

LEGAL ASPECTS OF THE CAMBODIAN PROBLEM

by

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The variety and inter-dependency of the international legal aspects of the search for a comprehensive political settlement to the Cambodian conflict are enormous. This is so even putting aside such issues as the legality or otherwise of the Vietnamese invasion of Cambodia in December 1978, much less even earlier factors which have contributed heavily to the current situation.

As you will be aware, there have been many efforts to resolve the conflict, in a variety of fora. A year ago, nineteen countries, including Australia, together with the four Cambodian factions, met in Paris. Some drafting was attempted but no legal instrument was agreed. A number of other meetings have been held since then. Although there have been some important concessions made by many of the principal parties, once again there has been little to emerge in the form of a single document agreed to by all the parties. This then might be described as being, from the legal point of view, the fundamental lacuna in the negotiating process: the lack of a single negotiating text which might serve to focus the somewhat disparate discussions on various aspects of the problem which have occurred to date.

Moves are underway to rectify that lacuna. The five permanent members of the Security Council (P5), given their particular role in that body's responsibility under Chapter VI and VII of the Charter, have met several times this year in an attempt to draft the general principles

to be included in the eventual comprehensive settlement. These are: the administrative arrangements in Cambodia during the transition to elected government, including the role of the UN; military arrangements; elections; human rights and international guarantees, including the question of Cambodian neutrality. The P5 have had some success to date, particularly with the first two topics. They are meeting again this very day in New York to attempt to secure agreement among themselves on the remaining subjects.

The next important step will be to translate these general principles into more detailed negotiating language in the form of a single negotiating text of a comprehensive settlement. It will be important to involve the Cambodian parties at a relatively early stage in order to avoid any perception they might form that a solution is being imposed, without their participation. In this regard, the choice of forum has been reduced to the Paris Conference. The basic reason for this is that all Cambodian parties have agreed at different times to meet each other in that forum. Other fora have had to be rejected because one or more of the Cambodian parties have applied unacceptable conditions on attending meetings in those fora.

It might be noted in passing that there has been considerable discussion of the legal form that the final comprehensive settlement might take. This has centred on whether it will have treaty status or not. At the Paris Conference last year, a number of participants, including some of the P5, expressed a preference for a document of less than treaty status. Since the final contents and form of the document will only be successful if agreed by consensus, there is thus the strong prospect that a document of less than treaty status might be the result.

More important than the form, however, will be the contents. One of the major and more contentious issues

will be the extent of the role played by the UN in the administration of Cambodia. This is crucial to the creation of a neutral atmosphere in which free and fair elections can be organised by the UN and ^{conducted} also under UN supervision. This immediately raises the question of what happens during this period to the sovereignty of Cambodia. After all, despite the competing claims of two entities to be the legitimate government of the country, Cambodia remains a State and Member of the UN.

Quite a few options have been canvassed. There is now general agreement on the concept of a Supreme National Council, made up of prominent Cambodians and representing a wide range of political opinions. This Council would be the symbol of Cambodian sovereignty and independence during the transition to elected government. The Council would also, when formed, represent Cambodia in the UN and in other international bodies. The question of the exact size of the Council and the method of nominating members remains unresolved, as does the equally important question of when the Council might be formed. These questions, however, are not so much legal as political, turning chiefly on whether or not the Khmer Rouge can nominate representatives directly to the Council, or indeed whether they can nominate members at all.

At any rate, the Supreme National Council would embody sovereignty during the transitional period. This in my view effectively disposes of the argument advanced, notably by India, against an extensive administrative role for the UN in Cambodia. According to this argument, the UN cannot exercise the sovereignty of a Member State under the Charter. This is, of course, an interesting question. The Charter does not expressly grant the UN organisation any such power. On the other hand, nor does it rule out totally the possibility of the UN playing at least some role in the administration of a Member State in what are, after all, fairly extreme circumstances.

Article 78 makes it clear that a Member State cannot be treated in a manner similar to a trust territory, in which the UN would have a significant role. Article 2(7) furthermore establishes that nothing in the Charter authorises the UN "to intervene in matters which ~~is~~ are essentially within the domestic jurisdiction of any state", except in relation to enforcement measures under Chapter VII. This, however, does not dispose of the possibility of a Member State voluntarily allowing UN involvement in matters which would otherwise be within the State's domestic jurisdiction. Accession to UN membership and Charter obligations, moreover, of itself represents a voluntary surrender of parts of State sovereignty to the UN in certain situations defined in the Charter. Chapter VII in any case gives the Security Council quite extensive powers to deal with, and enforce measures against, any threat to international peace and security, which the continuing conflict in Cambodia quite clearly represents. This indeed is at the root of current P5 involvement in the search for a peaceful solution to the conflict.

As I have already said, I believe that a Supreme National Council, imbued symbolically with the sovereignty of Cambodia, would be entitled to invite the UN to carry out certain tasks specified for it in a comprehensive settlement, and the Security Council in turn would be authorised by Chapter VII of the Charter to direct that measures be taken by the UN to comply with that invitation. There is also scope under Chapter VI for the Security Council at least to recommend action along these lines, particularly under Article 38 "if all the parties to any dispute so request". Other aspects of this issue, including the identification of key ministries or bodies in whose administration the UN would become involved and the exact extent of that involvement, are in the main political, and not legal, questions

The immediate objective of UN organised elections in Cambodia would be the establishment of a constituent assembly to draft a new Cambodian constitution, and also to form a new government. An important international legal aspect of the constitutional drafting exercise will be not only to ensure consistency between the document and fundamental principles of human rights, but also to enshrine such principles. To leave no doubt about the type of principles to be included, it would probably be appropriate to list them in the comprehensive settlement, rather than including only a general provision on the subject.

While respect for all human rights is important, the aspect which has occasioned most debate and dissension amongst the principal parties to the negotiations to date has been that of genocide. This issue understandably stirs up considerable emotion in most quarters. At the same time, it has highlighted one of the fundamental problems in the search for a comprehensive settlement, namely what to do with the Khmer Rouge. Put in a slightly more legalistic way: how do you protect the Cambodian people in future from a return to genocidal policies and practices?

Many - indeed most - groups, including governments, would greatly prefer not to have dealings with the Khmer Rouge at all, much less allow them any role in Cambodia's future. The search for a comprehensive solution, however, requires a very delicate balancing act by the negotiators. On the one hand, there is the realisation that in any form of solution, the Khmer Rouge, with a large, well-armed and efficient fighting wing, simply cannot be ignored altogether. On the other hand, there is the recognition by just about everyone except the Khmer Rouge and their principal backers (and perhaps not even them) that a formula must be found which ensures that the KR do not obtain any significant political role in the future Cambodia.

As I have already said, genocide is pivotal in all of this. On the one hand, the most vociferous supporters of the regime in Phnom Penh have in the past used every opportunity to insert references to past genocidal practices. This has predictably prompted instant objections from the KR and their supporters, and an ensuing stalemate. In the past few months, however, at Australian urging the perspective has changed to a rather more positive direction. We have suggested, it seems successfully, that rather than focussing on the past, what we should be doing is ensuring, through the comprehensive settlement, that genocidal policies and practices should have no future place in Cambodia. We would thus see a formula along these lines, buttressed by strong human rights provisions, as being included in the new Cambodian Constitution, and being an important element of a negotiating text of a comprehensive settlement.

Turning from this emotionally charged issue to one which stirs less passion, I would like to mention the subject of Cambodian neutrality and international guarantees. While some tend to regard this as being a relatively unimportant issue, it is interesting to note that the main players, including the Cambodian factions themselves, as well as Vietnam and China, have repeatedly stressed the importance of ensuring that any future Cambodia has effective neutrality. One of the Paris Conference committees, moreover, is charged with the development of articles on neutrality and guarantees. The question is not an idle one since anything but a neutral Cambodia is likely only to further incite the existing rivalries and mutual fears felt particularly by Vietnam and China. There is also an historical dimension. It was, after all, disregard for the status of neutrality that Prince Sihanouk declared while in power which was one of the major contributing factors to the current situation

Given this background, the comprehensive settlement will need to contain explicit, strong and detailed provisions on neutrality. As part of its functions as the symbol of Cambodian sovereignty, the Supreme National Council could make the formal declaration of neutrality immediately after its creation. The terms of the declaration itself could be drawn from appropriate recent models, such as those of Laos and Malta, although the Swiss and Austrian models also have useful elements. One useful addition not contained in these models, however, could be a further reference to respect by Cambodia for human rights.

The terms of the declaration of neutrality would most appropriately be contained as an annex to the comprehensive settlement in order to remove any doubts as to its status as an integral part of that settlement. Equally, the minimum terms in which other States would guarantee Cambodian neutrality should also be annexed to the settlement. There has been some debate in the Paris Conference context as to whether the declaration of neutrality and corresponding guarantees should together be of treaty status, as in the case of Laos in 1962, and in the case of the Soviet Union's guarantee of Maltese Neutrality in 1981. Again there are a number of States which have opposed such a course. Some of these cite as a reason their own internal ratification processes for treaties which could result in either lengthy delays or outright refusal to ratify respect for Cambodian neutrality. I must say that from my own point of view, the effectiveness of neutrality and guarantees will depend much more on political will than legal form.

In passing, it might be noted that the discussion of Cambodian neutrality to date has thrown up an interesting sub-issue. A number of States, including India, have insisted that references to Cambodian neutrality should also include a reference to non-alignment. Others argue that the concept of neutrality today includes non-

alignment, or indeed, that the classic concept of neutrality has today been largely subsumed by the notion of non-alignment. I think we here would all agree that there is no clear answer, particularly if what is understood by non-alignment is membership of the Non-Aligned Movement. It can be argued cogently that membership of a Movement which has become a major voting bloc on a wide range of issues is in itself a form of alignment which moreover may not always be consistent with neutrality in the classic sense.

There are of course a myriad of other legal problems related to the Cambodian question, large and small. You might think that I have avoided a fairly significant one in the form of the question of the UN seat, and you would be right. Quite apart from it being a subject on which one could expatiate for hours, I might be bold enough to suggest that while legal in form the question is in reality almost totally political in nature. There are possibilities in a legal sense for challenging the credentials of the existing claimant to the UN seat (the NGC) either within the UN Credentials Committee itself or when the Credentials Committee Report is considered by the General Assembly. Another possibility would be for a resolution on the seat issue to be considered under the Agenda Item dealing with Cambodia. The international response to any of these moves, however, will be conditioned almost totally by political considerations, although no doubt considerable reference will be made during debate to the 1976 Bouteflika decision on the seating of the South African delegation; and to the 1960 Congo precedent. Whatever the final outcome, I feel confident in saying that it is unlikely to shed much light on the legal question of whether refusing to seat a delegation is tantamount to expulsion or at least to the suspension of the rights and privileges of membership - something which arguably under Articles 5 and 6 of the Charter can only be done by recommendation of the Security Council.

There are a number of subjects which I might list without comment, if nothing else but to indicate that they are by no means forgotten. These include:

- . The laws that will be in force in Cambodia during the transitional period.

- . Legal aspects of the question of who constitutes a Cambodian citizen for the purposes of the elections.

- . The rights of Cambodian refugees and displaced persons, including the question of voluntary repatriation.

- . Border delimitation (since there are allegations that Vietnam has changed the border in its favour.) There is also the question of the title to islands in the Gulf of Siam.

- . Eventual succession problems.

The foregoing has been of necessity a broad-brush approach, but I hope that it has, if nothing else, highlighted the complexity of some of the issues involved.