of history, the United Nations has developed special procedures for the maintenance of peace by using military elements and units (peace-keeping operations¹⁷⁶). Peace-keeping on the basis of consent and cooperation was already developed under the League of Nations and remained fundamental under the UN Charter.¹⁷⁷ The instruments of consensual and cooperative peace-keeping are diplomatic negotiations, conciliation and mediation, thus traditional means of dispute settlement as provided in Chapter VI of the UN Charter.¹⁷⁸ By striving for impartiality and avoiding the use of force, peace-keeping on the basis of consent does not necessarily resolve conflicts but instead provides for stability which helps to create conditions required for a negotiated political settlement.¹⁷⁹ As one additional element, since the 1960 crisis in the Congo and in order to contain the respective conflict by facilitating cease-fires and by preventing a resurgence of hostilities, military support in terms of military observer groups and peace-keeping-forces has become an important component of the consensual peace-keeping approach.¹⁸⁰ In Cambodia, Namibia¹⁸¹ and West-Irian¹⁸², international administration had been entirely based on the consent of the states and

¹⁷⁵ Cf. M. Bothe, “Peace-keeping”, in: Simma, see note 74, MN 13 et seq.; M. J. Matheson, “United Nations Governance of Postconflict Societies”, *AJIL* 95 (2001), 76 et seq.; De Wet, see note 170, 314 et seq.

¹⁷⁶ Bothe, see note 175, MN 1 et seq.; the terminology in the field of UN peace-keeping operations is far from consistent, cf. W. M. Reisman, “Preparing to Wage Peace: Toward the Creation of an International Peacemaking Command and Staff College”, *AJIL* 88 (1994), 76 et seq.

¹⁷⁷ Bothe, see note 175, MN 5 et seq.; De Wet, see note 170, 314 et seq.

¹⁷⁸ Bothe, see note 175, MN 5 et seq.

¹⁷⁹ Doyle, see note 47, 25.

¹⁸⁰ The military support aims at containing the conflict by facilitating cease-fires and by preventing a resurgence of hostilities; Bothe, see note 175, MN 7 et seq.

¹⁸¹ See N. Matz, in this Volume.

¹⁸² See D. Gruss, in this Volume.

parties involved.¹⁸³ Since this action has been widely accepted by the UN member states, it is reasonable to accept the Security Council's competence to establish territorial administration with the consent of the respective territory as a customary power.¹⁸⁴ Hence, the legal basis for the establishment of UNTAC by Resolution 745 is to be found in the customary power entrusting the Security Council to administer territories by peace-keeping missions.

b. UNTAC – Mandate and Implementation

Part 1, section 2, article 2 para. 1 of the Comprehensive Settlement Agreement states that UNTAC will be established with civilian and military components under the direct responsibility of the UN Secretary General. For this purpose, the Secretary-General designated a Special Representative to act on his behalf.

The detailed provisions for UNTAC's mandate are to be found in annex 1 of the Comprehensive Settlement Agreement. They include general procedures (section A), UNTAC's civil administration (section B), UNTAC's military functions (section C) and provisions with regard to the elections (section D) and human rights (section E).

aa. The Mandate and its Limitations

The first limitation to UNTAC's comprehensive mandate was provided for by the Comprehensive Settlement Agreement and Resolution 745. Part 1, section 1, article 1 of the Comprehensive Settlement Agreement states that the transitional period "shall commence with the entry into force of this Agreement and terminate when the constituent assembly (...) has approved the constitution and transformed itself into a legislative assembly (...)". Resolution 745 specifies this provision and determines the time-frame of UNTAC's activities in Cambodia. According to para. 2, UNTAC "shall be established (...) for a period not to exceed 18 months". With the establishment of UNTAC by the above mentioned resolution, UNTAC absorbed the UNAMIC mission on 15 March 1992 and thus became operational. UNTAC's mandate ended in

¹⁸³ J. A. Frowein/ N. Krisch, "Article 41", in: Simma, see note 74, MN 20.

¹⁸⁴ According to a different opinion, the consensual territories administration is based on the implied powers in Article 39 in conjunction with Article 29 of the UN Charter; De Wet, see note 170, 314.

September 1993 with the promulgation of the Constitution for the Kingdom of Cambodia and the formation of the new Government.

The second limitation is to be found in the powers of the SNC. The provisions regulating the relationship between UNTAC and the SNC are included in Part 1, section 3, article 6 and in section A of annex 1 of the Comprehensive Settlement Agreement. As outlined above, article 6 states that the SNC delegates all powers necessary to the UN in order to ensure the implementation of the agreement. Article 2 of annex 1 provides special mechanism to resolve “all issues relating to the implementation of the Agreement which may arise between the Secretary-General’s Special Representative” and the SNC. First, the SNC offered advice to UNTAC, which was meant to comply with this advice on condition that there was consent among the members of the SNC and that the advice was consistent with the objectives of the agreement.¹⁸⁵ In the case of lack of consent among SNC members, the president was to decide on the advice offered to UNTAC.¹⁸⁶ If the president was not in a position to decide on the advice, the power of decision was transferred to the Special Representative, taking fully into account the views expressed in the SNC.¹⁸⁷ And finally, the Special Representative determined in all cases whether advice or action of the SNC was consistent with the agreement.¹⁸⁸ As a rule, for cooperation between the SNC and UNTAC, the Special Representative was called to “attend the meetings of the SNC and of any subsidiary body which might be established by it and give its members all necessary information on the decisions taken by UNTAC”.¹⁸⁹

The SNC had 12 members altogether in addition to the president.¹⁹⁰ The latter, Prince Sinhanouk, was the only leading figure more or less acceptable to all Cambodian factions and entirely acceptable to the Five. Following the establishment of UNTAC, the SNC held a total of 30 meetings.¹⁹¹ The practice followed by the SNC showed that the implementation and the external manifestation of decisions were always

¹⁸⁵ Comprehensive Settlement Agreement, annex 1, section A, para. 2, lit. a.

¹⁸⁶ Comprehensive Settlement Agreement, annex 1, section A, para. 2, lit. b.

¹⁸⁷ Comprehensive Settlement Agreement, annex 1, section A, para. 2, lit. c.

¹⁸⁸ Comprehensive Settlement Agreement, annex 1, section A, para. 2, lit. e.

¹⁸⁹ Comprehensive Settlement Agreement, annex 1, section A, para. 3.

¹⁹⁰ UN (ed.), *The United Nations in Cambodia: A Vote for Peace*, 1993, 10.

¹⁹¹ See above.

entrusted to Sihanouk.¹⁹² Since Sihanouk closely cooperated with UNTAC and the Special Representative, the relationship between the SNC and UNTAC did not cause difficulties. Thus, in practice, UNTAC's powers were not significantly limited.

The SNC is one of the exceptional features of the Comprehensive Settlement Agreement, forming a body *sui generis* under international law.¹⁹³ It is best regarded as an entity created by the Cambodian factions and given a special status, a type of international recognition in both a Security Council Resolution and the Comprehensive Settlement Agreement. The acceptance of the SNC by the international community did not conform to traditional notions of recognition of governments based on effective control and prospect of permanence. With regard to the legitimacy and acceptability of UNTAC's powers, the establishment of the SNC is significant: the agreement creates a progression in the *catena* of legitimacy. It first grants the SNC a special legitimacy as embodying Cambodia's sovereignty; from that premise flows the SNC's competence to represent Cambodia externally as body *sui generis*; and on that basis, the SNC derives its authority from legally granting (*vis-à-vis* the parties to the Paris Agreements) powers to UNTAC.¹⁹⁴

bb. Civil Administration by UNTAC

The second exceptional feature of the Comprehensive Settlement Agreement is UNTAC's mandate regarding Cambodia's administration prior to the installation of a democratically elected government. As to the civil administration functions, they were to give UNTAC an exceptional level of involvement in a state's official activities during a peacekeeping operation. The agreement provides for a three-tiered system to determine the relationship between UNTAC and the current governmental structures, i.e. the large administrative apparatus of the Vietnamese faction and the smaller organs of the three Cambodian factions.¹⁹⁵ On the first tier, the agreement states that, in order to achieve a neutral political environment that would be conducive to free and fair

¹⁹² V. Krishnadasan, "A Legal Perspective on UNTAC: An Overview", in: *IPS/UNITAR*, see note 54, 193.

¹⁹³ De Wet, see note 170, 297.

¹⁹⁴ Cf. Ratner, see note 84, 1 et seq.

¹⁹⁵ Cf. Ratner, see note 84, 1 et seq.

elections, "all administrative agencies, bodies and offices acting in the field of foreign affairs, national defence, finance, public security and information will be placed under the direct control of UNTAC".¹⁹⁶ The Special Representative was meant to exercise this control in order to guarantee the strict neutrality of the political environment in Cambodia. He was, furthermore, authorised to issue directives to the administrative agencies, bodies and offices binding all Cambodian parties. On the second tier, the Special Representative was meant to determine, in consultation with the SNC, which other administrative agencies, bodies and offices could directly influence the outcome of elections. These administrative entities were placed under direct supervision or control of UNTAC and were to comply with any guidance provided by it.¹⁹⁷ The last tier of UNTAC's control was destined for those administrative entities "that could continue to operate in order to ensure normal day-to-day life in Cambodia, if necessary, under such supervision by UNTAC as it considers necessary".¹⁹⁸ In that domain as well, the Special Representative was to determine the respective agencies in consultation with the SNC. The outlined system of control, however, does not override the procedures determining the relationship between UNTAC and the SNC provided for in section A, annex 1 of the Comprehensive Settlement Agreement.¹⁹⁹ The Secretary-General is still to comply with the SNC's advice provided that there is consent among the members of the SNC and provided that the advice is consistent with the objectives of the agreement.

In July 1992, UNTAC began to exercise its direct control over the state of Cambodia's administration in Phnom Penh. The civil administration personnel were deployed in the ministries of defence, national security, foreign affairs, consular affairs and finance. At the same time, UNTAC established provincial offices in all Cambodian provinces. The UNTAC personnel controlled the armed forces, trained Cambodian officers of the judiciary in penal law and human rights, established a border control unit in order to monitor customs and immigration and verified public revenue and expenditure.²⁰⁰ With respect to UNTAC's di-

¹⁹⁶ Comprehensive Settlement Agreement, part 1, section 3, article 6 and annex 1, section B, para. 1.

¹⁹⁷ Comprehensive Settlement Agreement, annex 1, section B, para. 2.

¹⁹⁸ Comprehensive Settlement Agreement, annex 1, section B, para. 3.

¹⁹⁹ Compare under IV. 2. b. aa.; Ratner, see note 84, 1 et seq.

²⁰⁰ Cf. Doyle, see note 47, 37 et seq.

rect control over the administrative entities of all factions, it must be emphasised that in practice only the Vietnamese faction had real administrative structures to control. The FUNCINPEC and KPNLF had virtually none, while the *Khmer Rouge* refused to allow UNTAC access to its zones to determine the extent of its administrative control.²⁰¹ As foreseen in the agreement,²⁰² the Special Representative could determine administrative entities which could directly influence the outcome of the elections and thus establish the direct supervision or control of UNTAC over it. This was done with respect to agencies responsible for education, public health, agriculture, energy and communications.²⁰³ With UNTAC, the United Nations supervised, for the first time, the administration of a state in a broad and direct way.²⁰⁴ Although the civilian administration component was extensive, UNTAC's mandate was not to govern but to control Cambodia during the transitional period. Moreover, the shared power relationship between UNTAC and the SNC provided for the acceptability of the transitional authority's administrative powers.

cc. Military Arrangements

UNTAC's military function was to stabilise the peace and security situation in Cambodia and to build an environment conducive to free and fair elections. The Comprehensive Settlement Agreement states that "UNTAC will supervise, monitor and verify the withdrawal of foreign forces, the ceasefire and related measures (...)"²⁰⁵ To this end, UNTAC was compelled to verify the withdrawal of all foreign forces and their non-return to Cambodia, to monitor the cessation of outside military assistance to all Cambodian parties and to assist with mine clearing. All forces were urged to regroup and move under UNTAC's control with arms and equipment to designated cantonment areas.²⁰⁶ Furthermore, UNTAC was supposed to initiate and supervise the demobilisation

²⁰¹ Findlay, see note 87, 59.

²⁰² Comprehensive Settlement Agreement, annex 1, section B, para. 2.

²⁰³ Ratner, see note 84, 1 et seq.

²⁰⁴ The precedent direct administration of West-Irian by UNTEA cannot be compared with UNTAC, since the former was not endowed with a similar broad- scale mandate; for details to UNTEA see D. Gruss, in this Volume.

²⁰⁵ Comprehensive Settlement Agreement, annex 1, section C, para. 1, lit. a-e.

²⁰⁶ Comprehensive Settlement Agreement, annex 1, section C, paras 2 and 3.

process of the military forces of all parties.²⁰⁷ Finally, UNTAC was to assist, as necessary, the International Committee of the Red Cross in the release of all prisoners of war and civilian internees.²⁰⁸ The military with 16,000 personnel from 32 countries emerged as the largest of UNTAC's components. The UN military presence after UNAMIC began in June 1992 under a unified command.²⁰⁹ UNTAC's mandate in the military field was significant to the settlement. The parties agreed that an international presence not only controls, but also supervises – the military aspects of the settlement.

dd. Human Rights

The Paris Agreements accorded UNTAC the responsibility for promoting an environment during the transitional period, in which respect for human rights was ensured.²¹⁰ To this end, UNTAC was to make provisions for the “development and implementation of a programme of human rights education to promote respect for and understanding of human rights;”²¹¹ for “general human rights oversight during the transitional period;”²¹² and for the “investigation of human rights complaints, and, where appropriate, corrective action.”²¹³

To undertake this mandate, UNTAC was active on two main fronts: addressing continuing violations of human rights, particularly those affecting the elections on the one hand; and, on the other hand, building the foundations for long-term human rights protection. In monitoring ongoing violations, UNTAC cooperated closely with the Cambodian authorities. Part of its work was to survey prisons throughout the country and to survey the information presented in the media and in education through schools and universities.²¹⁴ The SNC signed overall seven major human rights accords, all of these were translated into Khmer and widely circulated with the assistance of local human rights

²⁰⁷ Comprehensive Settlement Agreement, annex 1, section C, para. 4 and annex 2.

²⁰⁸ Comprehensive Settlement Agreement, annex 1, section C, para. 5.

²⁰⁹ UN, see note 190, 37 et seq.

²¹⁰ Comprehensive Settlement Agreement, part 3, article 16.

²¹¹ Comprehensive Settlement Agreement, annex 1, section E, lit. a.

²¹² Comprehensive Settlement Agreement, annex 1, section E, lit. b.

²¹³ Comprehensive Settlement Agreement, annex 1, section E, lit. c.

²¹⁴ UN, see note 191, 54.

groups.²¹⁵ Furthermore, due to the lack of satisfactory judiciary and legislation, UNTAC induced the SNC on the basis of annex 1, section D, para. 3, lit. a and b of the Comprehensive Settlement Agreement to adopt regulations relating to the judiciary and criminal law procedures during the transitional period prior to the elections.²¹⁶ UNTAC's role in protecting human rights was important, as it centralised human rights monitoring and promotion in the United Nations. The Paris Agreements integrate human rights into the conditions necessary for free and fair elections and therefore entrust human rights functions to UNTAC.²¹⁷

ee. Elections

The goal of the civilian and military arrangements was a politically neutral and peaceful environment for free and fair elections. Thus, as the crucial point of the peace plan, the Comprehensive Settlement Agreement entrusted UNTAC with organising free and fair elections for a national constituent assembly.²¹⁸ The main provision on elections is part 2, article 12 of the Comprehensive Settlement Agreement.²¹⁹

Section D of annex 1 and annex 3 of the Comprehensive Settlement Agreement contain the most important requirements for the elections. UNTAC was to determine a timetable for the electoral process, but the duration of the electoral process was not to exceed nine months from the commencement of voter registration.²²⁰ As a rule for the electoral process, UNTAC “will make every effort to ensure that the system and procedures adopted are absolutely impartial, while the operational arrangements are as administratively simple and efficient as possible.”²²¹ UNTAC was to establish, in consultation with the SNC, “a system of laws, procedures and administrative measures necessary for the holding of a free and fair election in Cambodia, including the adoption of an electoral law and of a code of conduct regulating participation in the election in a manner consistent with respect for human rights and pro-

²¹⁵ IPS/UNITAR, see note 54, 19.

²¹⁶ Findlay, see note 87, 64.

²¹⁷ Cf. Ratner, see note 84, 1 et seq.

²¹⁸ Comprehensive Settlement Agreement, part 2, article 12.

²¹⁹ Compare under III. 3. c. bb.

²²⁰ Comprehensive Settlement Agreement, annex 1, section D, para. 5.

²²¹ Comprehensive Settlement Agreement, annex 1, section D, para. 6.

hibiting coercion or financial inducement in order to influence voter preference.”²²² In the case that existing laws contain provisions which could defeat the objects and purposes of the agreement, UNTAC was authorised, after having consulted the SNC, to suspend or abrogate such laws.²²³ To support the electoral process, UNTAC designed and implemented a voter education programme.²²⁴ In the first phase of the electoral process, UNTAC was to create a system of voter registration, “to ensure that eligible voters have the opportunity to register (...)”.²²⁵ UNTAC was moreover responsible to facilitate the presence of foreign election observers and to investigate complaints of electoral irregularities entailing corrective action.²²⁶ At the end of the electoral process, UNTAC had to determine, “whether or not the election was free and fair and, if so, certification of the list of persons duly elected”.²²⁷ UNTAC finally was to establish a system of safeguards to ensure the absence of fraud during the electoral process.²²⁸

The registration of the parties began in August 1992, and voter registration started in October 1992. A total of more than four and a half million Cambodians were registered, representing nearly all estimated potential voters in zones to which UNTAC had access.²²⁹ Twenty political parties, among them the three factions FUNCINPEC, the Vietnamese faction and the KPNLF, presented themselves as parties.²³⁰ The elections took place from 23 to 28 May 1993 in a surprisingly non-violent environment. The voter turnout constituted a democratically satisfactory result of 90 per cent. In June 1993, the votes were counted. Sihanouk’s FUNCINPEC obtained the majority of votes (45 per cent) and hence, the majority of seats in the constituent assembly. The Vietnamese faction achieved 38 per cent of the popular vote and the KPNLF not quite four per cent. The remainder of the votes was shared among the 17 other parties.²³¹ By Resolution 835²³², the UN Security

²²² Comprehensive Settlement Agreement, annex 1, section D, para. 3, lit. a.

²²³ Comprehensive Settlement Agreement, annex 1, section D, para. 3, lit. b.

²²⁴ Comprehensive Settlement Agreement, annex 1, section D, para. 3, lit. c.

²²⁵ Comprehensive Settlement Agreement, annex 1, section D, para. 3, lit. d.

²²⁶ Comprehensive Settlement Agreement, annex 1, section D, para. 3, lit. i-k.

²²⁷ Comprehensive Settlement Agreement, annex 1, section D, para. 3, lit. l.

²²⁸ Comprehensive Settlement Agreement, annex 1, section D, para. 4.

²²⁹ Marks, see note 16, 45 et seq.

²³⁰ Doyle, see note 47, 20.

²³¹ Doyle, see note 47, 46.

Council invited the Secretary-General to report on the Cambodian election; the Secretary-General declared the election “free and fair” and the election’s result “fairly and accurately reflecting the will of the Cambodian people”.²³³ The Security Council endorsed the elections by Resolution 840, entirely supporting the new constituent assembly.²³⁴ In September 1993, Sihanouk as head of state signed the new constitution and accepted his formal restoration as King of Cambodia. As envisaged in the Paris Agreements, the constituent assembly was transformed into the new national assembly authorised to elect the new Cambodian government. At this point, UNTAC’s 18 month mandate came to its end.²³⁵

Cambodia’s elections were the first ones organised by the UN. The Comprehensive Settlement Agreement includes – arguably on account of this – a catalogue of highly detailed provisions with respect to UNTAC’s mandate. Unlike the elections in Namibia,²³⁶ where the UN only had an observational role, UNTAC was in charge of the entire organisation and supervision of the elections.

c. UNTAC’s Operation – Success or Failure?

The UN Secretary-General, at the outset of UNTAC’s mission had identified four essential conditions for it in order to “discharge its responsibilities effectively and with complete impartiality”:²³⁷ the full support of the UN Security Council; the full cooperation of the Cambodian parties and all other parties involved; full freedom of movement and communications; and the necessary financial resources provided by member states in a full and timely manner.²³⁸ These four conditions were not entirely achieved.

Whereas UNTAC mostly had the full support of the Security Council and the operation was amply funded, other conditions were not achieved. One of the essential conditions entirely absent was the

²³² S/RES/835 (1993) of 2 June 1993.

²³³ Doc. S/25913 of 10 June 1993.

²³⁴ S/RES/840 (1993) of 15 June 1993.

²³⁵ Findlay, see note 87, 97.

²³⁶ See N. Matz, in this Volume.

²³⁷ Doc. S/23613 of 19 February 1992.

²³⁸ Findlay, see note 87, 102.

full cooperation of the Cambodian parties – that is the *Khmer Rouge*'s in compliance with the peace accords and its refusal to participate in the peace process.²³⁹ UNTAC's military faced enormous problems with respect to the implementation of the ceasefires and the disarmament of the Cambodian factions. In order to resume power, the PDK repeatedly refused to comply with the ceasefire and impeded the disarmament since the very beginning of UNTAC's establishment in March 1992.²⁴⁰ Despite many attempts and a special appeal by the Secretary-General,²⁴¹ notwithstanding the respective compliance of the other three Cambodian factions, the PDK persisted in their position of non-compliance. Hence, the *Khmer Rouge* faction finally declared that it would take no further part in the Paris Agreements implementation and the last active *Khmer Rouge* leaders surrendered only in 1999.²⁴² After several deliberations among the UN and its members, the Security Council decided in Resolution 792²⁴³ to continue with UNTAC's mandate nonetheless since any delay would have jeopardised the elections and undermined the peace process in Cambodia.²⁴⁴ However, the presumption that UNTAC's mandate must be considered a success is based on the following reasons: UNTAC's design by the Paris Agreements; the coexistence of UNTAC and the Supreme National Council; the civilian nature of UNTAC's tasks; UNTAC's electoral component and the practical consideration that Cambodia was transformed into a basically secure, peaceful, democratic state.

As to the first reason for UNTAC's success, the comprehensiveness of the settlement plan deserves to be highlighted. In the Cambodian peace process, the parties agreed not only to the terms of ceasefire and the disarming of the factions but also to the maintenance of law and order and the repatriation of refugees. Moreover, they accepted unanimously UNTAC's promotion of human rights and principles for a new constitution, the UNTAC supervision of the administration and – most significant and important – the organisation, conduct and monitoring of elections by a UN transitional authority.²⁴⁵ The unprecedented and

²³⁹ Findlay, see note 87, 102.

²⁴⁰ Salmen, see note 60, 123 et seq.

²⁴¹ Doc. S/24090 of 12 June 1992.

²⁴² Salmen, see note 60, 123 et seq.

²⁴³ S/RES/792 (1992) of 30 November 1992.

²⁴⁴ Boutros-Ghali, see note 4, 19.

²⁴⁵ Doyle, see note 47, 25.

unique comprehensiveness of UNTAC's mandate comprised the personal and financial dimension as well:²⁴⁶ throughout its 18 month mandate, UNTAC disposed of a varying strength of 21,000 military and civilian personnel; the costs – including those for UNAMIC – amounted to 1,6 billion US\$.²⁴⁷

As to the second reason, the coexistence of UNTAC and the SNC, the SNC was legitimated by all Cambodian factions and acted as a unique source of legitimacy. The SNC was mainly responsible for exercising legislative power, while UNTAC acted primarily within the executive and judicial domain.²⁴⁸ This mechanism of coexistence was designed to avoid the delicate question of how to obtain consent for an international presence from different and differing parties, all of which claimed to be the legitimate government of Cambodia in the time before UNTAC's establishment.²⁴⁹

The civilian nature and the consensual basis of the transitional authority must be mentioned as a third reason for UNTAC's success. As outlined above²⁵⁰, UNTAC's operation, based on the consent of the conflicting parties gave rise to more acceptability; even though one of the conflicting parties – the *Khmer Rouge* – “withdrew” its initial consent during the peace-building process, UNTAC provided for stability in Cambodia due to its consensual basis. Moreover, the peace process, as a result of years of diplomacy, would have been torn apart if any attempt to use force had been made by UNTAC.

The fourth reason for UNTAC's success can be found in the electoral component. It serves as an example of what the UN and the international community can achieve with adequate resources and a professional planning. As the Cambodian people began the process of choosing their first democratically elected government since the 1960s, the situation in Cambodia was far from ideal. The result, free and fair elections to the constituent assembly and the creation and adoption of a

²⁴⁶ UNTAC's personal and financial dimension could at most be compared to that of UNMIK in Kosovo; for more details see J. Friedrich, in this Volume.

²⁴⁷ Cf. http://www.un.org/Depts/dpko/dpko/co_mission/untacfacts.html.

²⁴⁸ Comprehensive Settlement Agreement, part 1, section 3, arts 3 and 6.

²⁴⁹ Chesterman, see note 168, 74.

²⁵⁰ See under IV. 2. a.

new Cambodian constitution has to be regarded as UNTAC's major accomplishment.

After the completion of UNTAC's transitional operation in September 1993, the process of Cambodia's reconstruction proceeded – this must be mentioned as the fifth reason for UNTAC's success. Notwithstanding several incidents affecting Cambodia's security and peace situation, UNTAC achieved Cambodia's rehabilitation and reconstruction in many ways: estimates are that in only one year some 370,000 refugees and another 200,000 displaced person were assisted in returning to their former home.²⁵¹ Moreover, the transitional authority left a democratically elected government; it set in place the rudiments for a civil society; various rehabilitation projects improved the economy; and it contributed to the establishment of a state, which – for the first time for nearly 30 years – was not ruled by violence, intimidation and suppression, but by a stable government and by democratically legitimated law.²⁵²

V. Post-Conflict Justice in Cambodia

One of the most important and difficult challenges confronting a post-conflict society is the re-establishment of faith in the state.²⁵³ The need to balance reconciliation and stability for serious human rights violations has been faced by numerous states which have suffered armed conflicts in recent years.²⁵⁴ Given the dimension of the crimes committed by the *Khmer Rouge* during the Pol Pot regime, the fact that Cambodia is a party to the Genocide Convention and the degree of international involvement in the comprehensive state building process would lead to the assumption that the Paris Agreements or – at any rate – the Cambodian constitution would address the issue of post-conflict jus-

²⁵¹ IPS/UNITAR, see note 54, 28.

²⁵² For a detailed study of the Cambodian post-conflict situation compare International Crisis Group (ICG), Asia Report 8, 2000, *Cambodia: The Elusive Peace Dividend*, www.crisisgroup.org.

²⁵³ Chesterman, see note 168, 154.

²⁵⁴ Compare for detailed account of post-conflict justice A. Seibert-Fohr, in this Volume.

tice.²⁵⁵ However, it is a well-known fact that the issue of post-conflict justice in Cambodia came seriously to the fore only in late 2003.

1. Negotiations on a Khmer Rouge Tribunal

The morally and politically tortuous question of how to handle *Khmer Rouge* responsibility for genocide hung over the whole peace process, i.e. from 1979 until 1991. Some participants to the peace process advocated war crime trials, but most of them argued for putting the topic aside in the interest of Cambodian unity. Some other participants expected that a new democratically elected government would deal with the delicate issue. In any case, Cambodia's reconstruction was judged to be of higher priority than post-conflict justice.²⁵⁶ There are three main reasons for this delayed prosecution of the crimes committed: first, the last active *Khmer Rouge* leaders surrendered only in 1999, thus, *Khmer Rouge* as a fighting force still existed for 20 years after the official end of the regime. Second, many of the political, military and financial elites in Cambodia were affiliated with former *Khmer Rouge* officials. Numerous Cambodian citizens' life was connected in one or many ways to the *Khmer Rouge*. Although public opinion surveys discovered repeatedly that the overwhelming majority of Cambodians wanted the *Khmer Rouge* leadership to be prosecuted for their crimes, thus far the political elite has been unwilling to do so, because nobody has completely clean hands.²⁵⁷ Third, the international community's interest in accountability for *Khmer Rouge* crimes has increased only in recent years. This is due to the fact that from 1979 until 1989, international commitment predominantly focussed on the Vietnamese troops' withdrawal from Cambodia. Only subsequent to Vietnam's withdrawal in 1989, did the issue of post-conflict justice come to the fore. In 1997, the UN and the Cambodian government entered into negotiations on the establishment of a tribunal. Four years later, the Cambodian government passed a national law on the establishment of Extraordinary Chambers aiming at

²⁵⁵ Marks, see note 16, 45 et seq.

²⁵⁶ Similar logic has been applied in the case of peace settlements in Nicaragua and South Africa; cf. Findlay, see note 87, 6.

²⁵⁷ C. Etcheson, "The politics of Genocide Justice in Cambodia", in: P. Sands/ R. Mackenzie/ C. Romano (eds), *Internationalized Criminal Courts*, 2004, 181.

the prosecution of the *Khmer Rouge* crimes (hereinafter “the Cambodian law”).²⁵⁸ The Cambodian law settled several issues that had previously given rise to legal and political controversies between the Secretary-General and the Cambodian government because several provisions were settled in the manner favoured by the Cambodian government.²⁵⁹ After a period of unsatisfactory negotiations, and faced with this insufficient *fait accompli*, the Secretary General decided to leave the negotiations.²⁶⁰

2. Establishing the Khmer Rouge Tribunal

In Resolution 57/228 A, the General Assembly called on the Secretary-General to resume negotiations to conclude an agreement with the Government of Cambodia, based on previous negotiations on the establishment of the Extraordinary Chambers.²⁶¹ According to the resolution, the Extraordinary Chambers should have a jurisdiction consistent with that set forth in the Cambodian law on the establishment of the Extraordinary Chambers.²⁶² The personal jurisdiction of the Chambers should cover the senior leaders of Democratic Kampuchea and those most responsible for the crimes during the Khmer Rouge regime.²⁶³ The arrangements for the establishment of the Extraordinary Chambers are to ensure that the Chambers exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law and include provisions for the impartiality, independence and credibility of the process.²⁶⁴

²⁵⁸ Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, Law NS/RKM/0801/12, <http://www.derechos.org/human-rights/seasia/doc/krlaw.html>.

²⁵⁹ E.E. Meijer, “The Extraordinary Chambers in the Courts of Cambodia for Prosecuting Crimes Committed by the Khmer Rouge: Jurisdiction, Organization, and Procedure of an Internationalized National Tribunal”, in: Sands/ Mackenzie/ Romano, see note 257, 207.

²⁶⁰ Cf. Documentation Centre of Cambodia (DCCAM), www.dccam.org.

²⁶¹ Para. 1 of A/RES/57/228 A of 18 December 2002.

²⁶² *Ibid.*, para. 2.

²⁶³ *Ibid.*, para. 3.

²⁶⁴ *Ibid.*, paras 4, lit. a and 5.

Following the General Assembly's resolution, the Secretary-General resumed negotiations with the Cambodian government in March 2003. The UN and the Cambodian government finally reached a draft agreement²⁶⁵ on the establishment of Extraordinary Chambers in the courts of Cambodia (hereinafter "Extraordinary Chambers") where former *Khmer Rouge* leaders should be brought to trial. The General Assembly adopted the draft agreement with Resolution 57/228 B.²⁶⁶ After signing the 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 (hereinafter "the agreement"), the Cambodian parliament at last ratified it in October 2004. Both parties had stipulated that the agreement would have primacy over the Cambodian national law and that provisions in national law that were irreconcilable with the agreement would be modified accordingly.²⁶⁷

a. The Extraordinary Chambers and their Jurisdiction

The Extraordinary Chambers significantly differ from other war crimes tribunals in place at present. Like the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers are established by a bilateral agreement. Unlike the SCSL, the Extraordinary Chambers are established within a domestic legal system.²⁶⁸ The bilateral agreement only provides a legal basis for the cooperation between the two parties and regulates the principles and modalities of such cooperation. Thus, the Cambodian law is the constitutive instrument of the Extraordinary Chambers. This goes back to a compromise in which the Cambodian government achieved acceptance of its position by the UN.²⁶⁹

Unlike other war crimes tribunals, international judges are not in the majority on the benches of the chambers. One of the Extraordinary Chambers consists of three national and two international judges, the

²⁶⁵ 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, annex 1 of A/RES/57/228 B of 13 May 2003.

²⁶⁶ A/RES/57/228 B of 13 May 2003.

²⁶⁷ Cf. Meijer, see note 259, 208.

²⁶⁸ For details to the SCSL see M. Goldmann, in this Volume.

²⁶⁹ Cf. Meijer, see note 259, 210 et seq.

Appeals Chamber consists of four national and three international judges.²⁷⁰ At least, the Cambodian government was willing to accept that the Chambers need an absolute majority for each of their decisions. The Chamber's composition also seems to go back to an arrangement with the Cambodian government.²⁷¹ Under the agreement and the Cambodian law, the temporal jurisdiction of the Extraordinary Chambers extends from 1975 to 1979, the period of the *Khmer Rouge* regime.²⁷² Although it is not unusual for an internationalised judicial body to cover only crimes committed within a specific period of time, it must be stressed that the *Khmer Rouge* crimes were committed before and after the mentioned era as well. With a more expansive approach concerning temporal jurisdiction, one could be more confident that there would be a complete review of the Cambodian past. On the other hand, the virtue of limits on temporary jurisdiction becomes clearer in comparison with other cases such as Iraq.²⁷³

The jurisdiction of the Extraordinary Chambers covers crimes under international and domestic law. The international offences to be prosecuted are genocide, crimes against humanity and grave breaches of the Geneva Conventions.²⁷⁴ The co-existence of two different legal orders – the international conventions and domestic law – could cause difficulties with respect to the effective application of the law. Concerning personal jurisdiction, the agreement and the Cambodian law provide for “senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations.”²⁷⁵ This formulation is open to different interpretations and may give rise to some questions: how, for example, is “seniority” to be defined and how can it be evaluated that a person is “most responsible”? Answers to these questions will have to be found by the Extraordinary Chambers jurisdiction.

²⁷⁰ Cambodian law, article 3.

²⁷¹ Meijer, see note 259, 212.

²⁷² Agreement, article 1; Cambodian law, article 4.

²⁷³ With respect to the Iraqi Special Tribunal see R. Wolfrum, in this Volume.

²⁷⁴ Agreement, arts 1 and 9; Cambodian law, article 9.

²⁷⁵ Cambodian law, article 12, para. 1.

b. Procedural Law, Fair Trial and Penalties

Both the Cambodian law and the agreement are relatively brief and show ambiguities regarding the applicable procedural law. The agreement leaves procedural matters essentially to the Cambodian law. It states that “where Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency (...) with international standards, guidance might also be sought in procedural rules established at the international level.”²⁷⁶ The Cambodian law is drafted even more narrowly with respect to international procedural standards as it provides for the application of international standards only “if necessary and if there are *lacunae* in the existing procedures.”²⁷⁷

As to guarantees regarding the question of fair trial, the agreement mentions the principles of fairness, due process, public trials and the right to defence. Those principles have to be applied in accordance with arts 14 and 15 of the 1966 International Covenant on Civil and Political Rights to which Cambodia is a party.²⁷⁸ The Cambodian law also provides for the rights of the accused and the protection of victims and witnesses have to be fully respected.²⁷⁹ The trials have to be public unless “in exceptional circumstances” the Extraordinary Chambers decide to close the proceedings “for special reasons.”²⁸⁰ The rights of the defendant comprise the presumption of innocence, the right to be informed promptly and in an understandable language and the right to self-defence or assistance.²⁸¹

The Cambodian law seems to be unelaborated and incomplete. In the interests of clarity, completeness and comprehensive rules with respect to fair trial, an explicit reference in the Cambodian law to the International Covenant on Civil and Political Rights would have been advisable.²⁸² According to the agreement and the Cambodian law, all pen-

²⁷⁶ Agreement, article 12.

²⁷⁷ Cambodian law, article 33, para. 1.

²⁷⁸ Agreement, arts 12, paras 2 and 13.

²⁷⁹ Cambodian law, article 33.

²⁸⁰ Cambodian law, article 34.

²⁸¹ Cambodian law, article 35.

²⁸² Cf. Meijer, see note 259, 227.

alties shall be limited to life imprisonment.²⁸³ A first draft of the law providing for the death penalty as the maximum penalty was rejected by the Constitutional Cambodian Council by reasons of unconstitutionality.²⁸⁴ Under the actual Cambodian law, the prison term extends from five years to life imprisonment and may be combined with confiscation of personal property, money, and property acquired unlawfully or by criminal conduct.²⁸⁵

3. Post-Conflict Justice in Cambodia?

Considering the above-mentioned points, the UN's readiness for compromise faced with the position of the Cambodian government regarding post-conflict justice regulation has resulted in an inconclusive result. The initial disagreement between the two parties was fundamental: the Cambodian government wanted a national tribunal dominated by Cambodia and with assistance of the UN. The UN was only willing to support and assist a predominately international tribunal because of the dubious reputation of the domestic judiciary.²⁸⁶ An obvious motivation for the UN to advance the negotiations and to accept compromises with regard to the Extraordinary Chambers may have been the fact that, with many defendants being older than 70, time is running out for justice to be served.

VI. Conclusions

Cambodia has experienced the status as a protectorate in the *Union Indochinoise Française*, followed by the quasi-feudalist reign by both Prince and King Sihanouk; a violent military coup and civil war under Lon Nol; the terrors and genocide of the *Khmer Rouge* Maoism in 1975; the illegitimate occupation and oppression of the communist regime installed by Vietnam; and finally, during those vast mainly internal conflicts, the state was abused as a cue ball in the Cold War and post

²⁸³ Agreement, article 10; Cambodian law, article 28.

²⁸⁴ Cf. Meijer, see note 259, 229.

²⁸⁵ Cambodian law, article 39.

²⁸⁶ Cf. Etcheson, see note 257, 201 et seq.

Cold War era.²⁸⁷ Even though the peace process, the implementation of the Paris Agreements and UNTAC faced enormous challenges, it must be said that the state building process in Cambodia succeeded.

A main advantage in the Cambodian state building process was the fact that Cambodia, as a nation,²⁸⁸ was never falling apart. However, a positive side of Cambodia's tragic history is that *inter alia* due to the French protectorate, Cambodia remained a relatively homogeneous nation. Had it not been under French protection, the state would eventually have been swallowed up by Thailand or Vietnam.²⁸⁹

The Paris Agreements of 1991 represent an ambitious attempt to end a decades-old conflict rooted in events within and outside Cambodia.²⁹⁰ Major efforts were made by all the parties involved in the peace settlement process to reach a peace agreement. This should be a lesson for future state building procedures: a widespread consensus on the modalities of a peace settlement can lead to the acceptability of a transitional authority. And, moreover, in contrast to the Chapter VII peace-keeping operations, the consensual approach goes without the use of force and attaches importance to diplomatic strategies and deliberations. Even if it is true that the lack of success of certain peace-keeping operations e.g. UNPROFOR in the former Yugoslavia has prompted calls for more "robust" peace-keeping, if that means sacrificing the advantages of the non-use-of-force approach, the international community would lose an important tool of deliberative conflict management.²⁹¹

Despite the *Khmer Rouge's* violations and non-compliance with the peace plan, the benefits of the Paris Agreements are also to be found in the multilateral approach: the four differing Cambodian factions were encouraged to find an agreement and to renounce their own preferences which were incompatible with the will of the other parties.

The comprehensiveness of the Paris Agreements has to be highlighted as a further element of success in the Cambodian state building process: the parties to the peace agreement agreed not only to the terms of a ceasefire and disarmament but also to the maintenance of law and order and the repatriation of refugees; they agreed to constitutional

²⁸⁷ Doyle, see note 47, 51 et seq.

²⁸⁸ For details, see R. Utz, in this Volume.

²⁸⁹ Herz, see note 11, 62.

²⁹⁰ Ratner, see note 84, 1 et seq.

²⁹¹ Cf. Bothe, see note 175, MN 7 et seq.

principles for the future Cambodian constitution. Furthermore, UNTAC's promotion of human rights and principles for a new constitution, the supervision of the administration and the organisation, conduct and monitoring of elections by a UN transitional authority were part of the Paris Agreements. The peace plan provided for an exceptional solution to the problems that could arise from the fact that different and differing parties claim to be the legitimate government of a state in transition. The SNC as body *sui generis* had a status of unique source of legitimacy. The coexistence of the SNC and UNTAC helped furthermore to assure the acceptance of the UN transitional administration in Cambodia.

As much as UNTAC's mandate was successfully implemented, equally the post-conflict justice settlement in Cambodia must be considered as a failure. Lack of unanimity between the United Nations and the Cambodian state, meant that the process of establishing the *Khmer Rouge* tribunal took too long; furthermore, UN compromises with regard to a sufficient legal prosecution system fall short of the grave human rights breaches committed by the *Khmer Rouge* regime.