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Friedrich-Ebert-Stiftung in Southeast Asia

Friedrich-Ebert-Stiftung has been present in Southeast Asia for more than 30 years. Its country offices in Bangkok, Jakarta, Manila and Hanoi have been active in implementing national cooperation programmes in partnership with parliaments, civil society groups and non-governmental organisations, academic institutions and 'think-tanks', government departments, political parties, women's groups, trade unions, business associations and the media.

In 1995, the Singapore office was transformed into an Office for Regional Cooperation in Southeast Asia. Its role is to support, in close cooperation with the country offices, ASEAN cooperation and integration, Asia-Europe dialogue and partnership, and country programmes in Cambodia and other ASEAN member states where there are no Friedrich-Ebert-Stiftung offices.

Its activities include dialogue programmes, international and regional conferences (e.g. on human rights, social policy, democratisation, comprehensive security), Asia-Europe exchanges, civil education, scholarship programmes, research (social, economic and labour policies, foreign policy) as well as programmes with trade unions and media institutes.

Dialogue + Cooperation is a reflection of the work of the Office for Regional Cooperation in Southeast Asia of Friedrich-Ebert-Stiftung in Singapore: it deals with ASEAN cooperation as well as the Asia-Europe dialogue.

- *Dialogue + Cooperation* will tell you about our activities in Southeast Asia by publishing important contributions to our conferences and papers from our own work.
- *Dialogue + Cooperation* will contribute to the dialogue between Asia and Europe by systematically covering specific up-to-date topics which are of concern for the two regions.
- *Dialogue + Cooperation* will be an instrument for networking by offering you the opportunity to make a contribution and use it as a platform for communication.

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Editorial: Dialogue + Cooperation 3/2006

Dear Reader,

‘Parliaments and their members must cooperate more vigorously, and we [parliamentarians] must take a pro-active role in bilateral and multilateral relations at all levels, especially in security sector governance.’ With these words, HRH Prince Norodom Ranariddh, then speaker of the Cambodian National Assembly, inaugurated the workshop on ‘Parliamentary Accountability and Security Sector Governance in Southeast Asia’. The workshop was jointly organised by the Cambodian Institute for Cooperation and Peace, the Friedrich-Ebert-Stiftung Office for Regional Cooperation in Southeast Asia and the Geneva Centre for the Democratic Control of Armed Forces (DCAF).

From 7 to 11 February 2006, some fifty parliamentarians, military personnel, academics, journalists and civil society representatives from Southeast Asia and Europe exchanged thoughts on their experiences in the field of security. In their discussions on necessary actors, institutions and political systems for effective civilian and democratic control of the security sector, the term ‘security sector governance’ became the main thread.

In all democratic constitutions, parliaments are endowed to a certain extent with the authority to control the security sector. However, every now and then, the supervision and control of the security sector constitute a difficult task for parliamentarians. In many Southeast Asian countries, the military, political and economic spheres are closely intertwined and are not transparent and accessible to outsiders. In addition, parliamentarians often lack the proper expertise to evaluate national security policy or the need for certain military equipment. These circumstances impede the development of an accountable and transparent security sector, in particular when legal provisions for the civilian and democratic control of the sector are insufficient or ambiguous. Therefore, this workshop focused on mechanisms for parliamentary accountability in security sector governance.

This edition of D+C presents some selected contributions from the workshop. Since they were primarily intended to stimulate debate, they do not necessarily follow strict academic rules of presentation. After the keynote speech given by HRH Prince Norodom Ranariddh, Heiner Hänggi gives a comprehensive description of the evolution, connotations and definition of the concept of ‘security sector governance’. Djoko Susilo gives a concise overview of the role of parliament and security sector governance in Southeast Asia. He includes in his the discussion the role of regional structures such as ASEAN and the ASEAN Inter-Parliamentary Organisation (AIPO). Mario Joyo Aguja recalls in his paper the recent history of the security sector in the Philippines. With the perspective of a member of the opposition in the Philippines Congress, Mario Joyo Aguja critically evaluates the strengths and weaknesses of parliamentary oversight there. Although the Philippines is an example of a country where the intent and the infrastructure in the parliament are in place to control the security sector, the execution and the implementation—according to Mario Joyo Aguja—are lagging behind. In his paper, Yuddy Chrisnandi explains how to achieve transparency and parliamentary oversight of arms procurement and describes the historical context of the Indonesian armed forces procurement practices. Im Sithol sheds light upon the gap between theory and reality in a portrayal of the struggle of the Cambodian

National Assembly to exert its supervisory and control functions. Furthermore, Sri Yunanto provides interesting insight into the genesis and impact of the symbiosis of the Indonesian military and the 'business world'. Finally, Hans Born summarises the role and the state of the art of parliamentary oversight in Cambodia, Indonesia, the Philippines and Thailand.

Many countries are facing the challenge of how to deal with a past holocaust. Cambodia experienced a long protracted war, political strife and genocide. It is believed that at least 1.7 million Cambodians were killed or died during the Khmer Rouge rule from 1975 through 1978. In July 2006 the long-awaited Extraordinary Chambers in the Courts of Cambodia (ECCC) were established to bring former Khmer Rouge leaders to justice. On this occasion the Cambodian Institute for Cooperation and Peace and the Singapore-based FES Office for Regional Cooperation in Southeast Asia organised an international conference on 28 and 29 August 2006 in Phnom Penh. The conference dealt with the problems of how morally, legally and socially to come to terms with a past holocaust. From this conference, some selected papers and statements are included in this edition of Dialogue + Cooperation.

Referring to the Holocaust, genocide and war crimes committed by Germans during the Nazi regime and in World War II, Andrea Fleschenberg outlines in her paper some features of transitional justice in postwar Germany and introduces the different forms of reconciliation. She argues that after the collapse of an incriminated previous regime, the new political system needs processes of coming to terms with the past as a *conditio sine qua non* not only to legitimise itself *ex negativo* but also to sustain the democratisation of the political system and society. The following country cases deal from different angles with the difficulties of balancing judicial conviction and social pardon.

In 2002 the UN approved the Special Court for Sierra Leone to try those alleged to be most responsible for the war crimes and crimes against humanity committed during the country's civil war in the 1990s. Based in the country and combining international and national law, the Special Court for Sierra Leone is considered as a prototype of a new generation of international tribunals which is presumed to deliver justice faster and at lower costs than those established for Rwanda and Yugoslavia. Less known, however, are some circumstances that facilitated its establishment. Bintang Mansaray describes in her paper the efforts of Sierra Leonean society itself to reconcile and find justice. She argues that the ongoing process of transitional justice has been successful so far because society has been actively involved in it already from the very beginning of the peace agreements between the warring factions in 1999.

In one hundred days, between April and July 1994, as many as one million Rwandese were killed by their fellow Rwandese. These killings, of mostly unarmed civilians, were accompanied by numerous acts of torture, including rape. On coming to power, the current Rwandese government decided on a policy of maximal accountability for the crime of genocide and crimes against humanity committed from the onset of the armed conflict, 1 October 1990, through 31 December 1994. Arrests and detentions for these offences have, until recently, outstripped releases and trials. There are currently more than 100,000 Rwandese in the country's overcrowded detention facilities, in conditions that constitute cruel, inhuman and degrading treatment. Most of these detainees have not been tried in a proper court. Given the limited capacities of Rwanda's classical judicial system, there has been little or no judicial investigation of the accusations made against many of them.

There is little likelihood that most of them will have their cases heard by the country's existing, overburdened ordinary jurisdictions in the foreseeable future. Even the International Criminal Tribunal for Rwanda, established by the UN Security Council in Arusha, Tanzania, in 1994, has from 72 arrested suspects so far (in September 2006) convicted 28 and acquitted five. Against this background, the Rwandese government in 2002 launched a new court system, called *gacaca*, to overcome the flaws in the classical legal system of Rwanda. This new court system is named after and draws upon a customary system of community hearings used to resolve local disputes. The new *gacaca* tribunals, however, merge customary practice with a Western, formal court structure. Hildegard Lingnau critically evaluates in her paper the process of transitional justice in Rwanda and gives some recommendations for other such processes.

In 1975 Indonesia invaded East Timor, at that time a Portuguese colony. The UN never recognised Indonesian sovereignty in East Timor, and in 1999 the UN finally organised a referendum in which the East Timorese voted for independence. In response, the Indonesian National Army and pro-Indonesian Timorese militias began a campaign of violence and arson, murdering an estimated 1,500 people and forcing 500,000 to flee their homes. In the aftermath, the UN created the Serious Crimes Investigation Unit, a sort of 'hybrid court' similar to the one in Sierra Leone, to investigate and prosecute cases in the District Court of Dili, East Timor's capital. The new sovereign state of East Timor in 2002 established the Commission for Reception, Truth and Reconciliation to investigate the human rights violations committed in East Timor between 1974 and 1999 and to make recommendations for legal proceedings. The report of the commission was released in January 2006. Jose Caetano Guterres describes in his paper the work of the commission and the process of transitional justice in East Timor. Although the community reconciliation processes undertaken by the commission were generally successful, justice has so far not yet been rendered, as Jose Caetano Guterres deplors.

After long controversy between the UN and Cambodia about the Cambodian tribunal, the Extraordinary Chambers in the Courts of Cambodia will function as a hybrid court. From a legal point of view, Jörg Menzel examines in his paper the nature of the Cambodian tribunal and the forthcoming trial. Despite all earlier augurs who questioned the judicial abilities of the ECCC to deliver justice, Jörg Menzel views the coming trials of the remaining Khmer Rouge leaders as a chance for national reconciliation and for the development of the Cambodian legal system.

Benny Widyono tries to answer the question why it took 27 years to try the Khmer Rouge leaders. In his paper, Benny Widyono presents some inconvenient facts. Trapped in the geo-strategic exercises of China, the USA and USSR, Cambodia became a victim of the Cold War. When the Khmer Rouge regime was ousted by Vietnamese troops in 1979 and the Vietnam-backed People's Republic of Cambodia came to power, the international community continued to recognise the Khmer Rouge as the legitimate government of Cambodia and even insisted on their role in the Paris Peace Agreements from 1991.

The statements of Sean Visoth, Michele Lee and Helen Jarvis pick up various aspects of the Cambodian tribunal and the coming trial. Whereas Sean Visoth summarises the policy and views of the Cambodian government, Michelle Lee describes the role and contribution of the United Nations in the process. Helen Jarvis reminds us that already from 1979 onwards evidence of the crimes committed by the Khmer Rouge has been gathered and

that the can refer to an overwhelming documentation. Finally, in his statement, Deputy Prime Minister Sok An throws light upon the efforts of the Cambodian government to seek justice for the victims of the Khmer Rouge Regime.

All papers and statements reflect the opinions of the individual authors. The Singapore Office of the Friedrich-Ebert-Stiftung would like to express its sincere appreciation to all the contributors to this edition.

The Editor
Friedrich-Ebert-Stiftung
Office for Regional Cooperation in Southeast Asia

Parliamentary Accountability and Security Sector Governance in Southeast Asia

HRH Samdech Krom Preah Norodom Ranariddh*

On behalf of the National Assembly and on my own behalf, I wish to take this opportunity to welcome all of you to this important workshop on 'Parliamentary Accountability and Security Sector Governance in Southeast Asia' here in this historic city of Siem Reap, where Angkor Wat, one of the wonders of the world, is situated.

I would like to extend my warmest congratulations to the Cambodian Institute for Cooperation and Peace (CICP), which has worked in close cooperation with the Friedrich-Ebert-Stiftung and the Geneva Centre for the Democratic Control of Armed Forces (DCAF) to organise this timely and meaningful meeting.

The notion of security sector governance, on which my speech is focused, refers to the organisation and management of the security sector by a multiplicity of actors, particularly, but not limited to, the state. Normatively, the objective is to ensure that governance of the security sector is based on good governance, guided by the principles of accountability, participation, transparency and responsiveness to the needs of the people.

Institutionally, democratic governance of the security sector necessarily includes a constitutional and legal framework, civilian control and management of the security sector, parliamentary control and oversight, judicial control and broader public control that extends to civil society and includes an informed public debate on national security issues.

Thus, while democratic governance of the security sector is the desired objective, security sector reform is the means of achieving this result. Security sector reform implies that changes are required to improve security governance. In the case of Cambodia, it is widely acknowledged that the idea of parliamentary oversight over security sector governance has not yet completely taken root. Hence, there is a need to ensure that the parliament, in the future, will be positioned to conduct parliamentary oversight, preparation and analysis of defence budgets, and technical aspects of defence procurement.

The topics you have proposed for discussion here today and for the following days are timely and important to all of us, especially for members of parliament—the representatives and the protectors of the people. This workshop is useful because it will provide the opportunity for an exchange of views and experiences concerning security policies and the role of parliaments in different countries, in particular Cambodia, Indonesia, the Philippines and Thailand. It will also enable our parliamentarians to strengthen their capacities to oversee effectively the security sector.

To address security threats in global and internal affairs, especially terrorism and transnational crime, governments often call for an increase in defence spending. This often translates into tax hikes for the average citizen as government spending increases. While this may ease the minds of citizens and actually provide a higher level

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of security for a nation, the fact remains that every dollar that is given to the government is taken out of the cash flow of a nation's economy.

Despite the UN peace operation in Cambodia which led to the 1993 general elections, the country was only able to end the prolonged civil war in 1998. Cambodia has spent an enormous amount of money on war, and now it will have to spend huge amounts of money on rebuilding its economy. Cambodia's military expenditure for 1998 was USD\$160 million and for 2001 it was US\$112 million, which amounts to 3 per cent of GDP. Now Cambodia is at peace. Military expenditures dropped to US\$112 million in 2005.

Cambodia is a member of the Association of Southeast Asian Nations (ASEAN). As a signatory of the ASEAN Treaty of Amity and Cooperation, we will not have war with any other country in the region. However, the country still faces many security challenges. As you may know, the term 'security' is no longer understood only in terms of national defence, but is also largely defined in more general terms, including non-traditional political, economic, societal and environmental aspects.

Today's workshop on security sector governance focuses on two important words, 'security' and 'governance'. 'Governance' and 'good governance' are terms that are very popular now; these terms have four main principles. Although at present there is no general consensus on the desired qualities of good governance, its principles certainly include transparency, accountability, predictability and participation. Two other frequently cited principles are inclusiveness and legitimacy.

All of these are attractive and necessary attributes to be encouraged in any system

of governance. But good governance should also be judged in terms of the quality of decisions taken and policies adopted, specifically whether they produce outcomes that are broadly efficient, equitable, sustainable and cost effective. What makes such outcomes more likely, however, clearly depends to a large extent on the quality of the policy advice that is injected into the governance process to help guide key decision makers. Yet the role of policy expertise is largely missing from most discussions on effective governance, even though it can be helpful—even critical—at every stage of the policymaking process.

After the UN-sponsored election in 1993, Cambodia adopted a parliamentary system of government with a liberal democracy and pluralism. There are three separate powers: executive, legislative and judicial. Parliament must hold the government accountable for its decisions on behalf of the people in all fields, including in the field of security sector governance.

As parliamentarians we have to speak the truth for the welfare of our people, and we have to voice our people's concerns. They have entrusted us with their dignity. We must safeguard that trust by promoting lasting prosperity through sustainable development, democracy and peace. These are our imperatives and we embrace them. Parliaments and their members must cooperate more vigorously, and we must take a pro-active role in bilateral and multilateral relations at all levels, particularly in security sector governance. Working together in pooling our efforts for the sake of humanity, we can bring lasting peace and well-being to our world.

The word security sector governance is rather new for Cambodia. I hope that this workshop can draw on the many good and bad practices and lessons learned in security sec-

tor governance from different situations and from different countries. We can learn from those good experiences, and we will adopt good practices suitable for Cambodia.

I hope that the workshop will provide an

active debate and yield a fruitful outcome, and I now declare the seminar open.

Thank you so much for your kind attention.

The Concept of Security Sector Governance

Heiner Hänggi*

Introduction¹

Since the 1990s, security sector governance (SSG) has become a recognised item on national and international policy agendas. This process is driven by the understanding that a poorly governed security sector (including military, police and other security forces as well as the bodies managing and overseeing them) represents a decisive obstacle to the promotion of sustainable development, democracy, security and peace. Four separate developments have nurtured this trend:

- First, following the end of the Cold War, Western governments—in the framework of their ‘new defence diplomacy’—put emphasis, bilaterally as well as through multilateral security institutions such as OSCE and NATO, on the promotion of democratic civil-military relations in post-communist central and eastern Europe.² With other multilateral actors coming into the picture, notably the EU and the Council of Europe, this approach soon began to ex-

pand to non-military elements of the security sector such as the police, border guards and justice institutions.³ At the same time, security sector governance, albeit not necessarily under this label, was recognised as a key element in the political transition of countries in Africa, Latin America and east and south-east Asia.⁴

- Second, as a consequence of the rapid rise in the number of intrastate conflicts in the 1990s, the development community started to recognise the security-development nexus and to embrace SSG as an instrument of development cooperation. Following the lead of the United Kingdom, western donor countries and multilateral development actors such as the OECD and UNDP embedded SSG into development assistance policies and programmes.⁵
- Third, the promotion of SSG gained practical relevance in the context of externally assisted reconstruction of frag-

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1. This article is drawn from: Bryden, A. and H. Hänggi (eds.). 2005. ‘Reforming and Reconstructing the Security Sector’, in Bryden, A. and H. Hänggi (eds.). *Security Governance in Post-Conflict Peacebuilding*. Münster: LIT. pp. 23-42; Hänggi, H. 2004. ‘Conceptualising Security Sector Reform and Reconstruction’, in Bryden, A. and H. Hänggi (eds.). *Reform and Reconstruction of the Security Sector*. Münster: LIT. pp. 3-18; Hänggi, H. 2003. ‘Making Sense of Security Sector Governance’, in Hänggi, H. and T. Winkler (eds.). *Challenges of Security Sector Governance*. Münster: LIT. pp. 3-22 (4-8).
2. See, for instance, Cottey, A. and A. Forster. 2004. *Reshaping Defence Diplomacy. New Roles for Military Cooperation and Assistance*, Adelphi Paper No. 365. London: International Institute for Strategic Studies. pp. 31-40.
3. Hänggi, H. and F. Tanner. 2005. *Promoting security sector governance in the EU's neighbourhood*. Chaillot Paper No. 80 Paris: EUISS. pp. 25-42.
4. See, for example, Cawthra, G. and R. Luckham (eds.). 2003. *Governing Insecurity, Democratic Control of Military and Security Establishments in Transitional Democracies*. London: Zed Books; Ethier, D. 1990. *Democratic Transition and Consolidation in Southern Europe, Latin America, and Southeast Asia*. London: MacMillan.
5. See, for instance, Brzoska, M. 2003. *Development Donors and the Concept of Security Sector Reform*. DCAF Occasional Paper No. 4. Geneva: Geneva Centre for the Democratic Control of Armed Forces.

ile states as well as states emerging from violent internal or inter-state conflict.⁶ In the context of UN discourse, the improvement of security sector governance is increasingly viewed as key to success in post-conflict peace-building efforts.⁷

- Finally, highly developed countries, consolidated democracies and states which are internally and externally secure—in other words, the key promoters of improved security sector governance in transitional, developing and post-conflict countries—also began to face pressures to reform their own security apparatuses and improve relevant governance structures, particularly in response to new security requirements accentuated by 9/11 and its aftermath⁸ and to deficiencies in international security governance related to the effects of globalisation.⁹

Security sector governance is an expression of 'security governance'¹⁰ at the national level. Thus, it is essentially a state-centric concept. One may therefore expect that the

shift from *government* to *governance*, i.e., the fragmentation of political authority among public and private actors on multiple levels and the application of complex modes of collective political steering and coordination, has generally been rather modest in the security sector. Yet, governments increasingly face governance challenges in the security sector, which may range from the need to engage non-state actors—civil society actors as well as armed groups—to the ramifications of globalisation in the security domain as evidenced by the growing involvement in multinational peace operations or the expansion of international intelligence sharing in the context of the fight against terrorism. Applying a governance perspective, this article begins by offering a broad definition of the security sector. It then discusses some norms and standards of security sector governance which have gained broad though not universal recognition. Finally, it briefly introduces the concept of security sector reform, which is viewed as the principal approach to improving security sector governance.

The Security Sector from a Governance Perspective

There is no generally accepted definition of what the security sector comprises. Nonetheless, there appears to be a convergence on broad and narrow notions of the term. The narrow notion reflects a traditional *governmental* approach, which is

premised upon a state-centric view of security and the state's monopoly on the legitimate use of violence. Accordingly, the security sector can be considered as the component of the public sector responsible for the provision of internal and exter-

6. See, for instance, Bryden and Hänggi (2004), *op. cit.*, particularly chapters in Part II; Bryden and Hänggi (2005), *op. cit.*, particularly Chapter 2; Schnabel, A. and H.-G. Erhart (eds.) 2005. *Security sector reform and post-conflict peacebuilding*. Tokyo: United Nations University Press.
7. Statement by the President of the Security Council, UNSC, S/PRST/2005/30, 12 July 2005.
8. Reference is made to the increased salience after 9/11 of intelligence, police, law enforcement and border security, the blurring of lines between internal and external security and the need to find a new balance between increased powers of the security sector and the existing oversight mechanisms. See Slocombe, W. 'Terrorism/Counter-Terrorism: Their Impact on Security Sector Reform and Basic Democratic Values', in Bryden, A. and P. Fluri (eds.) 2003 *Security Sector Reform: Institutions, Society and Good Governance*. Baden-Baden: Nomos. pp. 291-301.
9. Reference is made to deficiencies in the accountability of national armed forces being deployed under the auspices of international institutions. See Born, H. and H. Hänggi (eds.) 2004. *The 'Double Democratic Deficit'. Parliamentary Accountability and the Use of Force Under International Auspices*. Aldershot: Ashgate.
10. On the 'security governance' concept see Hänggi, H. 'Approaching Peacebuilding from a Security Governance Perspective', in Bryden and Hänggi (2005), *op. cit.*, pp. 5-9.

nal security. It rests on two pillars: (a) the component parts of the state security (and justice) apparatus, which could be called 'security providers', and (b) the relevant civilian bodies responsible for the management and control of that apparatus, which could be called 'governance providers' (see Table 2).¹¹

Although still within the confines of the narrow government approach, this definition reflects a broad notion of security for two reasons.¹² First, it does not cover the military alone, but acknowledges the important, and in some countries predominant, role of non-military security forces either in the provision of security or, on the contrary, as a source of insecurity. Consequently, apart from the armed forces, the state security apparatus includes the police, gendarmerie and paramilitary forces, intelligence and secret services, border guards and customs authorities, as well as justice and penal institutions. The inclusion of the latter category of actors such as criminal investigation services, prosecution regimes and prison services into the security apparatus reflects the growing importance of internal security issues, particularly in the aftermath of 9/11. Second, this definition of the security sector adds a normative political dimension in the sense that it posits the state security apparatus as accountable to government authority or, as UN Secretary General Kofi Annan put it, that the security sector "should be subject to the same standards of efficiency, equity and accountability as any other [public] service".¹³ Consequently, apart from the secu-

rity apparatus and its internal control mechanisms, the security sector includes the elected and duly appointed civil authorities, such as the executive government, the relevant ministries (so-called 'power ministries', particularly the ministries of defence and the interior), the parliament and its specialised committees, as well as the judicial authorities and special oversight bodies such as human rights commissions, audit offices, inspectors-general and ombudsmen. Accordingly, the role of these bodies is to ensure that the security apparatus is managed in an efficient and effective way and is held accountable to current standards of democracy and human rights.

Given the centrality of the security sector as the sole agent of legitimate force in the nation-state, there are good reasons to believe that the shift from *government* to *governance* has generally been modest in the security sector. However, this focus on a security sector understood to be confined to state institutions does not correspond to reality in many countries, including established democracies as well as developing, post-authoritarian and post-conflict states. More often than not, non-state actors, armed groups and civil society organisations play an important role in providing or undermining security. From a governance perspective, this calls for a broader understanding of the security sector, which should include non-statutory security forces and non-statutory civil society groups as well.¹⁴

Given the increasing importance and, par-

11. For an authoritative definition of the security sector in the narrow sense see Informal DAC Task Force on Conflict, Peace and Development Co-operation. 2000. *Security Issues and Development Co-operation: A Conceptual Framework for Enhancing Policy Coherence*. Paris: Organisation for Economic Co-operation and Development. p. 8.
12. For a discussion of the broad notion of security see Sheehan, M. 2005. *International Security. An Analytical Survey*. Boulder: Lynne Rienner.
13. Annan, K. 19 October 1999. *Peace and Development—One Struggle, Two Fronts*. Address by the United Nations Secretary General to World Bank Staff. p. 5.
14. For authoritative definitions of the security sector in the broad sense see United Nations Development Programme. 2002. *Human Development Report 2002: Deepening democracy in a fragmented world*. Oxford: Oxford University Press. p. 87; OECD DAC. 2005. *DAC Guidelines and Reference Series: Security System Reform and Governance*. Paris: OECD DAC. pp. 20-21. Available at URL www.oecd.org/dataoecd/8/39/31785288.pdf.

ticularly in post-conflict cases, the prevalence of private and other non-statutory security actors, armed groups such as guerrilla and liberation armies, irregular paramilitary organisations, private armies of warlords, political party militias and mercenaries all have to be considered either part of the *de facto* security sector or at least as important actors shaping security sector governance. This also holds true for private military and security companies, which have become a key feature of many conflict and post-conflict theatres. Finally, again with particular relevance to post-conflict settings, foreign troops may also play a crucial role in the provision of security. Foreign troops impacting the security sector governance of the host country may take the form of international peace support operations, allied troops or even occupying forces.

Furthermore, given the relevance of civil society for democratic governance, non-statutory civil society actors such as the media, non-government organisations, research institutions and community groups may play an important role in the oversight

of the security apparatus. They can contribute to the creation of an informed public sensitised to security sector governance issues, and they can provide the state institutions responsible for the management and oversight of the security apparatus with alternative expertise.

Considering civil society actors and armed non-state actors as component parts of the security sector in the broad sense helps to transcend its essentially state-centric nature, which in an increasing number of cases wrongly assumes that the monopoly on the means of legitimate coercion rests solely with the state and its institutions.¹⁵ While necessary from a *governance* perspective, the broadening of the security sector to include non-state actors is much less desirable from a *government* perspective, particularly with regard to armed non-state actors. However, from both government and governance perspectives, the limited involvement or, even better, non-involvement of armed non-state actors in security sector governance, and a strong role for civil society actors, is desirable.

Norms and Standards of Security Sector Governance

This brings us to the normative dimension of security sector governance, which is closely linked to the concept of democratic governance. Amongst the few international documents referring to security sector governance is the UN General Assembly Resolution 55/96, entitled “Promoting and Consolidating Democracy”, which calls for “ensuring that the military remains accountable to the democratically elected civilian government” in the context of strengthening the rule of law.¹⁶ In its Human Development Report 2002, the United Nations Development Programme (UNDP) makes

a strong case for ‘democratizing security to prevent conflict and build peace’. Referring to the democratic peace thesis, which posits that democracies do not go to war against other democracies, the report stresses the crucial role of democratic control of the military, police and other security forces for human development and human security.¹⁷ Standards for democratic governance of the security sector have been set outside the UN system by a number of regional organisations such as the OSCE, NATO, the EU and the Council of Europe (see Table 1). The OSCE has gone the furthest so

15. See Wulf, H. 2005. ‘Internationalisierung und Privatisierung von Krieg und Frieden’, in *BICC/DCAF Schriften zu Sicherheitssektor und Konversion* No. 11. Baden-Baden: Nomos.

16. Human Rights Resolution 2000/47 on Promoting and Consolidating Democracy, para. 1, b, ix.

17. UNDP (2002), *op. cit.*, pp. 85-100.

Table 1. Norms and Standards on Security Sector Governance ¹⁸		
International Institution	Norms/Standards	Source
OSCE	'The democratic political control of military, paramilitary and internal security forces as well as of intelligence services and the police' (specified by a detailed set of provisions)	Code of Conduct on Politico-Military Aspects of Security (1994)
NATO Partnership for Peace (PfP)	'Ensuring democratic control of defence forces' (one of five objectives, specified in the PfP programme)	Framework Document (1994)
Council of Europe (Parliamentary Assembly)	'Control of internal security services in Council of Europe member states'	Recommendation 1402 (1999)
UNCHR	'Ensuring that the military remains accountable to the democratically elected civilian government'	Resolution 2000/47 (2000)
UN General Assembly	'Ensuring that the military remains accountable to the democratically elected civilian government'	Resolution 55/96 (2000)
EU (European Parliament)	Specifying the 'Copenhagen Criteria' for accession to include: 'legal accountability of police, military and secret services [...] and acceptance of the principle of conscientious objection to military service'	Agenda 2000, § 9
Community of Democracies	'That civilian, democratic control over the military be established and preserved'	Warsaw Declaration (2000)
Club of Madrid	'Civilian control over the military and defence policy, and a clear separation of the armed forces from police bodies and functions'	Closing Statement (2001)
Summit of the Americas	'The constitutional subordination of armed forces and security forces to the legally constituted authorities of our states is fundamental to democracy'	Quebec Declaration (2001)
UNDP	'Democratic civil control of the military, police and other security forces' (report enumerates principles of democratic governance in the security sector)	Human Development Report (2002)
OECD DAC	Norms and standards contained in the Guidelines on Security Sector Reform and Governance	DCAF Reference Document (2004)
Council of Europe (Parliamentary Assembly)	Norms and standards contained in Democratic oversight of the security sector in Council of Europe member States	Recommendation 1713 (2005)
EU (Council)	Norms and standards contained in the EU Concept for ESDP Support to Security Sector Reform	Note to the PSC (2005)
EU (Commission)	Norms and standards contained in the Concept for European Community Support for Security Sector Reform	Communication COM(2006) 253

18. This table, though revised and updated, is drawn from Hänggi, H., 'Making Sense of Security Sector Governance', *op. cit.*, p. 14.

far with the adoption of the politically binding Code of Conduct on Politico-Military Aspects of Security in 1994. This code contains the most innovative provisions on 'the democratic political control of military, paramilitary and internal security forces as well as intelligence services and the police' (paragraph 20). Sections VII and VIII of the code establish the basic components of democratic control of the armed forces regime, which is at the core of security sector governance in the Euro-Atlantic area and has influenced the elaboration of similar regimes elsewhere.¹⁹ This holds particularly true for the Americas with the 2001 Quebec Declaration²⁰ and for West Africa, where ECOWAS is currently drawing up a Code of Conduct for Armed and Security Forces in that sub-region.²¹ Whether the ASEAN Charter will contain a reference to these issues remains to be seen; however, the planned inclusion of affirmed principles such as the 'promotion of democracy, human rights and obligations, transparency and good governance and strengthening democratic institutions'²² would seem to provide a strong point of reference for security sector governance.

These normative international documents reflect a broad agreement on general principles and good practices in security sector governance. From an institutional perspective, democratic governance of the security sector would include:

- *a constitutional and legal framework* that enshrines the separation of powers (between the executive, legislative and judicial branches of government) and clearly defines the tasks, rights and obligations of the security sector and of the individual security institutions (e.g.,

separation between police and military);

- *civilian control* and management of the security sector by the government (civilian control over the ministry of defence, other security-related ministries and the military establishment as a whole, with civilian defence and interior ministers and civil servants having key policy and management roles and with a clear division of professional responsibility between civilians and the military; and national security advisory and coordinating bodies);

- *parliamentary control* and oversight of the security sector (including powers such as the approval of defence and security-related budgets, security-related laws, security strategy and planning, security sector restructuring, weapons procurement, deployment of troops for internal emergency situations and abroad, ratification of international agreements on security issues; and instruments of oversight such as defence committees, hearings, inquiries and investigations, mandating reports, etc.);

- *judicial control* in the sense that the security sector is subject to the civilian justice system, and no specialised courts (e.g. military justice courts) are completely outside the jurisdiction of the civil justice system; and,

- *'public control'* of the security sector through the existence of a security community that represents civil society (political parties, NGOs, independent media, specialised think-tanks and university institutions etc.) and that cultivates an informed national debate on security issues.

This body of widely recognised principles

19. For an overview see Hänggi, Heiner (ed.) 2003. *Practical Confidence-building Measures: Does Good Governance of the Security Sector Matter?* DCAF Working Paper No. 107. Geneva: Geneva Centre for the Democratic Control of Armed Forces.

20. See http://www.dfait-maeci.gc.ca/latin-america/latinamerica/right_nav/declara-en.asp.

21. See Adedeji Ebo. 2005. *Towards a Code of Conduct for Armed and Security Forces in Africa: Opportunities and Challenges*. DCAF Policy Paper. Geneva: Geneva Centre for the Democratic Control of Armed Forces.

22. See <http://www.aseansec.org/18031.htm>.

and practices effectively constitutes an ideal type of security sector governance that perhaps only a few countries are able to match in their entirety. Although there are no universally accepted models, civilian supremacy and legislative accountability (or civilian and parliamentary control) of the security sector are widely recognised as the most crucial elements of the concept of democratic governance of the security sec-

tor. One should note that the democratic governance of the security sector offers long-term advantages for the security forces themselves and does not impede their efficiency. It provides them with the resources that are politically considered necessary. It also facilitates their effectiveness and efficiency because they are under external scrutiny, thereby giving them legitimacy and social acceptance.

Improving Governance through Security Sector Reform

If democratic governance of the security sector as laid out above defines the objective that is desirable (but hardly ever met), then security sector reform (SSR) would be the means of meeting, or at least coming closer to meeting, this objective. The point of departure for SSR is a dysfunctional security sector, i.e., a security sector that does not deliver security to the state and its people in an efficient and effective way or, even worse, which is itself a cause of insecurity and violent conflict. Moreover, in line with the aforementioned normative dimension of SSR, and in view of the fact that non-democratic states may also have efficient and effective security sectors (though primarily for the purpose of regime security), a security sector must be considered dysfunctional if it is deficient in terms of democratic governance. Thus, SSR is meant to turn a dysfunctional security sector into a functional one, thereby reducing security deficits (lack of security or even the provision of insecurity) as well as democratic deficits (lack of oversight over the security sector). This double objective of developing an affordable, effective and efficient security apparatus within the framework of democratic accountability constitutes the

uncontested core of the SSR concept.²³

The SSR agenda favours a holistic approach in a double sense—firstly, by integrating all those partial reforms such as defence reform, police reform, intelligence reform and judicial reform, which in the past were generally seen and conducted as separate efforts; and secondly, by linking measures aimed at increasing efficiency and effectiveness of security forces to overriding concerns of democratic governance. Consequently, it has to be emphasised that reforms aimed to modernise and professionalise security forces without ensuring their democratic accountability are not consistent with the SSR concept as commonly understood. Such activities would more readily fall under the heading of technical assistance in the framework of ‘old defence diplomacy’, which was aimed at beefing up the armed and security forces of allies irrespective of governance considerations.²⁴ By definition, SSR-related activities must be aimed at improving the governance of the security sector.

Given the scope and complexity of the SSR concept, the range of SSR activities that

23. According to the OECD DAC, security sector reform ‘seeks to increase partner countries’ ability to meet security needs in their societies in a manner consistent with democratic norms and sound principles of governance, transparency and the rule of law’. OECD DAC, *op. cit.*, p. 11.

24. These attempts are not unusual, as noted in a recently published report by the OECD DAC: ‘In this context, there is a danger that traditional security-related programmes be simply re-labelled as SSR without a serious review of their contents to ensure that they support a governance-oriented approach to the security system’. OECD DAC, *op. cit.*, pp. 25-26.

are recommended and implemented by the actors involved is quite extraordinary. They range from political dialogue, policy and legal advice and training programmes to technical and financial assistance. Two major categories of reform activities can be distinguished—each reflecting one of the two core elements of SSR:²⁵

- First, measures aimed at restructuring the security apparatus. These SSR activities include partial reforms such as military and, more generally, defence reform as well as police reform, intelligence reform, judicial reform, prison reform, etc. In line with the holistic approach of SSR, it is imperative to link each area of engagement because efforts will not succeed unless complementary work is carried out in other areas. From a security governance perspective, activities aimed at engaging and integrating non-state armed actors into the state security apparatus might also be considered as a part of this category of SSR activities.
- Second, measures aimed at strengthening civilian management and democratic accountability of the security apparatus. These SSR activities include reforms of the relevant ministries and their management capacities (particularly financial management) as well as parliamentary and judicial oversight mechanisms. From a security sector governance perspective, capacity building for specialised civil society actors would also fall into this category of SSR activities.

In post-conflict settings, SSR activities have to tackle a third objective, namely, to address the specific legacies of violent conflict. These activities therefore include the

engagement of armed non-state actors; disarmament, demobilisation and reintegration of former combatants, including child soldiers; combating the proliferation and misuse of small arms and light weapons; mine action; transitional justice; etc.

In practical terms, SSR varies according to the specific reform context. It is generally accepted that no common model of SSR exists and that, in principle, each country engaging in SSR constitutes a special case and hence a different reform context. However, for analytical purposes, broad SSR contexts may be distinguished which contain a number of similar cases based on specific criteria for categorisation. If the level of economic development, the nature of the political system and the specific security situation are used as points of departure, the following three SSR contexts, or rather 'context clusters', emerge as typical (see Table 2):

- the developmental context in relatively stable developing countries (key criterion: socio-economic development);
- the post-authoritarian (including post-communist) context in transition countries (key criterion: political system); and
- the post-conflict context in countries engaged in rebuilding the state after conflict (key criterion: security situation).²⁶

Relatively good opportunities for externally assisted SSR activities tend to exist in developing countries that have embarked on a process of democratisation after elections or other forms of peaceful change, in post-authoritarian transition states which aim at joining a regional organisation that has democracy as a requirement for member-

25. For a systematic catalogue of SSR activities see Hänggi, H. and F. Tanner, *op. cit.*, annex V.

26. One should, however, be aware that highly developed countries, consolidated democracies and states which are internally and externally secure also face pressures to reform their security sectors, particularly in response to new security requirements accentuated by 9/11 and its aftermath or to deficiencies in international security governance related to the effects of globalisation. These pressures are not specific to a given reform context but are more generally applicable.

Table 2. Contexts of Security Sector Reform ²⁷			
	Developmental context	Post-authoritarian context	Post-conflict context
Key criterion	Socio-economic development	Political system	Security situation
Key problem	Development deficit	Democratic deficit	Security deficit
Key reform objective	Development	Democratisation	Peace-building and state-building
General reform process	Transition from underdeveloped to developed economy	Transition from authoritarian to democratic system	Transition from armed conflict to sustainable peace
Nature of external involvement	Reform pressure through development assistance coupled with political conditionality	Perspective of accession to regional organisation (e.g., EU, NATO) as incentive for reform	Reform pressure through international (mostly UN-led) peace support operations
Key external actors	Western donor countries; development organisations (e.g., UNDP, World Bank); transnational actors	Western donor countries; international organisations (e.g., EU, NATO, OSCE); transnational actors	Multinational peace troops (mostly UN-led); western donor countries; UNDP; transnational actors (e.g. NGO, PMC)
Specific security sector problems	Poorly managed and governed security apparatus; excessive military spending; security apparatus partly funding itself through own business activities	Oversized, over-resourced, omnipresent security apparatus; civil but no democratic control; strong state but weak civil society	State structures collapsed; very weak civil society; strong presence of armed non-state actors; specific security problems (e.g., small arms, land-mines)
Possibilities for SSR	Mixed-depending on political commitment to reform, strength of state institutions, role and state of security apparatus, regional security environment, donor approach to SSR, etc.)	Rather good if external incentives available, e.g., EU membership-strong state institutions, professional security forces, broader democratisation process)	In principle rather poor-weak and contested statehood, privatisation of security-depending on foreign commitment and local readiness to reform

ship (e.g., potential EU and NATO members) and in those post-conflict states in which international peace support operations offer a basis for reconstruction and local actors show a certain capacity and readiness for reform. In many other cases,

however, prospects for externally assisted SSR are rather dim. In particular, this applies to countries experiencing armed conflict and to fragile and 'post-conflict' states at early stages of conflict transformation, as well as to authoritarian regimes and so-

27. This table, although revised and updated, is drawn from Hänggi, H., 'Conceptualising', *op. cit.*, p. 10.

called illiberal democracies where the will to reform is lacking. This does not necessarily mean that SSR should not be promoted in these countries, but that this task will be even more challenging with greater political risks attached than is the case in more conducive environments.

The framing conditions, the nature of external involvement, the specific security sector problems and the challenges and possibilities for SSR may be very different depending on the specific reform context. What all three contexts have in common, however, is that SSR tends to be externally induced. In most cases, external (development and security) actors tend to initiate SSR programmes, fund them to a large extent and

often provide the bulk of expertise needed to implement these programmes. Where local will for reform is lacking, external actors often facilitate SSR programmes by means of political incentives or pressure. Furthermore, external actors seem to have a penchant for promoting their own (i.e., 'western') reform models, which rarely fit the specific SSR context on the ground. In all three reform contexts, there are tensions between external imposition and local ownership of SSR. Finding a balance between international good practice in this area and domestic political culture of reforming states is a *conditio sine qua non* for successful SSR, although this tension is inherent to the SSR concept itself and thus not amenable to easy solutions.

Conclusion

Though still a rather recently developed concept, security sector governance is useful for the analysis of new—post-Cold War, post-9/11—challenges in the interrelated areas of security and governance. Its comparative advantage is twofold: first, it extends beyond earlier, rather narrow, discourses on civil-military relations and democratic control of armed forces and bridges previously separate discourses on

security, democratisation, development and peace-building. Second, despite its inherent normative preference for *democratic* governance, the concept can also be used to critically assess the nature of security sector governance in non-democratic and/or poorly governed countries, thereby providing a conceptual framework for cross-country and cross-regional comparative research and policy debates.

The Role of Parliament in Security Sector Governance in Southeast Asia

Djoko Susilo*

Developments in international relations over the past decade have notably included the advancement of democracy in many countries, whether as a universal value or as a system of government. The impact of this development has been seen in the resolution of many conflicts by peaceful means, which as a result has allowed these new democracies to flourish. In addition, discrepancies between unilateralism and multilateralism have been lessened, paving the way for greater and more comprehensive cooperation for peace.

As such, democracy is seen as a valuable asset in structuring and expanding relations among countries. Democracy allows for shared values upon which to build cooperation, which can stimulate efforts to overcome conflicts in a peaceful manner. The process of democracy also raises the international community's awareness of issues such as human rights, good governance and new concepts of security. At the same time, such a development carries the potential risk of various and multidimensional threats and challenges which are interlinked and cross-border in nature. These threats require a comprehensive approach at all levels (bilateral, regional, multilateral).

The concept of security these days no longer only addresses military threats, but also non-military threats such as terrorism, civil wars and organised crime, as well as illegal trafficking and the proliferation of small arms and weapons of mass destruction. Human security has now become a priority, especially as the threats to our livelihoods

emerge, such as terrorism, natural disasters and infectious diseases like HIV/AIDS and avian influenza. At the same time, good governance is flourishing. This good governance has eight characteristics: it is participatory, consensus-oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive and concerned with the rule of law.

South-east Asia is no exception to this mainstream global development, particularly since the Asian financial crisis in 1997-98. The impact of this development was especially felt by ASEAN, the region's leading organisation, which responded by defining the steps towards building an ASEAN Community by the year 2020 as a means to greater regional integration. This was based on the three pillars of cooperation: in security (ASEAN Security Community), economy (ASEAN Economic Community) and socio-cultural affairs (ASEAN Socio-Cultural Community). Within this context, it is interesting to observe an increasing desire among countries of the region to push ASEAN to be democratic, to develop good governance, to respect and protect human rights and to build norms for relations among countries that are more open, advanced and mutually respectful.

Such development can also be seen at the national level when a nation implements adjustments and reform to respond to globalisation, which emphasises democracy, good governance, human rights, anti-corruption and free trade. Democracy affects how a nation administers state affairs, ad-

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justs the role of its control bodies and promotes civilian supremacy. Civil-military relations have also been altered as a result.

With regard to civil-military relations, it is interesting to observe Western thoughts on the general principles of democracy. Firstly, democracy requires all security services, including military and intelligence agencies, to accept and submit to civilian supremacy, which is composed of political parties elected through a free election with secret ballots. Secondly, military troops are exclusively dedicated to protecting the state from external threats and attacks, while police, state prosecutors, lower courts and other civilian bodies are in charge of maintaining order and resolving domestic disturbances. Thirdly, military officers are prohibited from political practices since democratic political culture gives political parties the role of guru and executor of democracy. In this context, military officers are expected to be military professionals who are not involved in political affairs and to avoid open political allegiances. In brief, military officers do not take sides.

In promoting and enforcing the principle of civilian supremacy and other military reforms, problems will surely arise. Firstly, the people in Southeast Asian countries are generally fragmented. Fragmented societies provoke mistrust that leads to ethical, religious and racial conflict, including in the form of local resistance to the central government. A pluralistic society can be transformed into a fragmented society if there is no effective system to properly manage such plurality (for instance, as in the Soviet Union and the Roman Empire).

Secondly, the military will often show scepticism toward the civilian capacity to manage defence and security issues. Thirdly, there are financial resource limitations to improving the welfare of military officers. It has been historically proven that most

military coups were caused by poor military welfare arrangements. It is therefore very problematic to maintain that militaries can be self-sufficient in regard to their own financial management. In democratising and exercising good governance, as well as in promoting accountability and transparency, this two-sided mechanism is no longer relevant.

Of all the significant changes required for democratisation, increasing the role played by parliament is perhaps the most critical, particularly for decision-making processes. As the main pillar of the democratisation process, parliament is indeed the people's representative, acting as a watchdog over the government, including budget-related policies. The question is how to make parliament function in an optimal matter. Do the existing legal instruments support the work of parliament effectively?

In the past, parliament was considered a mere supporting state body unable to balance the government's domination of state affairs. Democratisation has since brought positive changes. Today, parliament and the government play an equally important role and work collaboratively in shaping a brighter future for the nation and people. At the same time, the nature of regional problems has become increasingly complex, particularly in transitioning countries.

Some countries in the region have started implementing organisational adjustments and reform, notably with respect to the parliament's relationship to the executive. This could be facilitated, among other initiatives, through the issuance of new acts concerning general elections and constitutional amendments. In upholding civilian supremacy, the number of military officers in the parliament has also been gradually reduced.

One of the most pressing issues related to security sector reform is the management

and reform of intelligence agencies. Intelligence organisations gather and analyse information. Such actions require a high degree of secrecy, sometimes resulting in the abuse of power in the domestic political context. Therefore, it is a matter of urgency that there should be a clear democratic and parliamentary oversight of intelligence agencies in addition to executive control. Only a system of checks and balances will ensure and prevent the misuse of intelligence agencies.

Parliament should exercise democratic control over intelligence agencies through budgetary means and by the introduction of regulatory conditions that require parliamentary approval of the appointments of the heads of intelligence agencies. In addition, there must be a guarantee of access to information collected by the agencies for members of parliament. It is also very important to establish parameters of the services' mandates, as well as a professional code of conduct for members of intelligence services. For Indonesia, parliament should urgently pass a democratic intelligence law.

There is a growing tendency to improve the existing parliamentary system to achieve greater control over the government. As a part of this, parliament should be given access to certain classified information concerning the state's defence and security affairs. Without a doubt, democratisation requires greater transparency and openness.

With regard to regional inter-parliamentary cooperation, it has to be noted that although globalisation offers new avenues for improved development, it also marginalises certain countries, including those in this

region. As it is commonly known, ASEAN comprises countries with diverse levels of economic development and different understandings of democracy. Yet these obstacles have not discouraged ASEAN member countries from furthering their mutually beneficial cooperation. In this connection, the ASEAN Inter-Parliamentary Organisation (AIPO) could be an important vehicle in attaining greater benefits from globalisation, both collectively and nationally. AIPO could also be used to enhance capacity building.

There is no doubt that ASEAN is now showing greater interest in democratisation and starting to translate it into concrete action. However, the pluralistic political system has to some extent caused difficulties in relations among ASEAN member countries. In South Korea and Spain's past transitions toward democracy, economic development played a vital role in determining the outcome of the transition period. On the other hand, Indonesia's transition toward democracy occurred during a serious financial crisis.

Three important questions need to be addressed and answered urgently. Firstly, what can the parliament do to improve good governance of the security sector, in particular in intelligence services? Secondly, what can Southeast Asia's parliaments do to further the restructuring and implementation of institutional reform? And thirdly, what role can parliamentarians play in ensuring transparent and accountable arms procurement? The enforcement of the principle of civilian supremacy will be essential in many of the choices, decisions and actions of political leaders.

Key Tool for Oversight: Parliamentary Committees of the Philippine Congress

Mario ‘Mayong’ Joyo Aguja*

Introduction

The Philippine experience under martial law, in which the dictator had virtually unlimited powers and the military was allowed to spread its talons far and wide, underscores the need for an efficient and solid checks-and-balances infrastructure. The 1987 Philippine constitution, for all its inadequacies, contains several layers of protections and safeguards against militarism and upholds civilian supremacy at all times. Section 1, Article II, states, ‘The Philippines is a democratic and republican State. Sovereignty resides in the people and all government authority emanates from them’. This is further strengthened by Section 3 of the same article, which reads, ‘Civilian authority is, at all times, supreme over the military. The Armed Forces of the Philippines is the protector of the people and the State. Its goal is to secure the sovereignty of the State and the integrity of the national territory’.

The above provisions clearly define the mandate of the Armed Forces and are meant to emphasise the commitment to civilian authority and human rights in the post-martial law milieu. In furtherance of the doctrine of civilian supremacy, the constitution (Section 18, Article VII) mandates that the commander in chief of all armed forces of the Philippines is the civilian president.

It would be folly, however, to assume that the end of the Marcos dictatorship signalled the professionalisation of the security sector and the end of human rights abuses. On the contrary, the problem of impunity within

the military is unabated. Disturbingly, it has become a habit among presidents to appoint retired military officers to civilian posts, mostly in national security posts.

This paper seeks to describe the nature of parliamentary oversight of the security sector in the Philippines. While the system of the Senate is very similar to the practice of House of Representatives, the latter will be the focus of this paper. Specifically, it presents and examines the mandates, functions, structures and resources of the various parliamentary committees and subcommittees exercising oversight of the security sector, with particular focus on the Committee on Human Rights and the application of international humanitarian law. A brief background on the security sector will also be provided. Although focusing on various congressional committees, this paper will not assess the performance of these committees but merely attempt to draw relevant lessons on strengthening parliamentary oversight.

As a whole, this paper argues that as the country marches to full democratisation, given the changing situation and evolving concept of ‘national security’, the greater parliamentary oversight of the security sector is required. While the mandates for oversight are in place, the practice of effective oversight remains wanting. Likewise, the success of oversight hinges on the full independence of the parliament, its capacity and its adherence to good governance.

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Background on the Security Sector in the Philippines

Contrary to the traditional notion, the Philippine security sector is not composed only of the military. Rather, it includes various agencies of the government. Aside from the armed forces including the Civilian Armed Forces Geographic Units, it also includes the police, the intelligence community (the National Bureau of Investigation), the various departments of the office of the presi-

dent like the National Security Council, independent commissions like the Commission on Human Rights, local peace and order groups, the courts and legislative committees. For the purpose of providing a background on the security sector, this section will focus on the military, the police, the NBI and the National Security Council.

The Armed Forces of the Philippines

The Armed Forces of the Philippines (AFP) was formally organised in 1936 by Executive Order No. 1, issued by Commonwealth President Manuel Quezon, creating the Philippine Army and placing it under the Insular Police, later known as the Philippine Constabulary (PC). It was then composed of three major commands: the Philippine Ground Forces, the Philippine Air Force and the Philippine Naval Patrols. On the other hand, the Department of National Defense (DND) was formally organised on 1 November 1939 pursuant to Executive Order No. 230, to implement the National Defense Act (Commonwealth Act No.1) passed by the National Assembly on 31 December 1935 and Commonwealth Act No. 340 creating the department.¹

Many years later, the Communist insurgency led to the restructuring of the AFP. By the time it was engaged in bloody and violent encounters with the New People's Army (NPA), the armed component of the Communist Party of the Philippines, the AFP already had four major services: the army, the constabulary, the air force and the navy.

On 21 September 1972, President

Ferdinand Marcos issued Presidential Decree 1081, which plunged the entire country into martial law. Arbitrary arrests, detention, torture and disappearances were the norm and were implemented by a military completely servile and controlled by its commander in chief. Fundamental precepts of human rights, particularly due process, were discarded. The military played a greater role in our national life. It became executor of the orders of the dictator in its bid to maintain the authoritarian regime. It was the same military that played a crucial role in toppling the dictator in 1986, launched various coups during the Aquino government and was involved in the toppling of the Estrada administration and the recent coup attempts against the Arroyo administration. While it had already lost its professionalism, it is certain that its monopoly of the coercive power of the state makes it a possible ally or enemy of the people.

As of December 2005, the army had the largest number of AFP personnel, 65,000, followed by the navy with 35,000 and the air force with 15,000.² The AFP is under the executive supervision of the DND.

1. www.dnd.gov.ph.

2. Armed Forces of the Philippines, Office of the Deputy Chief of Staff for Personnel, December 2005.

The Philippine National Police

After the people power uprising of 1986, Corazon Aquino, wife of assassinated opposition leader Benigno Aquino, assumed the presidency. On 10 December 1990, she signed into law Republic Act 6975, divorcing the PC from the AFP. The PC became the nucleus of the Philippine National Police (PNP) which is now under the Department of Interior and Local Government.³

Also included in the PNP organisational structure is the Police National Training Institute, which is the premier institution for the training, human resource development and continuing education of all personnel of the PNP, Bureau of Fire and Bu-

reau of Jail Management and Penology. It has direct supervision and control of the Philippine National Police Academy.⁴

The total strength of PNP personnel as of April 2005 was 117,401, composed of the following:

- 10,694 (9.1%) police commissioned officers with the ranks of police director general to police inspectors;
- 101,778 (86.7%) police non-commissioned officers with the ranks of senior police officers 4 to police officers 1; and,
- 4,929 (4.2%) non-uniformed or civilian personnel.⁵

The National Bureau of Investigation

The NBI was founded on 13 November 1936 by Commonwealth Act No. 181. It was conceptualised by then President Manuel L. Quezon and Jose Yulo, then secretary of justice. It was patterned after the United States Federal Bureau of Investigation. Forty-five men were selected as agents from among 300 applicants. To complement this investigative force was a civilian staff composed of doctors, chemists, fingerprint technicians, photographers, stenographers and clerks.⁶

During the Japanese occupation, the Department of Investigation (DI) was affiliated with the Bureau of Internal Revenue and the Philippine Constabulary and known as the Bureau of Investigation. Subsequently, in the post-liberation period, all available DI agents were recruited by the US army Counter-Intelligence Corps as investigators.⁷

After that, the bureau assumed an increasingly significant role. On 19 June 1947, by virtue of Republic Act No. 157, it was reorganised into the Bureau of Investigation. Later, it was amended by Executive Order No. 94 on 4 October 1947, to its present name, the NBI.⁸

The main objective of the NBI is the establishment and maintenance of a modern, effective and efficient investigative service and research agency for the purpose of implementing fully principal functions provided under Republic Act No. 157, as amended.⁹

As of 2005, the NBI had filled 238 key positions, 181 (76 per cent) of which are investigation agents and 39 (16.4 per cent) directors of various levels. The bureau has 1694 permanent filled positions.

3. *ibid.*

4. *ibid.*

5. *ibid.*

6. www.nbi.doj.gov.ph

7. *ibid.*

8. *ibid.*

9. *ibid.*

.The National Security Council

Created under Executive Order No. 115 on 24 December 1986, just after the fall of the dictator, the National Security Council (NSC) is the government agency tasked to respond to issues of national security. It is mandated by law to perform the following duties:

To advise the President with respect to the integration of domestic, foreign, military, political, economic, social and educational policies relating to the national security so as to enable all concerned ministries, departments, and agencies of the government to meet more effectively, problems and matters involving national security;

To evaluate and analyze all information, events and incidents in terms of the risks they pose or implications upon and/or threats to the overall security and stability of the nation, for the purpose of recommending to the President appropriate responses thereto and/or action thereon;

To formulate and coordinate the implementation of policies on matters of common interest to the various ministries, departments, and agencies of the government concerned with the national security, and to make recommendations to the President in connection therewith;

To insure that policies adopted by the NSC on national security are effectively and efficiently implemented; and,

To make such recommendations and/or render such other reports as the President may from time to time direct.¹⁰

The NSC is composed of 28 members and chaired by the president. The majority of its members are representatives of the Senate (the Senate president, president pro-

tempore, majority floor leader, minority floor leader, chairs of committees on Foreign Relations, National Defense and Security, Public Order and Illegal Drugs) and the House of Representatives (the speaker, deputy speakers for Luzon, Visayas and Mindanao, majority floor leader, minority floor leader and chairpersons of the committees on Foreign Relations, National Defense and Security and Public Order and Safety. The rest of the members come from the cabinet (the executive secretary, the national security director general as secretary, the secretaries of Foreign Affairs, National Defense, Justice, Interior and Local Government, Labor and Employment, presidential spokesperson, the head of the Presidential Legislative Liaison Office, the presidential legal counsel) including the vice-president and past presidents of the Philippines and other government officials and private citizens whom the president may designate from time to time.

It should be noted that judicial authorities and special oversight bodies such as the ombudsman and the Commission on Human Rights remain outside the NSC mandate. Likewise, as a body chaired by the president, it meets only upon the behest of the president and its convening is highly dependent on the president's perception of what is a 'national crisis'.

To address specific issues like terrorism, the Arroyo administration formed the Anti-Terrorism Task Force. The ATTF was designed to provide a consolidated multi-sectoral response to the burgeoning problem of terrorism. Very recently, on 17 January 2006, the Inter-Agency Legal Action Group was created under Executive Order

10. EO No. 115, 'Reorganizing the National Security Council and Defining its Membership, Function, and Authority and for other Purposes' (24 December 1986).

493 to 'address specific offenses that constitute threats to national security includ-

ing but not limited to cases of rebellion, sedition and related offenses'.¹¹

The Role of Legislative Oversight

It cannot be overemphasised that an efficient parliamentary oversight mechanism is necessary in order to rein in the security sector, to prevent the sense of impunity that leads to human rights violations and to professionalise the various agencies involved in peace and order and national defence. During the Marcos regime, military activities were allowed to go unchecked by any civilian institution as Marcos abolished Congress during the martial law years. The Batasang Pambansa was convened in 1978, but it became yet another puppet of the dictator, performing only rubber stamp functions. Even the Philippine judiciary could not be counted on to intervene because it was also under the control of Marcos and gave its imprimatur to his draconian policies. The AFP took on civilian functions, with military generals being given leadership and juicy positions in the bureaucracy and in government-owned and -controlled corporations.

By and large, the present structure is an improvement over the Marcos structure. Checks and balances are theoretically present although actual good practices remain to be desired. The Supreme Court is more independent than it was under the dictatorship and has decided some cases in favour of civil liberties and due process. The ombudsman is also there to check on abusive generals and other military personnel. There is a Commission on Human Rights created by the 1987 constitution that can conduct investigations of human rights violations, although devoid of quasi-judicial powers.

However, it is legislative oversight that is

crucial in reforming the security sector and preventing impunity in the military. Its potential for being an effective mechanism is magnified, given that the Philippines is under a presidential form of government. Under a presidential form, the executive and the legislative are independent of each other. The doctrine of separation of powers is sacrosanct. Hence, a politically mature legislature can be a potent and effective checks and balances mechanism. As long as one body does not allow itself to be co-opted by the other, the tension between two divergent interests can work effectively to promote the people's welfare.

The basis for legislative oversight is found in the following provisions of the 1987 constitution:

Article 8, Section 21. The Senate or the House of Representatives or any of its respective committees may conduct inquiries in aid of legislation in accordance with its duly published rules of procedure. The rights of persons appearing in or affected by such inquiries shall be respected.

Article 8, Section 22. The heads of departments may upon their own initiative, with the consent of the President, or upon the request of either House, as the rules of each House shall provide, appear before and be heard by such House on any matter pertaining to their departments. Written questions shall be submitted to the President of the Senate or the Speaker of the House of Representatives at least three days before their scheduled appearance. Interpellations shall not be limited to written questions, but may cover matters related thereto. When the security of the

11. EO No. 493, 'Providing for the Creation of the Inter-Agency Legal Action Group (IALAG) for the Coordination of National Security Cases'.

State or the public interest so requires and the President so states in writing, the ap-

pearance shall be conducted in executive session.

Forms of Legislative Oversight

Legislative oversight may be wielded in a number of ways: through the power of appointment, power of appropriation and various legislative inquiries in aid of legislation addressing different national concerns. It could be a single chamber initiative or a joint congressional oversight.

The power to appoint is another important power of the legislature. In the Commission of Appointments, much politicking and horse-trading take place. This is a joint commission made up of members of the Senate and the House of Representatives. Its power is granted by the constitution:

Article 8, Section 18. There shall be a Commission on Appointments consisting of the President of the Senate, as ex officio Chairman, twelve Senators, and twelve Members of the House of Representatives, elected by each House on the basis of proportional representation from the political parties or organisations registered under the party-list system represented therein. The Chairman of the Commission shall not vote, except in case of a tie. The Commission shall act on all appointments submitted to it within thirty session days of the Congress from their submission. The Commission shall rule by a majority vote of all the Members.

The power of appropriation—also known as the power of the purse—finds its basis in the following constitutional provisions:

Section 24. All appropriation, revenue or tariff bills, bills authorizing increase of public debt, bills of local application, and private bills shall originate exclusively in the House of Representatives, but the Senate may propose or concur with amendments.

Section 25. (1) The Congress may not increase the appropriations recommended by the President for the operation of the Government as specified in the budget. The form, content, and manner of preparation of the budget shall be prescribed by law.

(2) No provision or enactment shall be embraced in the general appropriations bill unless it relates specifically to some particular appropriation therein. Any such provision or enactment shall be limited in its operation to the appropriation to which it relates.

The annual budget hearings in Congress, wherein the various agencies are made to face the members of Congress and explain what they have done with their budget allocation for the past year and why a greater budget allocation is necessary for the following year, are traditionally 'open season' for the members of the legislature to 'grill' the heads of the agencies over policy decisions. The legislators may opt for budget cuts to 'punish' errant agencies for flawed decisions, thus making it an effective oversight mechanism if wielded efficiently and responsibly.

The Various Legislative Committees

It must be emphasised that parliamentary oversight of the security sector through the various legislative committees is exercised not by a single congressional committee but

by several—sometimes overlapping, but mostly not coordinating. Of the 57 standing committees and 11 special committees of the House of Representatives, the most

directly concerned with oversight of the security sector are the committees on National Defense, Foreign Affairs, Public Order and Security and Human Rights and Appropriations.

1. The Committee on Appropriations covers 'all matters directly and principally relating to the expenditures of the national government including the payment of public indebtedness, creation, abolition and classification of positions in government, and the determination of salaries, allowances and benefits of government personnel'.

The committee is divided into subcommittees to address specific concerns. Subcommittee 9 handles the Department of Interior and Local Government, under which falls the PNP. Subcommittee 20 handles the DND, and Subcommittee 28 handles other executive offices like the Dangerous Drugs Board, the Philippine Drug Enforcement Agency, the Philippine Commission on Good Government, the National Intelligence Coordinating Agency and the National Security Council.

2. The Committee on National Defense and Security 'shall have jurisdiction over all matters directly and principally relating to national defense and national security, the Armed Forces of the Philippines, peace process, citizens army, selective services, forts and arsenals, military bases or reservations and yards, coast and geodetic highways, and disaster relief and rescue.'¹²

As of December 2005, the committee had been referred 51 national bills (10 in 2005), 27 resolutions of national significance (seven in 2005), seven local resolutions (one in 2005), and 11 privilege speeches, for a total of 96 measures. The committee con-

ducted 45 in-house or Metro Manila meetings and hearings (31 in 2005), one out-of-town public hearing, one inspection and one technical working committee meeting. Seventeen of these hearings dealt with issues surrounding the corruption case of the AFP comptroller, Major General Carlos F. Garcia. Sixteen of the committee's meetings were held jointly with four other committees on the wiretapping issue involving the president.¹³

The committee has eight standing subcommittees:

a. Subcommittee on Defense Resource Management—all matters pertaining to the defence organisation, its programmes, logistics, facilities and materiel acquisition: manpower training, education and development; military forces and authorised strengths; officer and enlisted personnel management including recruitment, training and promotion; defence financial institutions, awards and academies.

b. Subcommittee on Internal Security—all matters affecting the security of the state; measures pertaining to programmes addressing the insurgency problem, peace negotiations and amnesty.

c. Subcommittee on Reservist Affairs—all matters dealing with the development of a citizens' armed force and citizen military training procedures.

d. Subcommittee on Military Benefits—all matters dealing with the improvement of the quality of life of military personnel and their beneficiaries; measures pertaining to retirement and retirement benefits, medical care, pay and allowances.

e. Subcommittee on Civil Defense—all

12. Rule IX, Sec. 28 (ff), 2001-2004 Rules of the House of Representatives.

13. Accomplishment Report of the Committee on National Defense and Security for the Period January to December 2005.

matters pertaining to disaster preparedness, mitigation and other contingency plans, comprehensive civil defence and assistance including matters dealing with the protection and welfare of the civilian population, property and environment or other national emergencies.

f. Subcommittee on Defense Financial Institutions—all matters pertaining to RSBS, MBAI, AFPCES and other financial institutions catering to AFP members.

g. Subcommittee on Oversight—evaluation of the performance of the DND-AFP and its agencies; implementation of laws by said agencies; corrective measures on problems of performance and the implementation of laws, including implementing rules and regulations; the subcommittee furnish the Committee on Oversight a copy of all its reports, memoranda and other pertinent documents;

h. Subcommittee on Intelligence—all matters involving the intelligence community, their programmes, projects and budget. This subcommittee will be chaired by the chairperson of the committee, and its members are the vice-chairpersons of the committee.¹⁴

3. The Committee on Public Order and Safety derives its mandate from the rules of the House of Representatives, which confer on it general jurisdiction over the suppression of criminality including illegal drugs, illegal gambling, private armies, terrorism, organised crime, regulation of firearms, firecrackers and pyrotechnics, civil defence, efficiency and effectiveness of police and supervision of private security agencies. The committee is composed of 56 members, of whom 46 are from the majority coalition. It has only four female members. The committee has only four support staff.

Among the priority measures of the committee for the 13th Congress are the PNP reorganisation plan, the 'Magna Carta' for PNP personnel, amendments to the fire code and establishment of an integrated jail facility in Metropolitan Manila. In 2005, the committee met 32 times and received 44 measures.

The committee took part in the joint inquiry in aid of legislation into the so-called 'Hello, Garci' tapes involving the alleged wiretapped conversations between President Gloria Macapagal Arroyo and Elections Commissioner Virgilio Garcillano during the 2004 national elections. Consistent with its oversight functions, it was also able to conduct hearings on the rise in violent crimes as marked by murders of media workers and some government officials, police involvement in the violent mass rally in Hacienda Luisita and resurgence of illegal gambling operations, particularly 'jueteng' in many parts of the country. For 2006, the committee will start deliberations on the proposed legislation emanating from the inquiry on the wiretapping controversy.

4. The Committee on Foreign Affairs, as provided by the rules of the House of Representatives, covers 'all matters directly and principally relating to the relations of the Philippines with other countries, diplomatic and consular services, the United Nations and its agencies, and other international organisations and agencies'.

Under the committee are six subcommittees covering specific areas of jurisdiction. Only the subcommittees on National Territory, Regional and International Peace and Security and ASEAN and Asia-Pacific Affairs have direct bearing on the security sector, to wit:

Subcommittee on National Territory, Regional and International Peace and Security

14. Committee on National Defense, Internal Rules of Procedure.

city—all matters relating to territorial and boundary disputes; national and regional security threats; peace and disarmament issues; regional security arrangements, bilateral security concerns, defence cooperation agreements; and maritime and environmental concerns.

Subcommittee on ASEAN and Asia-Pacific Affairs—all matters relating to the Philippines' policies and participation in the Association of Southeast Asian Nations (ASEAN) and relations with countries and entities in the Asia-Pacific region.

In 2005, the committee was referred a total of 29 bills, 33 resolutions and five privilege speeches. The legislative agenda of the committee, as reflected in the 19 meetings conducted, involved measures on anti-terrorism, the Passport Act of 1996 and other passport concerns, archipelagic baselines of the Philippines, Myanmar (Burma), the Absentee Voting Law, the Foreign Service Act of 1991 and Department of Foreign Affairs concerns.

The committee comprises 72 members, 49 of whom (68 per cent) represent the majority coalition. It has 11 female members, or 15 per cent, and only five support staff.

5. The Committee on Human Rights covers 'all matters directly and principally relating to the protection and enhancement of human rights, assistance to victims of human rights violations and their families, the prevention of violations of human rights and the punishment of perpetrators of such violations'.¹⁵

As of 12 December 2005, a total of 53 measures had been referred to the committee. Of these, 14 were bills of national significance and 29 were resolutions. A total of 10 privilege speeches were also re-

ferred, three of which have been acted upon.¹⁶ Except for the House Joint Resolution declaring 21 September an International Day of Peace, all the other resolutions call for inquiries, in aid of legislation, on gross human rights violations, including alleged political killings, harassment, forced disappearances, torture and violent dispersals of rallies and picket lines.

The three anti-torture bills filed in the 13th Congress demonstrate how the legislature can be a powerful tool to combat military excesses with respect to human rights. House Bill 4307, for instance, filed by Akbayan representatives Loretta Rosales, Risa Hontiveros-Baraquel and this author, seeks to criminalise the employment of pain or suffering by agents of the state for the purpose of extracting information or confessions.

The committee plays an important oversight function in the light of the very nature of the military and because the country is home to two major internal armed conflicts—Muslim secessionism in the southern Philippines and the CPP-NPA insurgency. It is imperative to establish standards to govern the conduct of combatants, both state and non-state, so that abuses against non-combatants may be prevented. The Philippines' initial attempt formally to introduce international humanitarian law in its engagement with an internal armed group is via the Comprehensive Agreement for Respect of Human Rights and International Humanitarian Law (CARHRIHL). Signed on 16 March 1998 in The Hague by both the government and the National Democratic Front negotiating panels, the CARHRIHL is the first of four comprehensive agreements that the parties have agreed to forge in the interest of guaranteeing the protection of human rights and applying the principles

15. Committee on Human Rights, Internal Rules of Procedure.

16. Committee on Human Rights Accomplishment Report for the Period January to December 2005.

of international humanitarian law. While the CARHRIHL has yet to be implemented, it is still significant in that it may be considered a recognition by the Philippine government of the importance of international humanitarian law and the necessity of applying it to its domestic conflicts.

In the area of legislative inquiry, however, particularly at the level of the Committee on Human Rights, the accommodation of international humanitarian law is taking some time. Tragically, the general sense of the House of Representatives is that the insurgent attacks have to be stopped and public security has to be ensured, even if it means relaxing basic rules of combat. Thus

the international humanitarian law bill filed by the Akbayan Party List has not been moving forward, and the anti-terror bill, which is a shopping list of human rights and international humanitarian law violations, is being expedited.

The committee, however, has been effective in the area of legislative inquiries. Chaired by Rep. Etta Rosales, it has led inquiries into military incursions. The slayings of activists by the military have been a frequent subject of these inquiries, as well as the disproportionate use of force against rebel groups. It has also been at the forefront of efforts to promote international humanitarian law and human rights consciousness among the general public.

The Weakness of Legislative Oversight in the Philippines

While various mandated mechanisms and structures for parliamentary oversight are in place, the realities of the day present many problems that tend to weaken the effectiveness of legislative oversight. Here are four of the problems:

1. When the chief executive controls a majority of the lawmakers through perks and political favours, this renders fruitless any attempt at legislative oversight. This is especially true with regard to legislative oversight that tends to clip the powers of the state or guard against executive encroachment, like the Committee on Human Rights. Unlike other committees, such as the Committee on Justice or the Committee on Higher Education, which work in tandem with and present no conflict to other state institutions, the role of the Committee on Human Rights symbolises a collision of two competing ideals. Thus, the chair of that committee must have the political will not to be co-opted by an executive whose natural tendency would be to protect the military and promote internal and external security. In the Philippines,

the lower house is far from credible, with a majority of members following the president and voting for policies without any independent reflection and deliberation. Currently, the chair of the Human Rights Committee is an administration ally. This is a worrisome scenario, as it might result in the ratification or legitimisation of the president's anti-human-rights policies.

2. Limitations on the power of legislative inquiry by an overly strong executive can also pose a problem. Very recently, President Gloria Macapagal Arroyo issued Executive Order 464, which states, '... all heads of departments of the Executive Branch of the government shall secure the consent of the President prior to appearing before either House of Congress'. This includes senior officials of executive departments who in the judgment of the department heads are covered by executive privilege; generals and flag officers of the armed forces and other officers who in the judgment of the chief of staff are covered by executive privilege; national police officers with rank of chief superintendent or higher

and such other officers who in the judgment of the chief of the national police are covered by executive privilege; senior national security officials who in the judgment of the national security adviser are covered by the executive privilege; and other officers as may be determined by the president. A case is now pending before the Supreme Court questioning the legality of the executive order.

3. Further compounding the problem is a military in which the culture of impunity and machismo is still very strong. The old boys' club mentality of the members of the armed forces—germinated in the exclusive and elite Philippine Military Academy—is further exacerbated by the coddling they get from a president perennially trying to win their loyalty to avoid restiveness and adventurism. Thus, kickbacks and under the table deals are rampant in the AFP, but everyone turns a blind eye. Cases of execution-style killings and rub-outs hit the media every once in a while, but the investigations following them are perfunctory and scant. Retired generals are still given space

in the bureaucracy, affirming their continued influence in policy making and allowing military encroachment into civilian space. All these factors contribute to the sense of impunity of the military and allow its officials to scoff at legislative oversight, which is already weak.

4. The mechanism of legislative oversight via congressional inquiry is still, by and large, an inaccessible concept for the majority of Filipinos, and few understand that this could be a forum to seek redress, albeit not in the compensatory sense. This is a crucial problem in the area of human rights because the individuals who are not aware of this institutional recourse are most likely the individuals whose rights are most in danger of being violated. They could be farmers suspected of being NPA rebels, children caught in the crossfire in Basilan or labourers jailed for exercising their right to strike. If the committee just waits for a few cases to trickle in, it misses out on the opportunity to truly fulfil its mandate and make an impact in the field of human rights and international humanitarian law.

Conclusion

The Philippines is an example of a country in which the intent and infrastructure are in place, but the execution and implementation are wanting. This is true with regard to legislative oversight as a check mechanism; it is also true with regard to human rights—crystallised principles on paper but dispensable invocations in real life.

Legislative oversight is an important mechanism to ensure that the state and its agents remain mindful and conscious of their human rights obligations. It must be allowed to blossom to its fullest, devoid of the roadblocks of partisan politics, military culture and lack of public awareness.

Transparency and Parliamentary Oversight of Arms Procurement: Indonesian Case Study

Dr. Yuddy Chrisnandi*

Introduction

Before speaking about arms procurement in defence policy, we need to clarify what we understand by the concept of transparency. At the beginning of the conference we said that transparency is an important means of enforcing control and accountability in the public sector. As the main responsibility of the government in a democratic state is to protect the public interest, it must be ready to inform the public about its decisions. Transparency therefore requires openness, clarity and credibility in defence policy.

Transparency in defence policy, budgeting and procurement means that all key documents and other information prepared or commissioned by the government, including the department of defence and other defence agencies, should be made available to the public. At the same time, it is also necessary to recognise that the sources of information about defence policy, military budgeting and procurement are under the strict control of the executive branch of each country. Because of its importance to national security, defence-related information is sometimes confidential, not only for other countries, but also for the state's own citizens.

Procurement in the framework of traditional supply management has ordinary functional requirements that include inventory control, transportation, distribution, cataloguing, standardisation, financing and disposal (which in turn includes transport and storage, dismantling, the recovery of spare parts and the issuing of disposal receipts). On the other hand, in a framework of programme management, procurement is an important element from the second stage of the 'planning-programming-budgeting' chain.

Programming is a formulation of the defence plan that is designed to aid in understanding the cost-effectiveness of defence programmes given limited government resources. Because of financial constraints on the state budget, defence programming is an annual process. The main elements of that process are costing and re-costing of the baseline defence programme, estimating available funds, prioritising project options, building a basic programme for equipment and operations and lastly finalising and executing the procurement programme.

Transparency in Defence Procurement

Besides well-known criticisms of the economic dimensions of defence procurement policy, there are additional concerns related to the transparency of the process. As Alain

Faupin put it, 'the procurement of defence equipment is big business'. This sometimes creates problems for defence administrators. Among these are unpredictable

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changes in the makeup of inventories, cost escalation, delays and insecurities in delivery, cancellation of projects and programmes and so on.

From the 'economic' point of view, the main criterion for assessing procurement policy is 'competitive procurement', which can be realised through various types of trade contracts.

Acting as a principal, the department of defence has an obligation to specify its exact requirements to the contractor in such a way as to avoid any discrepancy in the contractor's behaviour. In practice, there are many instances in which technical specifications have been inadequately defined and suppliers and buyers have deviated from the objectives of the principal. In addition, insufficient civil monitoring and transparency (or simply the lack of information due to confidentiality requirements) in regard to bids, tendering, contracting and pricing can lead to unexpected results.

Not only might this increase the cost of purchases and decrease revenues from sales, but the undesired market role of the government and department of defence can adversely affect national industry. In its role as owner of the defence-related companies and regulator of military exports, government can largely determine the size, structure, technical progress and competitiveness of its defence industry. Defence procurement policy can be used as instrument of national industrial policy. From a liberal economic point of view, this direct involvement of the state in the economy is not acceptable. However, in evaluating defence procurement policy, the monopoly or oligopoly position of the government in the economy has to be accepted. Transparency should be seen as a way of controlling this interventionist policy.

At the same time, from the 'security' point

of view there are many cases in which the spread of confidential procurement-related information could be judged detrimental to national security. National legislation on the confidentiality of procurement-related information varies according to national historical experience and different understandings of national interests.

Finally, procurement can be seen from an 'administrative' point of view. Ensuring the accountability of public servants is one of the most important goals of contemporary administrative reform. This includes three important dimensions:

- standards of accountability (accountability for what) and transparency;
- agents of accountability (accountable to whom) and transparency;
- means of accountability (how accountability is ensured) and transparency.

The main issue for defence procurement accountability and transparency is the standards and criteria by which defence officials are held accountable. These standards are in continuous change, but generally include:

- UN resolutions and norms, including the Register of Conventional Arms (transparency in armaments);
- national laws, standards and statistics;
- national defence requirements;
- NGOs, press and media requirements.

In order to ensure accountability and transparency, it is important to consider which individuals defence procurement administrators are accountable to. These include representatives of all sections of the population representing various classes and groups of interests:

- press and media;
- parliament;
- state financial control office;
- defence agencies;
- international security organizations and agreements;
- NGOs.

General Pattern of Arms Procurement

There is a need for a comprehensive defence system in Indonesia that is in line with political developments and institutions, as well with current principles and concepts. Indonesian security and good governance are closely related.

Procurement is just one step in the sequence of actions needed to set up and implement a security policy. It can be the result of careful and precise planning, or be based on clever lobbying from foreign or national industrialists. It might even be influenced by both of these.

Who should be associated with the procurement of equipment, ammunition and other goods and services? This is a fundamental question. The answers vary from country to country and regime to regime. It depends very much on the national defence structure and on the level of parliamentary oversight of the security sector. No single agency or company could do all procurement tasks by itself. These tasks are wide-ranging and difficult, and the process is very long, requiring many actors.

The Decision-Making Process for Procurement Planning

Procurement planning is part of a multi-step procurement decision-making process. It should follow a security assessment and the definition of capabilities required to meet security needs. Accordingly, the planning process must take into account the current national defence or security concept. In France, for instance, procurement officials rely on a conceptual model outlined in the White Paper on Defence that consists of eight force systems, namely, deterrence, readiness, deep strike, C31, mobility, land, air and maritime. In turn, each of these is made up of five components: manpower, equipment, organisation, doctrine and training. Defence planning is the process by which the state's military is equipped to achieve the goals of security and defence set by the national security strategy. The national body in charge of making the decision in that field is the Defence Council, which is chaired by the president and includes several ministries, the joint chiefs of staff and the directors of armaments and gendarmerie, although this composition can be changed.

We can all think of examples of scandals caused by tainted procurement in our own

societies. No country, even in the developed and democratic world run by market rules and the rule of law, has escaped wrongdoing in that field. Good rules in this domain are not only intended to prevent such behaviour, but above all to provide the state with the best value of the equipment and services necessary to meet its defence and security needs. Greed should not be allowed to interfere with this goal.

The defence procurement process will be strongly enhanced if the following principles are respected:

- Foresight: with the exception of cases of extreme urgency, procurement needs should be thought out well in advance.
- Efficiency: the decision-maker is accountable to the entire nation, including its soldiers, taxpayers, workers and others, as well as to its allies.
- Simplicity: defence equipment is intended to be used under extreme conditions by personnel who, though well trained and educated, do not usually possess the technical skills of engineers.
- Interoperability: nobody works or fights alone, but in cooperation with others.
- Affordability: the country must be able

to afford its choices without jeopardising other areas of national economic and social life as reflected in the national budget.

- Sustainability: the country must be able to sustain spending levels as long as

possible without major or additional unscheduled costs.

- Transparency: while transparency is an obvious requirement for democratic control, it requires special attention and effort.

The Indonesian Armed Forces

To understand the development of Indonesian defence equipment over the course of the nation's history, it is necessary to understand Indonesian foreign policy, as can be seen in the changing of supplier countries. The provision of weapons requires a special relationship between supplier country and recipient country. As Andrew Pierre points out in his book *The Global Politics of Arm Sales*, the transfer of weapons is a mirror of the relationship between supplier and recipient.

After Indonesia achieved its independence, its military did not have any other option but to use the equipment that the Dutch left behind. This equipment continued to be used by the Indonesian army throughout the 1950s. Only in the second half of that decade did Indonesia receive new Russian equipment in connection to the West Irian campaign. Indonesia looked to the USSR to meet its defence needs after the USA refused its request for weapons. This refusal is perhaps easily understood when one considers that the USA would not want to support a country that had a dispute with one of its NATO allies.

As this new era continued, however, Soviet weapon transfers decreased gradually. Indonesia received some equipment from western countries, although deliveries of PT-76 tanks from the USSR continued, despite the fact that Indonesia began to receive AMX-13 and Stuart tanks from France and Great Britain respectively in 1975. Indonesia also received Saladin and

Ferret armoured fighting vehicles from Great Britain.

Although the Indonesian navy has the Soviet Riga class frigate, it also has Jones class destroyer escorts from the USA, while the Indonesian air force had both Australian CA-27s and US F-51Ds.

During the 1970s, Indonesia procured equipment from at least six different suppliers, the most important of which was the United States. These purchases included US F-5E/F Tiger II and OV-10 Broncos, Australian Nomad N-22s, Dutch F-27 Fatahillah class frigates, US A-4 Skyhawks purchased from Israel, South Korean PSMM-5 fast attack boats and French AMX-13 tanks and Exocet MM-38 missiles.

The role of the USA as Indonesia's biggest supplier of military equipment continued until the 1980s. By this time, European suppliers had become even more significant. Purchases included the British Hawk Mk-53 attack aircraft and Tribal class frigate, as well as German 209 diving ships and PB-57 fast patrol boats.

Finally, the Indonesian army began to use the US F-16A/B Fighting Falcon in 1989. However, following the Dili incident in November 1991 (shooting of East Timorese protesters by Indonesian troops in Dili), the US formally ceased supplying arms to Indonesia. Since then, the Indonesian army, longing to get more aircraft, purchased used models from various countries,

such as F-5Es from Jordan and F-16A/Bs from Pakistan. However, there has been no support from the US.

Because of these circumstances, at the beginning of the 1990s, Indonesia tried to purchase aircraft from Russia. However, after an agreement was reached to purchase planes from the Russian Sukhoi company, Indonesia was in the middle of an economic crisis in 1997 that resulted in the cancellation of the agreement. Violence in East Timor increased after a referendum in 1999.

The US still applies its embargo, despite the fact that 14 years have passed. Indonesia wants this embargo removed, as Minister of Defence Juwono Sudarsono argued in March 2005. Currently, 17 of 24 of the Indonesian air force's Hercules transport planes cannot fly.

Europe is more flexible than the US, but there are still many challenges. Many types of European equipment, such as the British Hawk, cannot be operated optimally because they contain US technology or products that remain under embargo.

Because of these difficult supply problems, Indonesia turned to Russia again, resulting in the transfer of four Sukhoi aircraft (two Su-27s and two Su-30s) in 2003. This Russian equipment was inexpensive, totalling around US\$40 million—meaning only Rp400 billion—per aircraft.

Defence cooperation was one of few topics discussed in the meeting between President Susilo Bambang Yudhoyono and the President Hu Jintao of China in their meeting on 25 April 2005 in Jakarta after the

50th anniversary of the Asia-Africa Conference. Indonesia clarified its desire for technical aid from China in connection with ensuring the autonomy of its main weapon systems.

Since 2003, China has invested in four strategic industries in Indonesian defence, including PT DI, which makes planes; PT Pindad, which makes weapons and ammunition; PT PAL, which builds ships; and PT Dahana, which makes explosives. There are also many lessons to be learned from China's efforts to develop its defence capabilities. Beside product-oriented development cooperation, Indonesia receives experience from China in the area of defence infrastructure development, including defence industry development.

Based on the Country Defence Act and Military Act, defence policy, strategy and management are now coordinated by the Department of Defence. This includes budget management. Every dimension of the budget proposed by headquarters is sent through the Department of Defence to the general director of defence planning under the supervision of the general secretary.

For 2006, the amount budgeted for the Department of Defence was around US\$2.82 billion. This was divided as follows: US\$0.92 billion for the army, US\$0.45 billion for the navy, US\$0.42 billion for the air force, US\$0.23 billion for headquarters and US\$0.45 billion for the Department of Defence. Indonesia's actual defence needs have been estimated to be around US\$5.4 billion, but the country cannot afford it at this time due to budget limitations.

Conclusion

Without a doubt, defence procurement is one of the most difficult decisions for a politician. It is also among the toughest for a military commander. Whatever the pre-

cautions and efforts to be transparent, it is likely to be considered a more or less secretive activity. The public will always see it in the darkest possible light.

To overcome the hurdles of this arduous process and the many bad perceptions that surround it, the following concepts should be emphasised, as I have stressed throughout my presentation:

- Transparency and national teamwork, combining the inputs of the government, the parliament, the military, the defence industry, the media and civil society.
- International cooperation needs to be taken into account, as no military action can be seriously considered outside of a coalition, whether permanent or simply of the willing.
- Last but not least, the goal is to meet public expectations in terms of the use of funds. This usefulness must be well demonstrated.

Security Sector Governance Challenges in East Asia: Cambodian Case Study

Im Sithol*

Currently, there is no comprehensive study of the status of security sector governance in Cambodia. This paper is intended to contribute to confidence and peace-building by developing a better understanding of the challenges. The paper will therefore: develop a coherent analysis of the nature of the security sector and its governance in the National Assembly with a focus on Committee No. 4 (the Committee on In-

terior Affairs, National Defence, Investigation, Clearance and Civil Service); provide an assessment of the effectiveness of these governance mechanisms; identify good practices and lessons from reform efforts; and generate recommendations for security sector reform (SSR) where applicable as well as possibilities for future work, taking into account the regional and international dimensions of the issue.

1. Background

National defence, national security, safety and public order are vital issues for countries all over the world. In this regard, the government of Cambodia has formed two ministries, National Defence and the Interior, to protect the country from foreign invasion and to ensure the people's security. A Committee on Interior Affairs, National Defence, Investigation, Clearance and Civil Service was established in the National Assembly to coordinate and control security sector governance.

After three decades of civil war and political strife, the Cambodian people have achieved peace and national reconciliation due to the strong political commitment and desire for national reconstruction on the part of all former warring parties, as well as the full support from the international community. After a democratic election organized by United Nations Transitional Authority in Cambodia (UNTAC) in 1993, a new coalition government was formed and a constitution was created to establish a new

Kingdom of Cambodia as a constitutional monarchy with a parliamentary system.

All political parties in Cambodia have worked together during the process of democratisation to exercise their right to govern the country through democratic elections. The National Election Committee (NEC), which was established as an independent and neutral body, organised general elections in 1998 and 2003. So far, Cambodia has elected legislators of the National Assembly three times.

In the July 2003 general election, the Cambodian People's Party (CPP) won a majority with 73 seats, while the Funcinpec¹ and the eponymous Sam Rainsy Party (SRP) won 26 and 24 seats respectively. Although the ruling party won a majority of seats, the Constitution required two-thirds of parliamentary seats to form a government. It was therefore necessary to join with either the royalist party or the opposition party (SRP). In

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1. Funcinpec is the French Acronym for Front de Union National pour Cambodge Indépendance Paix et Coopération.

order to strengthen the opposition forces and bargain for power, FUCINPEC and SRP established a so-called Alliance of Democrats to force the CPP to form a tripartite government, but on the condition that this government not include Hun Sen, who had been proposed by his party for the position of prime minister.

With political mistrust and differences in political positions, the formation of the government was deadlocked for nearly one year. Finally, the CPP was able to break the Alliance of Democrats and form a coalition government with Funcinpec. The SRP has since been isolated and remains in the opposition.

2. Roles of the National Assembly

In democratic societies, powers are separated between three branches of government (legislative, executive and judiciary) and include checks and balances. In Cambodia, this system is a part of the new constitution. The role of parliament in security and national defence is indispensable, because this is of crucial importance for strategic decisions of the country.

The National Assembly has certain powers to check and balance the powers of the government. According to Article 96 of the constitution, the deputies have the right to put a motion to the government. The motion shall be submitted in writing through the president of the National Assembly. The replies shall be given by one or several ministers depending on whether the matters relate to the accountability of one or several ministers. If the case concerns the overall policy of the royal government, the prime minister shall reply in person. The explanations by the ministers or by the prime minister shall be given orally or in writing within seven days of the question being received.

In case of an oral reply, the president of the National Assembly shall decide whether to hold an open debate. If there is no debate, the answer of the minister or the prime minister shall be considered final. If there is a debate, the questioner, other speakers, the ministers or the prime minister may exchange views within a time-frame not exceeding one session.

The National Assembly shall establish one day each week for questions and answers. There shall be no vote during any session reserved for this purpose.

In a parliamentary monarchy with the principles of liberal democracy and pluralism, the National Assembly is the creator of the government and reserves rights and powers to control government affairs. The main power of the parliament over the executive is that it may dismiss a member of the government or the whole cabinet by adopting a motion of censure by a two-thirds majority of the entire assembly. The motion must be proposed by at least 30 members.

In practice, the overthrow of the government by a motion of censure is difficult because the National Assembly members are highly politicised. The prime minister or head of government is usually appointed by the party with the top ranking and status. Achieving a two-thirds majority for a no-confidence motion is almost impossible. On other hand, if the government is dissolved twice during a 12-month period, the National Assembly is also dissolved.

Members of the government are collectively responsible to the National Assembly for the overall policy of the government. Each member of the government is individually responsible to the prime minister and the National Assembly for his or her own conduct. Members of the government shall not use the orders, written or oral, of anyone

as grounds to exonerate themselves from their responsibility. The government leads all state affairs in accordance with the political platform and the state plan adopted by the parliament.

The National Assembly has a very limited capacity. It almost never drafts laws, with the notable exception of the Anti-Corruption Law. Most laws are drafted by the government. Besides adopting laws, the National Assembly has the right to summon the government to clarify or explain irregularities or sensitive decisions. For example, on 15 September 2005, with the permission of Prime Minister Hun Sen, Minister of Economy and Finance Keat Chhun and his colleagues presented an explanation and clarification in the parliamentary session in response to a written question by opposition MP Keo Ramy concerning the rising price of petroleum. There was an active debate. However, no efforts have been taken to contain the rise of petroleum prices due to national budget limitations and the increase in oil prices in international markets.

In another case, the co-ministers of National Defence, Tea Banh and Nhek Bunchhay, and their colleagues gave a presentation in parliament to clarify a question of opposition MP Sun Chhay concerning four defence-related issues—armed forces demobilisation, military uniforms, petrol and rice procurement and the ministry's sale and transfer of some military bases and buildings. It was a long debate. However, there was no change in the actions of the Ministry of National Defence.

The National Assembly has other important roles. It approves a declaration of war. This is critical to national security and the fate of the country and its people. Cambodia has a policy of permanent neutrality, non-alignment, non-invasion, non-interference and peaceful co-existence with its neighbours and with all other countries

throughout the world based on mutual interests, but it still reserves the right to self-defence and to ensure the security of its people.

The National Assembly can participate in shaping the roles and responsibilities of government agencies, including the defence and security agencies, by adopting laws on the establishment of the government and the creation of ministries. However, the details of functions and structures of each ministry are entirely adopted by the Council of Ministers (or government) by royal decree or sub-decrees.

The administration and regulation of the import, production, sale, purchase, distribution and use of weapons and explosives of all types is conducted by the Ministry of National Defence or Ministry of the Interior, which are empowered by sub-decree. The Ministry of the Interior is in charge if the weapon or explosive is for national security, while the Ministry of National Defence takes control if the weapon or explosive is for national defence.

However, the National Assembly and its deputies still have rights and powers to regulate this implementation by asking questions, passing motions and conducting investigations of the government on behalf of assembly committees, the Standing Committee or the entire National Assembly.

To improve the effectiveness and efficiency of its work, the National Assembly has structured itself into various groups such as the plenary session, the Standing Committee, nine committees and the General Secretariat, which is responsible for the general administration of the National Assembly.

The nine assembly committees are:

1. The Committee on Human Rights, Complaint Investigations and Relations between the Parliament and the Senate

2. The Committee on the Economy, Finance, Banking and Audit
3. The Committee on Planning, Investment, Agriculture, Rural Development, Environment and Water Resources
4. The Committee on Interior Affairs, National Defence, Investigation, Clearance and Civil Service
5. The Committee on Foreign Affairs, International Cooperation, Campaigns and Information
6. The Committee on Legislation and Justice
7. The Committee on Education, Youth, Sport, Cults, Religious Affairs, Culture and Tourism
8. The Committee on Health, Social Affairs, Veterans, Youth Rehabilitation, Employment, Vocational Training and Women's Affairs
9. The Committee on Public Works, Transport, Telecommunication, Post, Industry, Mines, Energy, Commerce, Land Management, Urbanisation and Construction.

The committees were formed when the opposition party was boycotting the National Assembly. As a result all committee members were originally from the ruling parties (CPP and Funcinpec). However, in March 2006 an agreement was reached to include opposition party members in the committees.

3. Structure and Roles of Committee No. 4

Housed in the old National Assembly building, Committee No. 4 consists of seven members, including a chair and a vice-chair. The operation of the committee is governed by the internal rules of the National Assembly. Since the committee is supported by only three staff, there are just two small rooms for its work. A new National Assembly building is expected to be finished by 2007.

The main duties of the Committee on Interior Affairs, National Defence, Investigation, Clearance and Civil Service are as follows:

- monitoring governmental affairs, including the implementation of laws and policy related to the Ministry of the Interior and Ministry of National Defence, as well as investigating and vetting of all levels of civil servants;
- researching documents for its committee duties;
- coordinating relations between the National Assembly and the government;
- studying and researching bills, private bills and other affairs under the competence of the committee; and
- organising the general affairs of the army, cooperation policy and army assistance, the general administration of territorial authorities and investigations, including those involving corruption.

The committee also has duties that include:

- controlling and studying bills or private from the Ministry of the Interior and the Ministry of National Defence. According to Article 97 of the 1993 constitution, the committee can summon members of the government or the ministerial representative to clarify anything related to its responsibility;
- receiving proposals concerning the village, communal, district, provincial administration and national security in order to study jointly with the ministry of the interior by summoning the minister or a representative to explain and report to the permanent committee or the National Assembly, whenever the need exists;
- requesting and receiving reports from the Ministry of the Interior and the Ministry of National Defence about investigations and clearances by sum-

- monitoring representatives or those responsible;
- proposing private bills in cooperation with the Ministry of the Interior and the Ministry of National Defence;
- communicating with other countries concerning committee responsibilities and reporting to the permanent committee or the National Assembly;
- regularly monitoring the activities of the Ministry of the Interior and Ministry of National Defence in relation to the implementation of the political platform of the government, the existing laws of Cambodia and agreements with foreign countries;
- investigating irregularities or breaches of law, including all cases relating to the National Assembly in the area of responsibility of the committee;
- hearing claims related to the competencies of the Ministry of the Interior and Ministry of National Defence, then monitoring, deliberating and finally making written interventions to the ministries concerned; and
- visiting the armed forces, checking for irregularities and monitoring their needs, then reporting their proposals to the National Assembly, the government and the ministries concerned.

4. Procedures and Practices of Committee No. 4

Mr. Monh Saphan, the chair of the committee, was appointed by Funcinpec. Committee meetings are not open to the public. Meetings are held infrequently, according to demand, usually when draft laws are proposed for debate. All draft defence laws are first discussed in the committee before deliberation begins in the plenary of the parliament. However, there are very few laws concerning defence and security in Cambodia. Specific knowledge of or experience in defence issues is a major criterion for appointment to the committee.

On 3 November 2005 in the Inter-Continental Hotel, a conference on finance and corruption control in public administration was held under the Presidency of Prince Norodom Ranariddh, jointly organised by the second committee of the National Assembly and the Senate and sponsored by UNDP and CCSSP in cooperation with EIC to strengthen good governance, particularly in revenue collection and the organisation of the state budget. A number of speakers from the Senate and National Assembly proposed the participation of the legislature in state budget preparation, particularly the annual finance bill that is con-

sidered to be the primary law for the functioning of the state. This is regarded as new movement towards strengthening the capacity of the parliament, because in the past this bill was prepared by the government alone, which simply submitted it to the National Assembly for discussion and adoption. Under this system, the parliament did not have enough time to study the bill in detail. In the preparation phase, the parliament can propose amendments, especially in the nine assembly committees, which handle matters related to their fields of responsibility. If certain areas are considered priorities, increases in spending could be proposed; if the area is less important, expenditures could be lowered.

In general, donor countries and international financial institutions proposed reducing defence expenditures and increasing funds devoted to social and economic development. But Committee No. 4, which is responsible for these affairs, can propose to increase or decrease the budget in the annual finance bill or can propose a private bill if needed. If the explanation of this committee has sufficient merit, the entire assembly can approve the proposal.

5. Powers of Committee No.4

Although the power of the committee is clearly outlined in the internal rules of the National Assembly, it has clear limits on its competency. Within the legislature, the committee oversees the military and conducts inquiries. It has no role in budget preparation and limited access to defence budget documents, with the exception of the overall budget, which is usually expressed as a lump sum without details.

Committee No. 4, like some other National Assembly committees, can summon ministers or other individuals to clarify or explain any matters related to their areas of responsibility. For Committee No. 4, this can include calling the co-ministers of defence or co-ministers of the interior to explain irregularities.

Nor does the committee have a role in Cambodia's participation in peace missions before troops are sent abroad, much less over the decision to deploy troops. This is significant because Cambodia has sent

military personnel abroad for peacekeeping and demining.

Concerning defence procurement, the committee has no powers at all. The minister of defence has no obligation to provide the committee or the parliament with detailed information on procurement decisions beyond presenting the entire budget package, even when procurement choices concern a large portion of the budget. All procedures and awarding of contracts in military and security are conducted by the Ministry of Defence and Ministry of Interior themselves.

Except for reviewing draft laws on defence and security and conventions and treaties, the committee has no role in preparing national security policy, defence concepts, crisis management, force structure and planning, military strategy etc. The committee has no power concerning defence human resources management, the size of military or the appointment of high-ranking military officials.

6. Challenges in Security Sector Governance

The committee has a crucial role in the oversight of the government in the fields of national security and defence. However, there is much room for improvement, as the committee faces many challenges:

Limited Power of the committee. Although the constitution clearly spells out the role of the National Assembly, in practice its power is still limited. There is no clear description of the defence and security budget in the budget bill submitted to the committee. Information concerning defence and other security procurement, including purchases of weapons, is never sent to the committee.

Lack of shared information between the

National Assembly, the Ministry of National Defence and the Ministry of the Interior. Committee No. 9 has loose contacts with the Ministry of the Interior and Ministry of Defence. Some information required by the committee is considered confidential, which means that the committee has limited access to the information and databases concerning national defence and security.

Limited Human and Financial Resources. With the limited capacity of the MPs and their support staff, the committee faces difficulties in conducting research and preparing comments and advice on defence and security issues, es-

pecially concerning strategic decisions. In addition, the committee has no budget

to conduct research or travel to fulfil its role.

7. Recommendations

The recommendations below apply to general legislative power in Cambodia, especially regarding the Committee on Interior Affairs, National Defence, Investigation, Clearance and Civil Service. They aim to support effective and efficient control and investigations on national security and national defence:

- The Committee on Interior Affairs, National Defence, Investigation, Clearance and Civil Service should have its own budget.
- The committee should have experts on military affairs and national security, especially strategy preparation, at its disposal.
- The committee could be allowed to participate in some key functions of the

Ministry of National Defence and the Ministry of the Interior, e.g., military and national security strategy preparation, military procurement, weapons procurement, the participation of security forces in peacekeeping missions within the framework of the United Nations etc. Participation here is meant to refer to monitoring and ensuring transparency, not interference in executive affairs.

- The assembly should have an effective and efficient monitoring system to ensure the accountability of the government.
- The deputies should have educated experts and advisers at their disposal.

Parliament and Private Business in the Security Sector: The Indonesian Experience

Sri Yunanto*

This paper first will discuss the reasons for the involvement of the military in the private sector, which I will interchangeably refer to as 'business'. Second, it will address the military's interface with the private sector. Third, it will examine the legal side of this relationship, as well as the political background, in order to explain the context. Finally, remaining problems will be reviewed, including the role of parlia-

ment in dealing with this issue. This paper focuses mainly on Indonesia's experiences, although in analysing the causes of military involvement in the private sector, it also looks at the experiences of some other Southeast Asian countries with similarities to Indonesia such as the Philippines, Burma and Thailand, aiming to impart a general sense of the region, rather than to compare.

Causes of Military Involvement in the Private Sector

In the above-mentioned countries, the degree of involvement of the military in the private sector is in line with its involvement in politics. Burma is an extreme example of this, where the military is completely involved in politics. Military leaders are also political leaders. The history of military involvement in politics and business can be traced back to 1962, when a military coup d'état placed this country with a population of 49 million under a military junta's leadership. The new military administration formulated a concept called 'Burma's way to socialism'. Its totalitarian political system justifies total involvement of military leaders in business. Soon after taking control of the nation's politics, the military government nationalised 15,000 private companies and organised them under 23 state-owned companies totally controlled by the military rulers, despite their incompetence in management and business. The total involvement of the Burmese military in politics and economics strengthened both aspects to create

a totalitarian socialistic system.

Burma is an exceptional case in analysing countries in Southeast Asia. In the region, some countries have enjoyed a 'democracy' in which the armed forces still play a dominant role in politics. The Philippines, Indonesia and to some extent Thailand share rather similar experiences in the sense that their democratisation still leaves open questions of civilian control over the armed forces, which has led to the problematic involvement of the military in the private sector. In comparison to Indonesia and the Philippines, Thailand has handled its problems in a better way. The involvement of the military in business in the Philippines long predated the policy of former President Marcos in declaring martial law in September 1972. Marcos granted authority to the military to become involved in the private sector in return for their support for his politics.

The declaration of martial law opened up

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political and economic opportunities for the military as Marcos wholeheartedly sent middle and high-ranking military officers to be managers of various companies. This policy motivated hundreds of soldiers to take courses in business management in various universities. In addition, the president allowed the Ministry of Defence to establish financial institutions to promote soldiers' welfare.

Moreover, to increase his base, the Marcos administration provided 200 million pesos as initial capital for the establishment of Armed Forces of the Philippines Retirement and Separation Benefit System (AFP-RSBS), which later became a competitor to the government insurance system. In addition to this company, the military also established AFP Savings and Loan Association Incorporated, which was similar to a banking institution, as well as the AFP Mutual Benefits Association, an insurance company, and the AFP Commissioner Exchange Service, which sold tax-free commodities. The military then began to create businesses in non-defence industries such as housing, consumer products, entertainment and even a stock exchange.

Prior to 1973, the history of military politics in Thailand also opened opportunities for the military to become involved in the private sector. High-ranking officers were posted to managerial positions in public enterprises. However, after some of the generals were found to be involved in the 1972 murder of demonstrators, they were fired from their managerial positions.

The history of the Indonesian military's (TNI) involvement in the private sector was rather similar to that of the Philippines, notably in the political context after the war for independence. The early involvement of the TNI in business was initially mostly driven by relatively benign motives, i.e., to cover logistical support for the independence war. During the guerrilla warfare in the independence war, regional military commands

assumed the responsibility to lead military operations without sufficient logistical support. Some military ex-leaders admitted that to solve the problems, they ran legal and illegal business whose revenue was used to cover logistical needs. Until 1950, some regional military commanders were involved in smuggling cocaine and copra. Others commercialised military equipment like vehicles for financial rewards. In the following years, military commanders still authorised regional commanders to be involved in gold mining, such as in the case of Rejang Lebong.

Political developments in the Old Order (*Orde Lama*—the Sukarno regime) put the TNI, especially the army, in a strong political position that forced the president to allow them to become involved in the economic life of the state. Over time, however, the military's involvement in business shifted from a mere means to provide logistical support for the war for independence to a financial reward for their political support for Sukarno, just as in the case of the Philippines.

Under the concept of 'middle way politics', the TNI decided not to execute a political coup d'état to overthrow a civilian politician in conflict, but at the same time not to distance themselves from the political process as in most advanced democratic countries. In return, the president opened up opportunities to the military to become involved in business. The massive involvement of the military in business began when the military supported the government's policy of nationalisation of British and US companies. Richard Robinson noted that until 1958 the involvement of the military in business included shipping, storage, freight forwarding and ship docking services. This involvement in business coloured the political conflict with Indonesian Communist Party (PKI) throughout the period known as 'triangle politics'.

The collapse of the Old Order and its replacement by the New Order under the lead-

ership of General Suharto increased the involvement of the military in business. Under the concept of dual function (*dwi fungsi*), which was proclaimed at an army seminar in Bandung in 1966, the military, especially the army, decided to play a stronger role in maintaining the political and economic order. Following the approval of this concept, high-ranking military officers were posted in strategic companies such as PT Berdikari, Pertamina (National Petroleum Company) and Bulog (National Logistical Board). Other high-ranking officers ran companies in the car import business.

During the 32 years of New Order administration with General Suharto as president, the government formalised the involvement of military institutions in the business sector under categories such as 'foundations' (*yayasan*) and 'cooperative institutions'. Differently from the role foundations play in western countries, which are generally for charity and social activities, some big foundations in the New Order were created by businesses to avoid tax obligations. Many call this type of business an 'institutional' or 'formal' business.

Today, there are 227 businesses in the form of limited companies under the foundations established by the three armed services, including 14 companies operated under the air force foundation Yayasan Adhi Uphaya and 36 companies under the navy foundation Yayasan Bhumi Yamca. The rest are operated under big three army foundations: Kartika Eka Paksi Foundation owned by the army, Dharma Putra Kostrad owned by the Strategic Command Force (Kostrad) and Yayasan Korp Baret Merah (KOBAME) owned by the special armed forces (Komando Pasukan Khusus, also referred to as Kopasus).

In addition to the foundation-run companies mentioned above, the TNI also runs 1,300 cooperatives operated by various levels of the institution, from the military headquarters to lowest regional levels. Of these, 923 cooperatives are owned by the army, 124 by the navy and 147 by the air force. Military businesses run under foundation or cooperative labels cover a wide range, including property, banking, agro-business, insurance, plantations, tourism, transportation and forestry.

The Interface between Private Business and the Military

Democracy requires checks and balances between different branches of government. Democracy also requires civilian control over the military. The reason for this principle is that civilians are representative of the people's interest. Civilian control over the armed forces thus ensures that the democratic process will flow in a peaceful and manageable way.

These two principles imply that civilian authorities assume the responsibility to exercise control over the military budget, which covers both revenue and expenditure. In the Indonesian case, it is commonly known that defence expenditure is paid for by both revenue from the state budget,

called 'on budget' and by funds referred to as 'off budget'. While 'on budget' resources are clearly stipulated in the national budget (APBN), 'off budget' resources are from unclear and often ambiguous sources. It has also been said that military involvement in business contributes only five per cent of the total defence budget.

In many discussions regarding the military budget and military involvement in business, arguments pertaining to the lack of funds are used to legitimise the involvement of military in business. It has been stated that the government budget covers only 25-30 per cent (currently about 40 per cent) of the total budget proposed by the mili-

tary. This condition has given Indonesia one of the lowest national defence budgets in Southeast Asia, just above that of the Philippines.

However, this perspective does not consider the law on the TNI No. 34, Art. 66/1. This law stipulates that defence should be financed solely by the national budget, which means that the use of other sources of financing is not in accordance with the rule of law. Resources outside of the national budget, including revenues from business, must not be used to finance defence.

Another aspect related to the lack of funds for defence is the recent finding that parts of the defence budget are hidden in other budget items. For instance, export credits have been used to finance defence procurement. According to some sources, this has amounted to up to Rp7 trillion. In addition, the defence budget is also covered by revenue from regional budgets, such as in the case of ship procurement in Riau province.

However, the core problem is not how much money is available, but rather the lack of transparency and accountability in the TNI budgeting process. A clear example is the discrepancies between defence expenditures and the amount in the defence budget. There are indications that numerous military operations have been financed by resources from unclear sources.

Another logical question regarding the involvement of the military in the private sector is whether this practice has promoted the goals of professionalism, transparency and accountability, as well as respect for the principle of the rule of law, or whether the TNI has simply used its military businesses to promote the welfare of its soldiers.

The answer to the first part of this question is clearly 'no'. The involvement of the TNI in the private sector violates the notion of the professional military as defined by Article 2 of TNI Law No. 34.¹ The involvement of TNI in business has no direct relationship to the effort to modernise defence equipment, as the above-mentioned five per cent is supplied for soldiers' welfare. In addition, military businesses, which have been called 'grey businesses', in some ways take the form of a commercialisation of security services, which is a violation of government regulation No. 6/1974, which forbids government employee to run businesses.

It is believed that military business has provided additional revenue for low-ranking military officers as well as high-ranking officers, who are then perceived as promoting soldiers' welfare. The improvement of soldier welfare takes the form of additional facilities like education assistance, health insurance and the financing of housing for soldiers' families, which are paid from businesses run under the foundations.

Several research projects have found that soldiers who are assigned to conflict areas extract illegal levies from the people. While using some privileges of facilities can be categorised as 'understandable' if it is viewed from the history of the military in Indonesia, these levies are an illegal activity that to some degree have prolonged the conflict because soldiers on duty benefit from the conflict.

History has shown that high-ranking military officers and their private partners have benefited more from businesses in institutional, non-institutional and grey categories. In the institutional category, the companies are often run under foundations and coop-

1. Article 2 defines professional soldiers as those who are well trained, well educated, well equipped, not involved in politics and business, obedient to the state's policy according to the principle of democracy and civilian supremacy, and with respect for the principles of human rights and national and international law.

eratives that establish joint operations and assets with their private partners. In this type of joint operation, military commanders serve as ex-officio leaders, e.g., as chairmen, which allows them to receive additional income from their positions.

Their private partners, who generally have better business skills, have benefited more than the military institutions. While the private partners developed their business institutions into giant conglomerates, some military business institutions made little progress, while others suffered losses and even went bankrupt. If we study the history of Indonesian conglomerates, the majority of which are of Chinese descent, they have enjoyed partnerships with military institutions.

To support the argument above, let us look at the auditing report by Ernst and Young of military business under the Kartika Eka Paksi Foundation. After decades of operation, its companies suffered a number of problems, such as a lack of accountability to their soldiers and the domination of the military culture in business operations, which resulted in the recruitment of poorly qualified individuals and other human resource failings. In addition, their investment policies were not strategic, but rather largely reactive and dominated by initiatives from their private partners. Consequently, the business institutions have a lesser bargaining position vis-a-vis their private partners. The companies do not focus on their core competencies, lack clear asset ownership, suffer from huge debts and make only a small profit at best. Recently, the ex-officio position in the companies has been abolished.

By contrast, the partnership between individual generals and private partners has continued. Some generals have established their own companies using their family name. At the same time, their private partners have developed their businesses into

giant conglomerates. Such practices have involved abuse of privilege, which is against the principle of justice and fair competition. These mutual relations are sometimes described in graphic terms, with the private actors as a 'cash cow' and military institution or individual as a 'security guard'.

In the 'grey business' category, it has also been discovered that some multinational companies have enjoyed the commercialisation of security services from the military and police. In return, they provide extra money to the military institution or military individuals, money which is not managed in transparent and accountable ways. Two examples of these practices deserve further investigation. One is the payment of Rp12.1 to 45.9 billion by Exxon Mobile Oil to 100-150 military posts in Lhoksumawe. In another example, Freeport MacMoRan made payments of Rp 50 billion in 2002 and Rp 40 billion in 2001 to the TNI in Papua. While these figures are known, it is still unclear how much was paid in total by two companies to TNI, and other multi-national companies probably followed the same practices.

The following conclusions can be drawn about the grey businesses mentioned above. First, these transactions are not made in transparent and accountable ways, which means that they are prone to corruption and misuse. Second, the money mostly goes to high-ranking military officers, despite the fact that small portions also goes to low-level soldiers and is used to improve facilities. A joke making the rounds in Jakarta commented on the grey practices of the military in conflict areas: 'When soldiers leave for military operations, they are armed with M16s. After they finish their assignment they bring 16 M (meaning Rp16 million) home'. Third, in conflict areas, some personnel of the security forces have been found to have committed human rights violations. For all these reasons, there is a need for an

international system to prevent multinational companies from financing such repression by the security forces. While the practices above are certainly against the law, such practices have shifted the focus of the institution and soldiers from their defence role to a private security function that is outside their specialisation.

A lack of business skills goes along with unaccountable practices within military business. This has resulted in mismanagement and misuse of power, not to mention the legal term 'corruption'. In 1976, General Ibnu Sutowo's failed leadership of the national oil company Pertamina resulted in its bankruptcy after amassing US\$11 billion in debt. The Suharto administration kept this case closed, at least in part to hide the levels of corruption which most likely

involved other high-ranking military officers, including Suharto himself.

Similar practices occurred when the former commander of the Army Strategic Command withdrew Rp135 billion from Mandala Air, which was owned by the Dharma Putra Kostrad foundation, for unclear purposes. Financial auditing under his successor classified it as corruption. However, no legal process ensued. People are now sceptical whether a war against corruption under President Susilo Bambang Yudhoyono's (SBY) administration will ever touch military institutions and military personnel. No general has ever been sent to trial for corruption. These levels of corruption and misuse of power also existed in the Philippines, involving middle and high-ranking military officers of the AFP-RSBS.

Legal Foundation and Political Context of Military Involvement in the Private Sector

The middle way politics of the Old Order can be seen as the cornerstone of official involvement of the military in the private sector. In the New Order, their growing involvement in business was strengthened by the concept of dual function. Within this concept, the TNI was assigned to maintain the political and economic order. This gave the TNI three different functions: defensive, political and economic.

The only legal basis that regulates the involvement of state employees of the TNI in the private sector is government regulation No. 6/1974. This clearly stipulates that government employees and TNI members must not run businesses or be involved in the private sector. However, this regulation has not been enforced. For example, it was not used to deal with high-ranking military officers who served as ex-officio chairmen in the private sector businesses run by military foundations. Officers in these positions received additional income.

A concrete example of this double function was when a general was appointed as a commander in strategic command forces (Kostrad) while at the same time being appointed as leader of the Dharma Putra Kostrad and simultaneously serving as chair in some of the companies operated under the foundation. This phenomenon is quite common in Indonesian bureaucratic practices. From a political perspective, the New Order regime intentionally created this condition to maintain the personal loyalty of military commanders to the president.

The slow handling of this issue in the *reformasi* time was also caused by the fact that reform always occurred with military support, if not military control. After Suharto's departure, President Habibie never tried to intervene in internal military affairs, which meant that he let the military formulate their own reforms. In the beginning of the year of reform, when the people still had a strong spirit, the TNI

successfully (if half-heartedly) formulated an internal reform later known as the 'new paradigm'. The TNI made some significant changes, such as liquidating its faction in the parliament and the social and political division in its organisational structure, as well as keeping its distance from its former political ally, Golkar. However, this new paradigm did not clearly state a vision of reform in regards to the military's involvement in business. The new paradigm simply stated that the TNI would keep its companies under their foundations.

The Gus Dur administration, which succeeded Habibie, put the political relations between the president and the TNI in high tension. Gus Dur tried to exercise subjective control over the military by replacing 'powerful' generals with his own men. However, along with bad relations with the parliament who appointed him, this blunder drove Gus Dur to 'political suicide'. His political defeat increased the TNI's political influence on his successor Megawati.

In the early part of her administration, Megawati made no progress in reforming the TNI. The power transfer from Gus Dur to Megawati was considered to be an 'unsmooth' transition by the TNI—a historical problem of civilian politicians. This

slowed down, if not halted, reform processes within the TNI. No liquidations of military businesses or of territorial commands were placed on the agenda of the Megawati regime.

On the other hand, discussion about the strategic issues of TNI reform among civil society organisations was becoming ever more euphoric, considering the rising pessimism about the political situation. A number of discussions, seminar workshops, research projects and working groups on issues such as defence reviews, the professionalisation of the TNI, the TNI and human rights, the liquidation of territorial commands and the involvement of TNI in business were successfully conducted by civil society organisations such as the Ridep Institute, ProPatria, Pacivis, Imparsial, Lesperssi and others.

It was only at the end of 2004, at the end of Megawati's administration, that parliament passed TNI Law No. 34/2004, whose Article 76 clearly outlines the termination of the military's involvement in business. This article ordered the government to take over the military's businesses in five years' time (by 2009) and to issue government regulations for the implementation of these takeovers.

Problems Concerning the Takeover: Conflicting Perceptions and Political Will

Several analyses have stated that the success of the parliament in passing the TNI law has left the government's successor with a 'time bomb'. This law put the government and military in a rather hard position, especially its article on military businesses. The hasty approval of the law was at least partially driven by legislators' worries about the forthcoming election, in which their parties' presidential candidates would run against candidates with military backgrounds, such as General Wiranto and

General Susilo Bambang Yudhoyono (SBY), who were considered strong candidates. The result of the direct presidential election proved that worry to be valid, as SBY was elected president.

The passing of the TNI law was regarded as a farewell prize to the reformist movement, despite the fact that it was seen as a half-hearted effort and left some problems of implementation. First, with regards to the typology of these businesses, Article 76

seemed only to address the institutional, formal side of the TNI's involvement in the private sector, ignoring its problems with non-institutional businesses and 'grey practices'. Second, the article states that the government is to take over all military business, including cooperatives. This interpretation is not in line with the law on cooperatives, which still allows government employees to establish cooperatives. In sum, the TNI law still needs judicial review, particularly in order to be harmonised with Law No. 25 on cooperatives. Harmonisation also needs to occur with the laws on state finance and state companies. The coming judicial review must clearly state whether or not cooperatives are included in the interpretation of the term 'businesses' under this article.

It is not yet clear whether these problems of interpretation will lead to problems of implementation, since the government has not yet issued regulations on its implementation. This might be caused by the military headquarters' expression of resistance to the president. In their extreme definition, as stipulated in Article 76, government takeovers of business will not make the TNI happy, especially the army, which provides important support for the president.²

This political resistance has been underlined by the ambiguous role of the Ministry of Defence, which should be in charge of implementing Article 76. Another factor that contributes to this lack of support is that the majority of high-ranking officers, with the exception of the Minister of Defence, have an old-fashioned mind-set. The consistency of the SBY administration in implementing Article 76 is an indicator of how seriously SBY supports democratic control over the armed forces. It also helps to evaluate how the president deals with the army, his core supporter.

If the government is really serious about implementing the takeover of military businesses, despite the absence of regulations, it can establish a work plan that is publicly explained to the people. Other serious efforts that could be undertaken include investigating the 'grey revenue' that private businesses of the military received from businesses such as Freeport and Exxon.

Current government statements seem to indicate the contrary. The government is reluctant to exercise its political will in these takeovers. In spite of the fact that the TNI commander expressed his willingness to complete the takeover process in two years, subsequent statements underlined government ambivalence. First, the Ministry of Defence issued a statement that the government is planning to take over only companies whose assets are valued at more than Rp20 billion (US\$2.1 million). This statement is in contradiction to Article 76, which says that 'the government is to take over all businesses directly or indirectly owned by the TNI' without considering the company's level of assets.

Another ambivalent statement was made by Said Didu, the secretary of the minister of State Enterprises, when he said that government will take over only military companies that use government assets, meaning that the government would let the TNI continue its businesses under foundations and in the form of cooperatives.³

The Didu statement is totally against two laws. In addition to violating Article 76, it violates the Second Law on State Finance No. 17 (2003), which states that foundations are included in state finances, because the state auditor has the responsibility to audit the foundation. Moreover, military institutions are also state institutions, and their businesses are also

2. Many believe that the SBY style of leadership is to make everybody happy, i.e., hesitant and slow.

3. *Jakarta Post*, Thursday, 20 October 2005.

state possession. As for cooperatives, this will require further scrutiny, as their assets are collected from individual soldiers. More reluctance can be seen in the lack of seriousness in enforcing laws on 'grey'

business practices and institutions that received unclear income from the private sector, such as in the case of the commercialisation of security services to Freeport and Exxon.

The Role of Parliament in the Oversight of Military Business

In democratic states, legislatures and executives share common responsibilities, despite having different oversight roles. They both assume responsibility for the efficiency of the security forces. The role of parliament in oversight covers legislation stipulating the scope of security forces, the power of the armed forces and their budget. Parliament may form a commission or create an ombudsman to oversee the security forces by conducting investigations and dealing with public complaints.

With regard to defence budgets, the role of parliament is to endorse the procurement of important equipment and weapons. To do this, parliament must be equipped with strong powers, that is, influencing government decisions and behaviour so as to reflect the people's interests. The components of parliamentary power include legal authority, constitutional authority, expertise and political will.

Political reform in Indonesia has increased the role of parliament, which was previously under executive dominance. Amendments to the constitution have created a parliament whose major function is in line with the principles practised in democratic countries. These include Article 20 A/1 of the constitution, followed by Article 25 of Law No. 22/2003 on the structure and function of the People's Consultative Assembly, the House of Representatives (DPR), regional representatives (DPD), the regional houses of representatives and Article 4 on the legislative order. The functions of the DPR are enacting legislation,

endorsing the budget proposed by the government and exercising oversight.

In the context of security sector reform, the parliament has a legislative function in three laws: No. 2/2002 on the state police, No. 3/2002 on national defence and No. 34/2004 on the TNI. In line with these articles, Article 30/5 of the constitution stipulates that the structure and position of the TNI, the police and the relationship between the TNI and the police, as well as the requirements for civil participation in the defence and security of the state, are all under the rule of law.

In the context of military involvement in business sector, parliament has fulfilled its legislative role in the enactment of Article 76, which obliges the government to take over military businesses. However, in spite of this, parliament still has a number of obligations to cope with the article's shortcomings. These include the harmonisation of Article 76, the Cooperative Law, the Law on Foundations and the Law on State Enterprises. In this harmonisation, the parliament should clearly explain its interpretation of the article that specifies 'all companies directly or indirectly managed or owned by military' in order to prevent other interpretations by the executive, such as the statements by the minister of defence and the secretary of the minister of State Enterprises.

In regards to the budget function, it would be a good idea if the government established an ad hoc committee to recalculate in detail the real gap between the defence

budget and defence expenditures so that revenue from unclear sources, such as in the case of Exxon and Freeport and the other 'five per cent' of the budget injected from military business will clearly be identified. The objective is to establish a clear direction for the effort to fund the TNI and police entirely from the government budget. If the argument is that the military lacks sufficient funds, the parliament should see whether this is really because of a lack of government money, or rather because the lack of defence review and a comprehensive defence strategic plan has led to inefficient budget management.

In its oversight function, the parliament should require the government to formulate an activity plan for the implementation of the takeovers even before the government regulations have been enacted. This will help to make sure that the government regulations will not be against Article 76. On top of that, the parliament should also exercise

its oversight role in the case of payments made to TNI by Freeport, Exxon or other companies in the same fashion as has been done by the New York City pension funds. As a shareholder, this institution questioned Freeport over its payment to the TNI.

It would be a good idea if parliament began to shift its focus from the hot issues to more strategic issues such as the transparency and accountability of the defence budget, including how to deal with broker companies. Oversight over incidental or temporary cases such as the procurement of Sukhoi planes and M1-17 helicopters should not come at the expense of oversight on strategic issues. The will to push for the TNI's professionalism, accountability and transparency should constantly motivate parliament to exercise its three functions. Given that it is the parliament that defines the 'professional TNI', it must assume the most responsibility for the enforcement of this professionalism.

Conclusion

Indonesia has embarked on security reform towards the parameters of democratic control. The constitution and subsequent laws and regulations, despite their lack of comprehensiveness, have been enacted, including a policy to tackle

the involvement of the military in business. The parliament's political will, in addition to that of the executive, and constant pressures from civil society organisations will be necessary to accelerate the process.

Parliamentary Oversight of Defence in Cambodia, Indonesia, the Philippines and Thailand: Status and Prospects

Hans Born*

This article focuses on the current status of parliamentary oversight of the armed forces in four selected Southeast Asian states: Cambodia, Indonesia, the Philippines and Thailand (before the September 2006 coup).¹ The objective is to assess the role of parliament in overseeing defence policies, budget control, defence procurement, troop deployments abroad and mili-

tary personnel policy decisions. The chapter also addresses the general oversight powers of parliament, which also apply to the defence sector, as well as the strengths and weaknesses of parliamentary defence committees in the region. The article concludes with recommendations for strengthening the role of parliament in defence policy in Southeast Asia.

The Relevance of Parliament in Security Sector Governance

Hardly any study can be found that focuses on the role of parliaments in Southeast Asia, and no comparative study exists on the role of parliaments and security sector governance in the region. Some explain this lack of interest by the common assumption that Southeast Asian parliaments only rubber-stamp government decisions. Others point out that the financial aid programmes of the international financial institutions leave Southeast Asian governments and parliaments with little discretion to choose their own priorities.² Therefore, why bother with parliaments?

Despite these arguments, it is important

to focus on parliaments, particularly their role in defence matters. A first reason is that they are a major source of legitimacy in any democracy. Some even claim that parliaments are the single most important institution for a democracy.³ Indeed, parliament can give or withhold legitimacy, for example, to the government's defence policy or deployment of troops abroad.

Secondly, parliaments play an important role in the system of checks and balances within security sector governance. The edifice of security sector governance consists of five layers of accountability:

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1. Concerning Thailand, the data collected in this article refers to the Thai parliament before the September 2006 military coup. The data do not refer to the current military-appointed interim parliament, which has no oversight powers over the government.
2. For an explanation of the lack of interest in parliaments in general and those of Asia in particular, see the excellent work of Jürgen Rüland, Clemens Jürgenmeyer, Michael H. Nelson and Patrick Ziegenhain (2005), *Parliaments and Political Change in Asia*, Singapore: ISEAS, pp. 1-4. Another interesting study on Asian parliaments is provided by Philipp Norton and Nizam Ahmed (1999), *Parliaments in Asia*, London: Frank Cass. Among recent case studies focusing on a single Southeast Asian parliament, noteworthy is Aaron M. Stern, 'Institutional changes in legislatures: Thailand's House of Representatives 1979-2002', Ph.D. Dissertation, University of Michigan, Ann Arbor, 2006.
3. Jeffrey Hahn (1996), *Democratisation in Russia. The Development of Legislative Institutions*, Armonk, NY: M.E. Sharpe, p. 4.

- internal control within the military (e.g., inspector-general or military ombudsman);
- executive control (final command authority, approval of operations, control of policy and budget and appointment of senior personnel);
- parliament (law making, budget control, investigations, questioning the minister, etc.);
- judiciary (adjudicating, revising policy through prosecution, providing effective remedies); and
- civil society (providing alternative views to public, investigative reporting, advocating alternative policies).

In this edifice of security sector governance,

parliament plays an important role as a countervailing power against executive power through the law-making process, parliamentary public debates, its specialised defence committee, investigations and hearings.

Thirdly, parliament is an important arena for discussions, dialogues and arguments about security that affect the lives of citizens. Particularly in post-conflict and authoritarian states, parliament has the potential to bring together former enemies to discuss their differences in political dialogue instead of fighting. If political actors and movements cannot express their grievances and opinions within the political system, dangers exist that they will act outside the political system and eventually undermine that system.

Parliaments: Workshops of Democracy

In Winston Churchill's phrase, parliament is the "workshop of democracy", and it is within that workshop that the necessary powers to control the activities of the state, including defence activities, are determined. While parliaments may range from the ornamental to significant governing partners across political democratic systems and cultures, they have some common characteristics, which include the three basic functions that they perform: representing the people, making (or shaping) laws and exercising oversight. These functions are interconnected: parliaments articulate the wishes of the people by drafting new laws and overseeing the proper execution of those policies by the government. In short, the parliament is the mediator between the government and the people.

Though we take it for granted that modern government must be democratic in the sense of deriving its authority directly or indirectly

from the people, states differ in shaping legislative-executive relations. Furthermore, there are no universal standards or best practices for parliamentary oversight; accepted practices, legal procedures and parliamentary structures in one established democracy may be unthinkable in another. Although there is no single set of norms for civil-military relations, there is a general agreement that democracies adhere to principles of democratic civil-military relations. Parliamentary oversight of the military sector is a *sine qua non* for democracy.

The ultimate power of parliament is to send the government home (no-confidence mechanism), block budgets or stop or delay legislation.⁴ The no-confidence vote is characteristically found in parliamentary political systems only, since in most presidential systems the president is elected by the people directly and not by parliament. From these powers (and

4. M. Laver and K. Shepsle (1999), 'Government Accountability in Parliamentary Democracy', in A. Przeworski, S. Stokes and B. Manin (eds.), *Democracy, Accountability and Representation*, Cambridge University Press, p. 281.

the credibility to use this power), all other powers *vis-à-vis* the government are derived. In more specific terms, with regard to the defence sector, we can identify the following parliamentary defence oversight powers:

1. General powers: these include powers which are in principle applicable to all fields of government. In most countries these powers include the right to initiate or to amend laws, raise questions, summon members of the executive and their staff to testify, summon members of civil society, have access to classified information, carry out parliamentary inquiries and hold hearings.

2. Budget control: the right to allocate and amend defence budgets—on the level of programmes, projects and separate line-items; to approve or reject any supplementary defence budget proposals; and to have access to all relevant defence budget documents.

3. Peace support operations: the right to approve or disapprove decisions to send troops abroad, the mandate and the budget of peace support operations, the number of military personnel involved, rules of engagement, command/control requirements and the duration of the mission; in addition,

parliaments have the right to visit troops on missions abroad.

4. Defence procurement: involvement of the parliament in the government's decision concerning contracts, specifying needs for new equipment, selection of manufacturers and assessing offers for compensation and offsets.

5. Security policy and planning documents: the right to amend or to dis/approve the security policy, defence concept, crisis management concept, force structure/planning and the military strategy.

6. Military personnel policy: involvement of parliament in the formulation of military personnel policy as well as the approval of appointments and retention of senior military and civilian personnel.

Together, these instruments of control cover the most important aspects of any military: planning, operations, money, people, equipment and policy. Before an assessment of the role of parliaments in these six areas of parliamentary oversight, the context of the democratic control of armed forces in Southeast Asia will be discussed.

Context: Democratic Governance of the Security Sector in Southeast Asia

The role of political institutions like parliaments is shaped by history. The performance of parliament, its customs and its procedures as well as the expectations of the voters about what their representatives should do, all have their roots in the past. In general, the longer a representative institution exists, the greater the chance that democracy as a form of government has taken root in society.⁵ Although the four states in Southeast Asia have enjoyed brief

spells of democracy before, in none of the states was parliament able to develop as a strong tradition. This is due to the frequent periods of military rule, in which periods parliament either did not exist at all or was appointed by the military and/or its function was limited to rubber-stamping the decisions of the executive. It was only in recent times that the Philippines turned to democracy (in 1986), followed by Cambodia in 1991, Thailand in 1994 and Indone-

5. Rüländ *et. al.*, *op. cit.*, p. 25.

Table 1. Characteristics of Political Systems in Four Southeast Asian States

Country	Political system	Return to democracy	Constitutional provision on command authority	Declaration of war
Cambodia	Parliamentary constitutional monarchy	1991	none	Parliament
Indonesia	Presidential republic	1999	President	President with consent of parliament
Philippines	Presidential republic	1986	President	Parliament
Thailand	Parliamentary constitutional monarchy	1994	King	Parliament

sia in 1999.⁶ This means that parliaments began only very recently to function as independent oversight institutions, with little experience of controlling budgets, defence procurement and other matters of defence. The armed forces, on the contrary, existed already before the regime change and have an enormous advantage over parliament in terms of knowledge,

expertise and resources. Additionally, all countries but Thailand experienced a long period of colonial rule during which parliament played only a very marginal role, if any role at all. In order to understand better the specific role of parliament in each of the four states, brief background information on each parliament is given, starting with Cambodia.

Cambodia

After World War II, France loosened its grip over its colonies and granted Cambodia some degree of autonomy within the French Union. In 1946, with French consent, King Sihanouk gave his people several democratic rights, including the right of association, the right of assembly and the right to free speech. Political parties were formed, and elections were held for a constituent assembly.⁷ After its independence from France, Cambodia experienced its first elections (under international auspices) in 1955, which were won by the

king's Sangkum party. The king, however, started to curtail the young democracy and transformed Cambodia into a *de facto* one-party state in which parliament played a rather ornamental role. This form of guided democracy lasted until 1970, in which year the civil war started followed by an extremely brutal Khmer Rouge dictatorship. The negative legacy of the Khmer Rouge should not be underestimated: more than a million Cambodians died, and Cambodian society was all but destroyed. This cruel period had a very negative impact on civil

6. The September 2006 military coup ended Thailand's longest spell of democracy, 15 years. The generals dissolved parliament and replaced it with their own appointed interim 'parliament'. Since 1932, Thailand has experienced 10 military coups. Aaron M. Stern, *op. cit.*, pp. 40-43.

7. Lao Mong Hay, 'Building democracy in Cambodia: Problems and prospects', in Frederick Z. Brown and David G. Timberman (eds.), *Cambodia and the international community: The quest for peace, development and democracy*, New York: Asia Society, 1998.

society, creating mistrust among the people and leaving a generation without proper education.

In this context, Cambodia had UN-sponsored elections in 1993. In the new parliamentary constitutional monarchy, the king has no real powers, although he appoints two members of the Senate and has significant influence as the nation's symbol of unity. The government, led by the prime minister and other ministers, originally had to be approved by a two-thirds vote of confidence by the National Assembly (this was changed to an absolute majority in 2006), which contains 123 seats. Its members are elected by popular vote for a five-year term. The Senate has 61 members, two of whom are appointed by the King, two elected by the National Assembly and the others by commune councillors and National Assembly members for a term of seven years. In general, the National Assembly increasingly conducts policy debates, but has only very limited powers to scrutinise government policy and activities.⁸

The Cambodian constitution lacks any pro-

vision on democratic control and accountability of the armed forces. This can only lead to confusion about the separation of powers between the king, government and parliament. The parliamentary defence committee normally plays an important role in overseeing the armed forces because it allows parliamentarians to specialise in defence oversight while being endowed with a budget, staff and other resources. The defence committee of the Cambodian parliament, however, meets less than once a month, which is probably too infrequently to exercise regular oversight of the armed forces. The Cambodian parliamentary defence committee has no special budget for conducting investigations or hearings. The committee has the lowest number of staff among the four Southeast Asian states. Committee meetings are secret, which might be necessary on some occasions. However, meeting *in camera* as a matter of rule leaves the general public and media with the problem of having no information about the debates, possible votes and opinions of the committee members. This is a formidable obstacle to the public's efforts to hold parliamentarians accountable for their decisions.

Indonesia

Following Japanese occupation in World War II, Indonesia declared its independence in 1945 after previously being subjected to Dutch colonial rule for more than 300 years. Like other countries in Southeast Asia, Indonesia was not able to gain any experience in democratic government during colonial rule. The 1950 constitution marked the beginning of a brief spell of parliamentary democracy, which lasted until 1959, when then President Sukarno replaced parliamentary government by a so-called 'guided democracy'. Between 1959 and 1998, the only role of the Indonesian parliament was to rubber-stamp the

decisions of presidents Sukarno and Suharto.⁹

After decades of dictatorship and 'guided democracy', Indonesia held its first free parliamentary elections in 1999 and became the world's third most populous democracy. The first years were difficult as the young democracy was plagued by financial crisis, an insurgency in the province of Aceh, sectarian violence in the Moluccas, Sulawesi and Kalimantan, natural disasters, widespread corruption, weak courts and an inadequate legal framework. The national armed forces (TNI) left the political scene

8. Freedom House, 'Freedom in the World—Cambodia (2005)', available at <www.freedomhouse.org>.

9. Rüländ *et al.*, *op. cit.*, pp. 29-32.

by giving up its seats in the parliament in 2004. Nevertheless, the TNI maintains a 'territorial network' of military personnel in every district and village, giving it substantial leverage in local politics.¹⁰

The military gained prestige when it remained neutral during the impeachment of Wahid, the first post-1999 president, even when he called upon the army to declare a state of emergency (which the TNI refused to do). Additionally, civilian control was strengthened by the appointment of a civilian minister of defence in the first post-1999 government. Parliamentary control of the defence budget remains rather problematic because the TNI receives only 30 per cent of its funding from the state; the rest is financed by the private businesses of the TNI (see the article of Sri

Yunanto in this volume). In order to curtail these practices, the current civilian defence minister has proposed that all private businesses of the military be transferred to the state. However, it remains to be seen whether this plan will succeed. With the president's party holding only 55 of 500 seats (and allied political parties able to bring only 111 votes to bear in parliament), the government is forced to cooperate with parliament, which facilitates parliamentary oversight of the armed forces. The parliamentary defence oversight committee has 49 members, is supported by 20 staffers and has a budget of US\$100,000. With three meetings per week, this committee is the most active of the four Southeast Asian parliaments. All meetings are public, except for hearings on the secret intelligence budget.

Table 2. Parliamentary Defence Committees (2006)

Country	Members	Chaired by party of	Supporting staff	Budget (US\$)	Meetings	Meeting frequency
Cambodia	7	Government	3	0	Secret	< 1 per month
Indonesia	49	Government	20	100,000	Public except for intelligence budget	3 per week
Philippines	85	Government	5	0	Public except for executive	1-2 per month
Thailand	22	Government	30	39,900	Secret	1 per week

The Philippines

In 1935, during US colonial rule, the Philippines adopted a 'commonwealth constitution' modelled on the US political system, including a directly elected president and a system of checks and balances between the legislature and the executive.

After independence in 1946, the Philippines experienced democracy until 1972. In that year, under the pretext of a weakening economic situation as well as challenges from Islamic and communist rebels, President Ferdinand E. Marcos declared mar-

10. Freedom House, 'Freedom in the World—Indonesia (2005)', available at www.freedomhouse.org.

tial law. Marcos' system of 'constitutional authoritarianism' lasted until 1986, when mass protests ('people power') sent him into exile in Hawaii.¹¹

With its return to democracy in 1986, the Philippines has the longest recent democratic experience of the four Southeast Asian states. However, the return to democracy did not mean that the military stayed out of politics. Two former presidents have been ousted through army-backed 'people power' movements—Ferdinand Marcos in 1986 and Joseph Estrada in 2001. In 2006, amidst rumours of a coup by certain elements of the armed forces, President Arroyo declared a state of emergency, and the suspected coup plotters were arrested. Control of the military is complicated by an ongoing civil conflict with communist rebels and Islamic militancy, as well as by a high level of corruption among the security forces.¹²

The Philippines has a bicameral legislature. The 24 members of the Senate are elected for six years, while the 264 members of the House of Representatives are elected for a three-year term, which is rather short compared to other countries, perhaps too short to build up the expertise required for effective oversight of the security armed forces. Of the four Southeast Asian states, the Philippines has the largest defence committee, consisting of 85 members, although they are assisted by only five staffers. Eighty-five members gives wide room for specialisation in the various fields of national security and defence policy. On the other hand, unless the committee is well managed, the danger exists that it is too large to operate effectively and efficiently. As a rule, committee meetings are public (except for meetings of its executive) and take place twice per month. The parliament can count on a 'vibrant and outspoken' press.¹³

Thailand

Thailand is the only Southeast Asian state which was never colonised by European or American powers. Thailand was an absolute monarchy until a coup d'état forced the king to abdicate in 1932. The abolition of the absolute monarchy was not rooted in popular discontent, but in discontent among elite circles in the military and state bureaucracy. It was not the aim of those elites to set up a parliamentary democracy, but to restrict the prerogatives of the king and to set up a civil-military coalition that would be able to rule the country.¹⁴ Consequently, parliament played a rubber-stamp role and was not allowed to exist at all between 1959 and 1968.

Between 1968 and 1971, Thailand experienced a brief spell of democracy, which was terminated by a coup, after which a military junta took over both the executive and legislative functions. Then again, spurred by student uprisings, the years 1973-76 formed another period of, albeit unstable, parliamentary governments. As had happened before, democracy was ended again by a coup followed by a period of martial law. General Prem Tinsulanonda governed until 1988, when he was succeeded by Chatichai Choonhavan, 'whose "completely elected" "buffet cabinet" (referring to allegedly rampant corruption) was removed by a coup in 1991.'¹⁵ The 1992 'Bloody May' intensified the pressure for political

11. Rüländ *et al.*, *op. cit.*, pp. 27-29.

12. Freedom House, 'Freedom in the World—Philippines (2005)', available at <www.freedomhouse.org>.

13. *ibid.*

14. Michael L. Mezey, 'The 1971 coup in Thailand: Understanding why the legislature fails', *Asian Survey*, Vol. 13, No. 3 (March 1973), pp. 306-317.

15. Rüländ *et al.*, *op. cit.*, pp. 34-36.

reform, ultimately leading to the 1997 constitution, which laid the basis for a number of independent organisations to counter corruption among political leaders as well as irregular elections. These independent watchdogs were: the Election Commission, the National Counter-Corruption Commission, the National Human Rights Commission and the Constitutional Court. The 1997 constitution also ended the practice of 'appointed' members of parliament.

Nevertheless, the new constitution did not end political turmoil or corruption, as indicated by Prime Minister Thaksin's resignation in 2006 after massive street protests and the annulled April 2006 elections. Thaksin's abrasive style and huge wealth won him many enemies. It was probably his easy victory in April's election that prompted the army generals to stage a bloodless coup in September 2006, endorsed by the king. The military declared martial law as well as replacing all democratic institutions by military-appointed and -supervised proxies, including the 1997 constitution, the parliament, the Constitutional Court and the prime minister. The coup ended Thailand's

longest spell of democracy so far, and it remains to be seen on whose and what terms Thailand will return to democracy in 2007, as promised by the military. When the military dissolved the parliament in September 2006, it installed an interim parliament with no powers to vote on government matters; parliament can debate and question government policy but it cannot censure or impeach anyone in the military government.

Until September 2006, Thailand had a bicameral legislature, consisting of 400 members of the House of Representatives serving four-year terms and a Senate with 200 members elected for six years.¹⁶ With one meeting per week, the parliamentary defence committee was the second most active of the four selected Southeast Asian parliaments. It had 22 members, supported by 30 staff members (which is rather high) and a budget of US\$39,900. Both the budget and the large staff were important resources. The powers of the former parliament and its committees in the area of defence and security policy were rather weak, as will be discussed in the following section.

Methodology for Analysing Parliamentary Defence Oversight Powers

The data used in this article are based on a questionnaire on 'Provisions and Powers of Parliamentary Committees on Defence and National Security'¹⁷ that was distributed among parliamentarians, parliamentary staff and civil society representatives of Cambodia, Indonesia, the Philippines and Thailand who attended the workshop on 'Parliamentary Accountability and Security Sector Governance' in Siem Reap, Cambodia, in February 2006.¹⁸ The ques-

tionnaire aimed at providing a comprehensive overview of all formal powers that enable parliament to oversee the armed forces in these four countries. For the most part, the questions refer to the formal situation and not to the praxis of oversight.

The six areas of parliamentary defence oversight powers explained in the previous section were used for a questionnaire that evaluated a total of 104 powers. An index was

16. Freedom House, 'Freedom in the World—Thailand (2005)', available at <www.freedomhouse.org>.

17. Available at <<http://www.dcaf.ch/pcaf/tools/questionnaire.pdf>>.

18. The author is grateful to Congressman Mario 'Mayong' Juyo Aguja of the Philippines; Dr. Djoko Susilo, member of the parliament of Indonesia; Dr. Perapong Manakit, secretary of the Senate Standing Committee on Military Affairs of Thailand; and Mr. Im Sithol, research fellow of CICP in Cambodia.

constructed according to which a parliament's power to oversee the armed forces and defence policy can vary from full powers (100 per cent) to zero. Using the same set of questions as was used for a survey among parliaments of states in the Euro-At-

lantic area,¹⁹ it allows for comparisons to be made between the four Southeast Asian parliaments and those of states in North America and Europe. In the next section, the results are analysed for each area of parliamentary defence oversight powers.

Parliamentary Oversight Powers

General powers

Table 3 gives an overview of the five general parliamentary oversight powers that apply to all fields of government, including defence. The parliaments of all four Southeast Asian states have the power to initiate new legislation or to adopt legislation proposed by the government. In all parliaments, this power is not delegated to the defence committee, but remains a privilege of the plenary. Although all parliaments have the right to initiate legislation, most exercise this right only in exceptional situations. Legislation is nowadays a very complex, specialist and time-consuming issue. Many parliamentarians do not have the expertise or the time to go into the details

of developing new legislation. Therefore, in practice, most parliaments have delegated the legislative function to the government and only approve, reject or amend legislation.

The powers to design and initiate defence legislation are some of the greatest powers to determine national defence policy that a parliament can possess. The legal framework for defence is important to put the functioning of the armed forces on a legal footing. This framework is vast and includes the constitution and a wide array of laws and decrees, including: the military service law, law on obligatory mili-

Table 3. General Powers of Parliament

Country	Initiate legislation on defence issues	Question minister of defence	Summon military, civil servants	Obtain defence/ military documents	Hold defence hearings, inquiries	Total powers (per country)
Cambodia	X	X	X	X	X	5 (100%)
Indonesia	X	X	X	X	X	5 (100%)
Philippines	X	X	X	X	X	5 (100%)
Thailand	X	X	X	X	X	5 (100%)
Total (per power)	4 (100%)	4 (100%)	4 (100%)	4 (100%)	4 (100%)	20 (100%)
X: The parliament possesses the power.						

19. The results of this study are available in Hans Born and Ingrid Beutler (2006), 'Between Legitimacy and Efficiency: A Comparative View on Democratic Accountability of Defence Activities in Democracies', in Giuseppe Caforio (forthcoming), *Social Sciences and the Military: An Interdisciplinary Overview*, London: Routledge, pp. 261-268.

tary service, conscientious objectors and alternative service law, law on status of military personnel, law on reserve forces, laws on benefits and pensions, military discipline law, law on military justice, martial law, law on veterans, law on troop deployment abroad, law on the domestic use of the military, law on military intelligence, law on the military ombudsman and/or inspector-general and law on the organisation of the armed forces. In addition, numerous general laws also apply to the armed forces, such as the law on the state of emergency, laws on financial accountability and budgeting, state secret laws and anti-corruption laws. Furthermore, a wide variety of government decrees apply, such as those on military personnel policy.²⁰ Through its ability to influence where and when new legislation is required or amended, parliament has the power to influence defence policy.

Table 3 demonstrates that all selected parliaments can question the minister of defence. Similarly, the summoning of members of the military and civil servants to parliamentary committee/plenary meetings

to testify is a common legislative power in these states.

In all states examined, without exception, the parliament is granted the power to obtain documents from the ministry of defence and/or the military. This is an important power that leads to greater transparency and accountability of governmental and military decisions and actions. All parliaments are granted the power to conduct inquiries into defence issues and hold hearings on those issues.

The powers described above refer to the formal situation. Indications exist that these powers are not always used. For example, in Cambodia, the rights to question military commanders and experts from civil society, demand documents from the military, organise parliamentary inquiries and hold hearings were not used by the parliament during the last two years.²¹ On the other hand, the defence committee of the House of Representatives of the Philippines conducted approximately 16 investigations and hearings into defence-related issues in the same period.²²

Budget Control

The power of the purse is at the heart of parliamentary control and is parliament's most important oversight power, together with its law-making power. The power of the purse is based on the principle that the spending of taxpayers' money needs to be overseen by the people's representatives in parliament. It is the task of parliament to oversee whether the money is spent on the desired priorities in an efficient manner, according to the require-

ments of the law. Principles alone are not enough to assure the proper use of public funds. Therefore, many countries around the world have developed or are developing a systematic approach for the approval and evaluation of budget proposals: a planning, programming, budgeting and execution system. Basic characteristics of modern government defence budgeting in relationship to the role of parliament include:²³

20. Hans Born and Vincenza Scherrer (forthcoming), 'Democratic Oversight and Accountability', in *OECD Manual on Implementation Framework for Security Sector Reform*, Paris: OECD.

21. Information from Cambodian civil society representatives to author, February 2006.

22. Communication between congressmen and author, February 2006.

23. H. Born, P. Fluri and A. Johnsson (eds.) (2003), *Parliamentary Oversight of the Security Sector: Principles, Mechanisms and Practices, Handbook for Parliamentarians*, Geneva/Belgrade: IPU/DCAF, pp. 131-132.

Table 4. Budgetary Powers of Parliament				
Country	Access to all defence budget documents	Can amend and allocate defence funds	Control defence budget by line-items	Total budgetary powers (per country)
Cambodia	O	O	O	0 (0%)
Indonesia	X	X	X	3 (100%)
Philippines	X	O	O (programme level)	1 (33%)
Thailand	X	X	O	2 (67%)
Total (per power)	3 (75%)	2 (50%)	1 (25%)	6 (50%)
X: The parliament possesses the power.O: The parliament does not possess the power.				

- legality: all expenditure and activities should be in keeping with the law as enacted by parliament;
- power of amendment and allocation: parliament has the right to amend and allocate defence budget funds;
- transparent defence budgeting: parliament has access to all necessary documentation to enable transparent decision-making; and
- specificity: the description of every budget item should result in a clear overview of government expenditure, enabling parliament to control the budget at three levels: defence programmes, projects and line items.

Our analysis shows that a mixed situation exists in the four Southeast Asian parliaments. The Cambodian parliament does not possess any of the budget control powers mentioned in Table 4. Although the parliament has the formal right to adopt the yearly defence finance bill (while lacking sufficient time to debate the bill), it has no access to budget information; it does not have the right to amend or allocate defence bud-

gets; and it does not have the right to control government spending down to the level of individual items of the defence budget. The lack of full control over the defence budget may have the following consequences. Government's power to allocate public funds is not checked by the countervailing power of parliament. The lack of access to budget information facilitates corruption, abuse and mismanagement of public funds.

The parliament of the Philippines is slightly better off, as it has access to budget information, but it has no power to correct government spending. These powers are possessed by the parliaments of Indonesia and Thailand. The latter, however, lacks the power to exercise budget control at the level of line-items. Although the Indonesian parliament seems to be able to exercise full oversight of the defence budget, as mentioned before, only 30 per cent of the defence budget is financed from the treasury. The other 70 per cent, coming from private businesses owned by the military, falls outside parliament's budget control.

Peace Support Operations

Another important tool of parliamentary oversight is the constitutional or legal right to approve or reject the deployment of

troops abroad. Its importance lies in the fact that peacekeeping operations have become a permanent phenomenon in inter-

national relations. All four Southeast Asian states participate in UN peacekeeping operations. As of 31 July 2006, Cambodia

had 151 troops deployed in UN peacekeeping operations abroad, Indonesia 200, the Philippines 559 and Thailand 195.²⁴

Table 5. Parliamentary Oversight of Peace Support Operations

Country	Approval <i>a priori</i>	Mandate of mission	Approve mission budget	Duration of mission	Operational issues	Right to visit troops	Total (per country)
Cambodia	O	O	O	O	O	O	0 (0%)
Indonesia	O	O	X	O	O	O	1 (17%)
Philippines	O	O	O	O	O	X	1 (17%)
Thailand	X	X	X	X	X	X	6 (100%)
Total (per power)	1 (25%)	1 (25%)	2 (50%)	1 (25%)	1 (25%)	2 (25%)	8 (33%)
X: The parliament possesses the power. O: The parliament does not possess the power.							

Of the four countries, only the Thai parliament had full oversight powers over peace support operations. At the other end of the scale, the Cambodian parliament does not possess a single power to control the decision of government to send troops abroad. The Indonesian parliament has the right to approve or reject the budget of the peacekeeping operation. With this power, Indonesian parliamentarians have the opportunity to cancel or to alter the operation through the power of the purse. However, this power does not amount to prior authorisation of the operation. Once the government has sent troops abroad, calling back the troops during the mission harms the entire peacekeeping operation as well as the reputation of the country. The Philippines' parliament is in a worse position: it has only the right to visit troops when they are stationed abroad.

Regarding the prior authorisation of sending troops abroad, four models of parliamentary involvement can be distinguished:²⁵

1. Parliament has the right of prior authorisation of PSOs, including the right to discuss and influence the details.
2. Parliament has the right of prior authorisation but not the power to influence the detailed aspects of PSOs (including rules of engagement, duration of the mission and mandate), giving government full authority once parliament has authorised the mission.
3. Parliament does not have prior authorisation power. The government can decide to send troops abroad on peace missions without the legal obligation to consult par-

24. United Nations Department for peacekeeping operations (DPKO), 'Contributors to United Nations peacekeeping operations: Monthly summary of contributions', available at www.un.org/Depts/dpko/dpko/contributors/2006/july06_1.pdf.

25. Hans Born and Heiner Hänggi (2005), *The Use of Force under International Auspices: Strengthening Parliamentary Accountability*, DCAF Policy paper No. 7, Geneva. Available at www.dcaf.ch/_docs/pp07_use-of-force.pdf.

liament. Nevertheless, parliament is informed about the deployments.

4. Parliament has no authorisation power or right to information about future or pending PSOs.

Regarding the results presented in Table 5, the Thai parliament fits within the first category. Because the other parliaments do not have prior authorisation powers, they do not belong to the second category either. Since

the Indonesian parliament exercises the power of the purse concerning peacekeeping operations, it is very likely that it is informed by the government about the activities and costs involved. For that reason, one can assume that the Indonesian parliament belongs to the third category. It is not known to what extent the Philippines' and Cambodian parliaments are kept fully informed about ongoing peacekeeping operations. Therefore, it is unclear whether they belong to the third or fourth group of parliaments.

Defence Procurement

Defence procurement is an important step in the sequence of actions needed to set up and implement a security policy. Parliament plays an essential role in ensuring that procurement decisions focus on the right issues, as well as in finding solutions to problems such as bad trends or improper conduct. Such a role entails parliamentary involvement in the entire procurement process, including the preparation phase, the procurement itself and later during the life cycle of the programme after the conclusion of the contract. Whether parliament is granted any powers in determining the procurement of equipment, goods, ammunition and services is a matter of much variation in the countries studied.

In order to guarantee systematic defence planning, programming and budgeting, procurement plans need to be defined against the background of the existing national security plan, defence plan, military force structure plan and military personnel planning. Without these key documents, the danger exists that purchase of equipment will be based on military requirements alone, instead of in combination with national priorities as elaborated in national security plans.

According to the IISS Military Balance, Cambodia, the Philippines, Thailand and in particular Indonesia all bought considerable amounts of military equipment dur-

Table 6. Parliamentary Powers to Influence Procurement Decisions						
Country	Right to disapprove contracts	Right to all information	Involved: specifying need	Involved: selecting producer	Involved: assessing offers	Total (per country)
Cambodia	O	O	O	O	O	0 (0%)
Indonesia	O	X	O	O	O	1 (20%)
Philippines	O	O	X	O	O	1 (20%)
Thailand	O	O	O	O	O	0 (0%)
Total (per power)	0 (0%)	1 (25%)	1 (25%)	0 (0%)	0 (0%)	2 (10%)
X: The parliament possesses the power. O: The parliament does not possess the power.						

26. IISS, *The Military Balance 2005-2006*, London: Routledge, pp. 310-314.

ing the last decade, including military training fighter planes, state-of-the-art fighter aircraft, transport aircraft, modern combat helicopters, submarines, maritime patrol aircrafts, transport/tanker aircrafts and armoured vehicles.²⁶ To what extent was parliament involved in these decisions?

Our results show that Southeast Asian parliaments generally have either very limited or no control over the government's procurement decisions. Only in Indonesia is the government obliged to provide the parliament with all relevant information about possible defence procurement decisions; however, the government is not obliged to ask for the parliament's consent. In the

Philippines, the parliament is able to play a role in specifying needs for new equipment—however, specifying needs does not amount to approving defence contracts. Parliament plays no role in defence procurement in Thailand and Cambodia. The lack of parliamentary involvement in defence procurement can have the following consequences:

- Parliament cannot play a counterbalancing role against executive power.
- There is a lack of public debate about defence spending priorities.
- Unnecessary secrecy associated with procurement decisions leads to a greater risk of mismanagement, abuse and corruption.

Policy

Generally, politicians have limited interest in defence policy compared to other fields of government. They also have little active engagement in the formulation and supervision of national security, defence policy and the armed forces. Yet to ignore the importance of parliamentary involvement and debate is to ignore the fact that defence policy decisions involve vast amounts of resources, the lives of citizens and the welfare of the country. Furthermore, although politicians may not be routinely

occupied in matters of national defence, they may become interested or involved during a crisis or emergency. It is at this point that it may be discovered that the defence policy is not as expected or that the armed forces are not as compliant and effective as they were thought to be.²⁷ Civilian control of defence policy is a national responsibility, and therefore any policy change and decisions should focus on the processes of deliberation and justification in the national public sphere.

Table 7. Parliamentary Powers to Influence Defence Policy Decisions

Country	Security concept	Defence concept	Force structure, planning	Military strategy	Total (per country)
Cambodia	X	X	O	X	3 (75%)
Indonesia	X	X	X	O	3 (75%)
Philippines	-	-	-	-	-
Thailand	X	X	O	O	2 (50%)
Total (per power)	3 (75%)	3 (75%)	1 (25%)	1 (25%)	8 (50%)
X: The parliament possesses the power. O: The parliament does not possess the power. - : Not available or not applicable.					

27. See D.L. Bland (1999), *Parliament, Defence Policy and the Canadian Armed Forces*, Kingston, Ontario: School of Policy Studies, available at: www.queensu.ca/sps/defence/publications/claxton1/claxton1.pdf.

With regard to security and defence policy formulation, we see some interesting differences between the parliaments studied. While information on the Philippines is lacking, it can reasonably be concluded that all parliaments are in-

volved in policy formulation of national security and defence policy. The parliaments concerned are less involved when it comes to the more operational plans of force structure planning and military strategy.

Military personnel

Parliamentary involvement in military personnel issues implies that parliament ensures that the government takes its responsibilities as an employer seriously. Military personnel decisions involve, among other considerations, (multi-)yearly plans, ceilings for the numbers of military personnel and decisions to appoint or fire top military commanders.

The study shows a mixed picture concerning parliamentary involvement in military personnel decisions in Southeast Asia, varying from zero involvement in Cambodia and Thailand to a reasonable level of involvement of parliament in Indonesia and the Philippines. The power to give consent

to senior personnel is particularly important because it ensures that the appointments of the most important military leaders are subject to broad political consensus. It also ensures that the criteria for top appointments are not purely military, but also ensure that the commander has skills to function in a democratic civil-military context. However, in order to avoid politicisation of top appointments, a politically mature attitude is required from members of parliament as well. The power to impose ceilings on the maximum number of military personnel—a power possessed by the Philippine parliament—is an effective tool against uncontrolled growth of the armed forces.

Table 8. Parliamentary Powers to Influence Armed Forces Personnel Policy

Country	Military personnel plan	Setting number of personnel	Consent to appointments	Total (per country)
Cambodia	O	O	O	0 (0%)
Indonesia	X	O	X	4 (67%)
Philippines	-	X	X	2 (66%)
Thailand	O	O	O	0 (0%)
Total (per power)	10 (63%)	9 (56%)	8 (50%)	23 (50%)
X: The parliament possesses the power. O: The parliament does not possess the power. - : Not available or not applicable.				

Comparing the Parliamentary Defence Oversight Powers in Southeast Asia

In this section some general comparisons are drawn between the four Southeast Asian parliaments. This section also tries to answer why parliaments differ in the level of

oversight of the armed forces. Table 9 presents the comparisons per oversight power and Table 10 brings the parliaments together in a comparative perspective.

Table 9 shows that all general powers of parliamentary oversight are possessed by the four states. These powers include the right to legislate, question the defence minister and his staff and organise hearings and investigations. Previous research shows that these are also the baseline powers of parliaments of states in the Euro-Atlantic area.²⁸ However, the same is not the case for the power of the purse. Contrary to parliaments in the Euro-Atlantic area, Southeast Asian parliaments do not possess the full power of the purse. Of all possible budget control powers, parliaments in Southeast Asia possess only 50 per cent, as opposed to 81 per cent in the Euro-Atlantic area. Additionally, Table 9 shows that Southeast Asian states play hardly any role in defence procurement decisions: they possess only 10 per cent of all possible parliamentary powers to oversee defence procurement. As mentioned earlier, this lack of involvement may lead to unchecked defence procurement priorities as well as excessive secrecy and possible cover-ups of waste, mismanagement and corruption in military and government circles.

Table 10. Parliamentary Powers over Defence Activities: Ranking of States	
Country	Average of Powers
Indonesia	16%
Thailand	14%
Philippines	12%
Cambodia	8%

Turning to Table 10, it appears that the Indonesian parliament is the strongest of the four selected Southeast Asian parliaments, followed by Thailand, the Philippines and Cambodia. Additionally, previous research has shown that parliaments in the Euro-Atlantic area have considerably more oversight powers over defence policy. Whereas the four Southeast Asian parliaments possess between 16 (Indonesia) and 8 per cent (Cambodia) of all possible parliamentary defence oversight powers, in the Euro-Atlantic area this ranges between 93 (USA and the Netherlands) and 35 per cent (Turkey). How can these differences in parliamentary defence oversight powers be explained?

Explaining Differences in Parliamentary Oversight Powers in Southeast Asia

Six explanations exist for the differences in the role of parliament in the oversight of the armed forces in Southeast Asia: (1) the debate on 'Asian versus Western values'; (2) the level of democratisation; (3) the length of democratic experience; (4) the impact of the political system; (5) the role of the military during the authoritarian regime and its legacy for the new democratic order; and (6) the relationship between the general economic situation and democracy.

These six factors will be briefly discussed, not with the aim of providing a definitive answer, but in order to contribute to the discussion on the role of parliament in the oversight of armed forces.

A first explanation might be that governance structures function differently in Asia than those in the Euro-Atlantic area. Such an explanation would fit within the so-called 'Asian values' debate that flourished in the

28. The comments and comparisons with parliaments in North America and Europe (Euro-Atlantic area) are based on Hans Born and Ingrid Beutler, 'Between Legitimacy and Efficiency: A Comparative View on Democratic Accountability of Defence Activities in Democracies', in Giuseppe Caforio (forthcoming), *Social Sciences and the Military: An Interdisciplinary Overview*, London: Routledge, pp. 261-268. This research focused on the parliaments of the Netherlands, USA, Germany, Czech Republic, Switzerland, Macedonia, Sweden, Denmark, United Kingdom, France, Romania, Hungary, Poland, Spain, Canada and Turkey.

1990s, referring to the belief that Asian states possess a unique set of values and institutions based on the region's history and culture.²⁹ For example, in 1993 the then government leader of Singapore, Lee Kuan Yew, declared, 'I do not believe that democracy necessarily leads to development. I believe that what a country needs to develop is discipline more than democracy' (*Time*, 14 June 1993). However, others have pointed out that these types of remarks serve to legitimise authoritarian regimes in Asia. Moreover, the 'Asian versus Western values' debate oversimplifies reality by denying the diversity and richness of various cultures in Europe and Asia.³⁰ In spite of these objections, the local context of Southeast Asia cannot be disregarded altogether. It would be useful to explore whether parliamentary practices and traditions exist or are lacking in Southeast Asia and compare them with parliamentary practices elsewhere.

A second explanation might be given by the level of democratisation in the countries concerned. Level of democratisation can be defined as the human rights situation in a country, including political rights and civil liberties (right to vote, right to assembly, freedom of expression etc.). This concept is based upon the idea that having elections alone is not enough to constitute a democracy. Parliaments can function effectively only if members of parliament and society at large can freely exercise all these rights. According to the Freedom House survey on political rights and civil liberties in 2005, Cambodia is declared 'not free' because its elections were hampered by voter intimidation and media censorship. Political killings occurred and the government has recently shut down TV stations

and newspapers for criticizing the government and the king.³¹ The Freedom House researchers are more positive about the political rights and civil liberties situation in Indonesia, which qualified as 'free', whereas recent political instability in Thailand and the Philippines had given reason to qualify them as 'partly free'.³² Apparently, the human rights and political liberty situation in Southeast Asian states is not optimal, which is not conducive for parliamentarians to exercise effective and critical oversight over the government's defence policy.

Another way of defining the level of democratisation is to focus on the length of democratic experience in a country. This might be a relevant explanation because building up democratic institutions takes time. Writing the rules of procedure for a parliament may not be a lengthy process, but making sure that the rules are respected and used by people with experience and backed up by resources can require years. The longer a country's democratic tradition, the more the executive has to share its power with the legislature. As most parliaments in North America and Europe have a longer institutional tradition, this notion might explain that parliaments in Southeast Asia have generally weaker oversight powers than their Euro-Atlantic counterparts. Perhaps finding the right system of checks and balances between the executive and legislature is something which can be achieved only over time.

A fourth explanation for the difference in parliamentary powers might be found in the characteristics of the political system. Indonesia and the Philippines are presidential republics and Thailand and Cambodia

29. See, for example, Amartya Sen, 'Human rights and Asian values: What Lee Kuan Yew and Le Peng don't understand about Asia', *New Republic*, 14 July 1997.

30. Amartya Sen (1999), *Development as Freedom*, New York: Anchor Books, pp. 231-238.

31. Freedom House, Cambodia, *op. cit.*

32. Freedom House, 'Freedom In The World 2006: Selected Data From Freedom House's Annual Global Survey Of Political Rights And Civil Liberties', available online at www.freedomhouse.org/uploads/pdf/Charts2006.pdf.

are parliamentary democracies. However, these characteristics do not seem to explain the differences in parliamentary oversight powers in the four Southeast Asian states. First of all, compared to parliamentary oversight powers over defence policy in the Euro-Atlantic area, all parliaments in Southeast Asia are relatively weak. Secondly, the strongest parliament can be found in Indonesia (presidential system), the next strongest in Thailand (parliamentary democracy), the third strongest in the Philippines (presidential republic) and the weakest in Cambodia (parliamentary democracy).

A fifth explanation for the differences in oversight powers between Southeast Asian and Euro-Atlantic parliaments might be found in the role of the military in politics during the authoritarian regime and perhaps after the regime change. If the military played a powerful role during the authoritarian regime, it might be assumed that some residual privileges are still in place, making it more difficult for parliament—and the government for that matter—to exercise full oversight. How does the situation in post-authoritarian states in the Euro-Atlantic area compare with those in Southeast Asia? In Indonesia, the military was an important player in politics. Until 2004, the Indonesian military was able to appoint military personnel as members of the parliament. Furthermore, up to this day the Indonesian armed forces have successfully defended their privilege of collecting revenues through private businesses that are outside the scope of parliamentary oversight. Thailand was under military rule until the regime change in the first half of the 1990s (and now again after September 2006). In the Philippines, as mentioned before, the military played an important role in supporting or withholding support for the president, contributing to the oust-

ing of both Marcos and Estrada. In Cambodia, a protracted civil war gave an important role to militias and military forces, which either attacked or supported the government of the day. In the context of these four states, it can be assumed that the armed forces had time to build up a powerful position in the country and to protect their political and institutional prerogatives even after the regime change. In the former communist states in the Euro-Atlantic area, the situation was different. The military was always strongly under control of the communist party and did not play any political role outside the party. Because the subjugation of the military to the civilian rulers was the norm during communism, the post-communist democratic rulers had 'only' to focus on replacing the communist party control mechanisms with democratic accountability and civilian control mechanisms. Therefore, parliamentary oversight was easier to establish in these post-communist states than in the post-authoritarian states in Southeast Asia. It has to be underlined that Europe has also had its share of military (dominated) governments. In post-World War II Europe, military dictatorships existed in Greece, Portugal and Spain as well as in Turkey. From this point of view, the democratic transitions in Greece, Portugal, Spain and Turkey might provide valuable insights into Southeast Asian states.

A last explanation concerns the general economic situation or per capita income. Previous research has pointed out that a relationship exists between wealth and democracy. A higher per capita income is related to a greater chance that a democracy will take root and institutionalise.³³ Although it can be questioned whether democracy creates wealth or vice versa, the reasoning behind this relationship is interesting. The

33. Adam Przeworski (2004), 'Democracy and Economic Development', in Edward D. Mansfield and Richard Sisson (eds.), *The Evolution of Political Knowledge*, Columbus: Ohio State University Press. Also available at <http://www.nyu.edu/gsas/dept/politics/faculty/przeworski/papers/sisson.pdf>.

idea is that wealth leads to the development of a middle class and small business firms which can gain a living independently of the state. Additionally, the state has to bargain with the representatives of these middle classes and private business firms in order to gain financial and political support from these groups.³⁴ Furthermore, more wealth means more money and time for education. These factors influence indirectly the role of parliament, because this institution reflects the power structures of

society at large. There may also be a direct relationship between wealth and the role of parliament. In wealthy states, parliament is more likely to have sufficient funds and staff at its disposition to exercise oversight. Furthermore, in less wealthy states, the military is more likely to collect revenues outside the state budget as is the case, for example, in Indonesia. If armed forces are financed from sources outside the state treasury, parliament cannot use the power of the purse to steer them.³⁵

Conclusions

The objective of the article is to compare and analyse parliamentary oversight of the armed forces in Southeast Asia. A survey was used to compare the four parliaments of Cambodia, Indonesia, the Philippines and Thailand (before the September 2006 military coup). The survey is based on a questionnaire distributed among parliamentarians, staffers and civil society experts who attended the Siem Reap February 2006 workshop on parliamentary accountability and security sector governance in Southeast Asia.

The main findings are as follows:

- Firstly, the questionnaire was distributed to a limited group of parliamentarians, parliamentary staff and civil society experts from Southeast Asian states. Further research is needed to validate these preliminary research results.
- Based on an index for parliamentary oversight powers between 100 per cent (strong oversight) and 0 per cent (weak oversight), all four Southeast Asian parliaments have rather weak oversight powers. The Indonesian parliament possesses 16 per cent of all possible

parliamentary oversight powers, the Thai parliament (before the 2006 coup) 14 per cent, the parliament of the Philippines 12 per cent and the Cambodian parliament 8 per cent. These results are in stark contrast with the parliaments in North America and Europe, with the Dutch and US legislatures as the strongest (93 per cent of all possible oversight powers) and the Turkish parliament as the weakest (35 per cent) in the Euro-Atlantic area.

- The four Southeast Asian parliaments all possess the powers to initiate and amend legislation, question the defence minister and summon military officials and civil society experts to parliamentary hearings, as well as to conduct investigations and organise hearings. However, these powers are not necessarily fully used in practice.
- Parliamentary defence committees are better resourced and staffed in Indonesia and Thailand than in the other two countries surveyed; the defence committees of Indonesia and Thailand meet the most frequently. The Cambodian parliament is the least active parliament and also has the fewest resources.

34. Fareed Zakaria (2004), *The Future of Freedom: Illiberal Democracy at Home and Abroad*, New York: Norton Publishers, pp. 69-76.

35. A similar situation arises when the armed forces are financed on the basis of foreign military assistance programmes, which are executed outside the scope of parliamentary oversight.

- The Indonesian parliament has strong tools for controlling the defence budget. Through the power of the purse, parliaments can influence procurement decisions and peacekeeping operations as well as the number of personnel on the payroll. Nevertheless, the Indonesian parliament's power of the purse is limited because a substantial part of the armed forces' spending is financed through private businesses. The Cambodian parliament possesses little to no influence over the defence budgeting process. The parliaments of the Philippines and Thailand are between these two.
- Southeast Asian parliaments have little or no role in defence procurement. This may be a cause for concern, because defence procurement involves great sums of public funds—up to hundred of millions of dollars per contract. If military and government decisions are not subject to transparency and accountability, there is an increased risk of corruption and misuse of funds.
- Only the parliament of Thailand possesses full oversight powers on deploying troops abroad in peacekeeping operations. The Cambodian parliament is not at all involved in decisions to send troops abroad, while the parliaments of Indonesia and the Philippines play a rather marginal role.
- According to the collected data, the parliaments of Indonesia and Cambodia are able to discuss and possibly to influence national security and policy concepts.
- The consent of the Philippine and Indonesian parliaments is needed for appointing senior military personnel. The Cambodian and Thai parliaments are not involved in this type of personnel issue.

The general conclusion is that the parliaments in Southeast Asia have rather weak powers to oversee the government's defence policy and military. The consequences of a

weak parliament can be serious. Firstly, weak parliaments can lead to unchecked government military projects that do not enjoy democratic legitimacy and public support, e.g. deployments of troops abroad or the use of military force at home. Equally, it can lead to military projects, especially defence procurements, which are not sustainable financially. Thirdly, since power corrupts and absolute power corrupts absolutely, an unchecked government and military could lead to widespread corruption and misuse of executive power. Parliamentary accountability and transparency could counter these trends. Last but not least, human security is not only a matter of military force, but also of dialogue between all parties. Parliament is the forum for having substantive discussions about threats to security and possible measures to counter those threats. If parties cannot bring forward their demands and needs within parliament—i.e. within the political system—it will undoubtedly lead to political instability.

The September 2006 coup in Thailand shows that having a parliament as such is no guarantee against a military coup. Our results show that the Thai parliament was rather weak—in terms of defence oversight powers—and could not be considered an effective countervailing power against executive and military power. More specifically, the Thai parliament did not possess the power to exercise detailed defence budget control, to give consent to top military appointments, to check defence procurement contracts or to control the size and structure of the armed forces. Therefore, the Thai military was able to protect its prerogatives against any far-reaching democratic accountability and transparency. This conclusion raises concerns about the return to democracy in Thailand if the military is allowed to maintain its prerogatives. It also raises concerns about the privileges and prerogatives of the military in other young democracies in Southeast Asia.

On the basis of the analysis, some suggestions can be derived for strengthening parliamentary oversight of the military. We distinguish three avenues for strengthening parliaments: legal powers, capabilities and willingness of parliamentarians to exercise oversight.

Legal powers: Southeast Asian parliaments might consider demanding greater participation in decisions to send troops abroad. They also might consider requesting a greater and more detailed say in the approval of defence budgets as well as defence procurement contracts.

Capabilities: Having legal oversight powers is not sufficient. Parliamentarians need to have a well-managed defence committee in order to guarantee efficient and effective debates and specialisation in defence issues. This committee also needs to be backed up by sufficient staff and funds. To this end, a change in rules of procedures is advised to guarantee that the defence committee meets at least once per week. Par-

liamentarians might also consider appointing a member of the opposition party as the chair of the defence committee or at least as vice-chair in order to enable the members of opposition to exercise their oversight duties.

Willingness: Legal powers and capacity to oversee defence policy are necessary but not sufficient conditions for effective oversight. If parliamentarians are not aware of the importance of some executive decisions and policies or if they are not willing to hold the government to account, these legal powers and capacities are of no avail. Attitude is perhaps the most difficult factor to change, as it is not always dependent on individual parliamentarians. Equally important are the power structures of the political parties, which might make or break governments and parliamentarians. Nevertheless, it is important to expose parliamentarians and their staff to international meetings in which best practice and experiences of effective oversight are exchanged.

Dealing with a Past Holocaust and National Reconciliation—Some Insights and Reflections from the German Experience

Andrea Fleschenberg*

In Germany, we have been confronted with two different reconciliation processes in recent history: the Nazi regime, which claimed millions of lives worldwide, as well as the socialist regime of the Socialist Unity Party (SED), whose dictatorial legacy still poses a challenge to unified Germany. In Germany, processes of dealing with a burdened past are part of our general societal consensus and an important part of our political culture. But this has not always been the case, if one remembers the long way towards democracy and the continuous efforts to deal with the Auschwitz portent, as Hannah Arendt called it, ever since in postwar Germany. Due to the time limit, I can only briefly focus on the West German process of transitional justice.

During the last 60 years, Germany's socio-political development, nationally and internationally, has been shaped and somehow overshadowed by the unspeakable Second World War crimes, in particular the Holocaust among millions and millions of deaths caused by the totalitarian Nazi regime under Hitler in various countries. But the judicial prosecution was difficult and, as some German historians and journalists point out, one of the founding myths of the new democratic Germany is that the judicial prosecution of Nazi crimes was quite successful, although it wasn't (Perels 2006; Probst 2005; Herzinger 2003). In November 1945 International Military Tri-

bunal started with 21 main war crimes culprits, the remaining decision-makers of the Nazi regime, and a prosecution staff of 1,000 in Nuremberg, trying charges by the USA, France, Great Britain and the Soviet Union (the "Allies"). Its main goal was to prove individual guilt for Nazi crimes. Four different criminal categories were distinguished: participation in a war conspiracy, crimes against peace (aggression), war crimes and crimes against humanity. All accused pleaded "not guilty" (Probst 2006).

The process confronted the German public for the first time with its concrete guilt—a painful process for many, although the signs of the time were amnesia, amnesty and attempts at 'normalization' to stabilise the young democracy and integrate low-level Nazi perpetrators into the new political system and culture, partly also explainable by the continuation of former Nazi elites in the West German judicial and administrative system (Herzinger 2003). Between 1945 and 1949, only 100 of 4,500 persons indicted for Nazi crimes in German courts were charged with homicide (Herzinger 2003). In 1949, 1951, 1954 and 1968 several laws were codified which granted amnesties to certain Nazi perpetrators, including bureaucratic/organisational masterminds ("Schreibtischtäter"), and ended the denazification process, the lustration of former Nazi elites and public service employees, initiated by the Allied

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forces (Herzinger 2003, Perels 2006). It was only in 1958 that West Germany established a central judicial administration office in Ludwigsburg, responsible for the systematic prosecution of Nazi crimes. Around 500 persons were convicted on charges of involvement in the Holocaust, while many trials were initiated only due to charges being presented by individuals, coincidence or some committed prosecutors (Herzinger 2003). According to recent statistics of the Ludwigsburg office, of the 6,497 indictes in trials against violent Nazi criminals, only 166 were sentenced to life imprisonment. The majority escaped long sentences through a judicial exculpation rather distant from any kind of critical stance toward the Nazi dictatorship: they were seen as assistants, committing, not their own, but somebody else's crimes in a totalitarian state (Perels 2006).¹

But the judicial eye-openers for the West German public, changing the self-perception of many Germans (so Herzinger), were the Auschwitz trials held in Frankfurt from 1963 to 1965 in combination with the Eichmann trial held in Jerusalem in 1961—despite low sentences and no remorse shown by the 22 indictes of the Frankfurt trials (six sentenced to life imprisonment, 11 to three and a half to 14 years' prison, three acquitted and two died or were released due to illness) (Herzinger 2003). This coincided with the second phase of West Germany's transitional justice process in the second half of the 1960s, which was marked by a questioning from the children's and grand-children's generations about what their parents and grand-parents did and how far they were guilty. This process, taking place in the family, the courts and the archives, changed the spiritual and moral climate profoundly, as Aleida Assmann explains (Herzinger 2003).

The Nazi regime was understood as a unique breach of civilisation that represented an obligation for the German state and its citizens to ensure a historical responsibility of 'never again', 'never again war from German soil', with profound implications for Germany's societal consensus, self-understanding, political education and foreign policy. The third phase started around 20 years ago with the so called 'historians' controversy' discussing how to integrate this unique and outstanding mass crime of the 20th century into German and European historiography (Aly 2006). And the challenge remains today to understand fully what happened and how during the Nazi regime and to deal with this burdened past through different means and instruments.

Since the early German experience with war crimes tribunals and judicial prosecution of a totalitarian dictatorship and its masterminds and executioners, a remarkable process has taken place on a worldwide scale, on which I would like to focus the rest of my presentation, which will hopefully allow us to see our different kinds of reconciliation processes, not only the challenge which Cambodia now faces, from a more systematic and embedded or rather holistic angle of democratisation efforts worldwide of which any kind of transitional justice or reconciliation efforts represent an integral part. Without a realistic and nationally owned assessment of the parameters of dealing with a burdened past—power brokers, vetoes, geopolitical influences, societal needs, problems and composition, transitional stability etc.—and without the understanding that it might be advisable to combine various instruments in different phases depending on the current balance of moral imperatives and socio-political necessities and problems, political reconciliation processes—taking decades if not generations—might fail. But let's take a

1. By comparison: after German reunification in 1990, 22,250 preliminary proceedings against political police officers ('Stasi' members), lawyers, SED party officials and soldiers and 877 trials were conducted. Similarly, nobody could be convicted if s/he did not break the East German SED laws—similarly to the interpretation vis-à-vis Nazi culprits (Nolte 2006).

step back to look into these aspects in more detail.

Reconciliation take place in different shapes and forms in various countries throughout the world, in part through the third wave of democratisation which began in Portugal in 1974 and spilled over into Latin America and Southeast Asia and the fall of the Berlin Wall in 1989. It has become more and more difficult for many former rulers and officials to avoid dealing with their repressive dictatorial past. Worldwide political opinion and the international community, especially transnational networks for

human rights and victims, have been able to oppose the usual amnesia and amnesty of these former rulers with a successful campaign for justice through criminal prosecution and the truth and by establishing precedents under international law during the past two decades. Nevertheless, time and again there are very loud voices that demand a clean break with the past in the name of peace, inner political stability and unity and that proclaim reconciliation as the path to the democratic future of their country, even without revealing the truth and pointing out responsible parties.

What do Reconciliation Processes Involve in General?

A reconciliation process involves all the activities of a democratic political system in dealing with its legacy of dictatorship (or conflict). It generally takes place after a system has changed or collapsed. The previous political system, which is regarded as negative or illegitimate, is evaluated in the new political system by current political and social officials, civil society and successive generations in order to come to terms with the present. It encompasses the collective process of a country which is multi-dimensional, complex, open, emancipatory, step by step and difficult to be controlled and directed by the political and social players involved. In this process, the individual and collective political biographies, the structures and decisions made, responsibilities, patterns of behaviour, values, concepts, as well as the entire political, economic, cultural and social legacy and the consequences of the previous political system are re-evaluated in terms of the specific culture—with different consequences for offenders, accomplices, bystanders and victims. The goal is to legitimise the new political system *ex negativo* through enlightenment and transparency, to establish a new collective identity and memory, to promote democracy and to establish a general consensus for all of society (Fleschenberg 2004: 31-32).

Therefore, processes of coming to terms with the past are a central and indispensable part of a sustainable democratisation. According to Ferdowsi and Matthies, a collective memory which is imbued with violence, trauma and the destruction of human capital (the representatives of society) through suppression and human rights violations bears the far-reaching consequences of many years of armed conflict that weigh heavily on the affected society and lead to a widespread deficit in social capital, i.e. mutual trust for one another. This social capital is essential for building a functioning democracy and a sustainable *civic culture*—a peaceful and democratic political culture—which is understood and accepted by the citizens of the affected country as being inclusive and representative. (Ferdowsi & Matthies 2003: 326) All citizens should feel welcome and integrated into the new social political system—in particular also the victims who were often marginalised in society and should not become victims a second time; and also the offenders and the accomplices—the crux of the reconciliation process often involves this exchange of interests—who were the responsible parties in the old system.

In most democratising and post-conflict societies, reconciliation represents an almost unsolvable task or balancing act between the imperatives of political ethics and what is attainable through practical politics. This is because, in the post-conflict transition process, according to Ferdowsi and Matthies, the main players are confronted with a series of characteristic dilemmas and conflict of objectives:

- the difficult economic, societal and institutional consolidation of peace and the establishment of a general democratic consensus for all of society;
- the interdependence of success and failure within and among the individual branches of the state and society;
- the conflict of objectives between democratisation and attaining political stability;
- the conflict of objectives between prosecuting crimes against humanity by a state under the rule of law and pragmatic considerations in terms of practical politics or geo-strategies (security versus justice);
- the creation of an effective state (monopoly of power, rule of law, interventionist state), in order to establish struc-

tural stability; and

- the demobilisation and civil control of the military and former armed / guerrilla fighters in spite of a lack of resources and traditions of civil control. (Ferdowsi & Matthies 2003: 343-347).

Coming to terms with the past is a cross-sectional variable with a multitude of social, socio-economic and political security tasks to be overcome by a post-conflict society. How does one deal with the past elite and collaborators and their offences as well as resistance fighters and victims? How should and can the traumatising legacy of conflict be integrated into the new collective memory and the newly established general democratic consensus? How can one be guaranteed that the new political system will be inclusive, representative and thereby worthy of trust and participation by all citizens? 'The consolidation of peace is essentially a political and societal project, rather than one of material supply and the reestablishment of a physical infrastructure', which should not only be controlled from above, but rather should especially be developed from the grassroots level (Ferdowsi & Matthies 2003: 35-36).

When Do Reconciliation Processes Take Place—Which Conditions and Influences Exist?

During the past two decades, we have been witness to a multitude of different reconciliation processes and their results. Their development and success are widely influenced by a large number of factors. First of all, the balance of power between the old and the new forces is of major importance before and after the transition and the democratisation process: does this involve a revolution, a system collapse or perhaps a negotiated transition in which the former rulers, who are still powerful, have secured privileges and amnesty agreements and can thereby dictate a narrow room for manoeuvre to the new officials?

How fragile or sustainable is the process of democratisation? Some of the Latin American transitions in the 1990s made this clear to us.

Additional factors are the legitimacy, competence and qualification of the new rulers as well as experience with transitional justice, which means post-dictatorial criminal prosecution on the national and international level. Attracting considerable attention were the cases of Pinochet (Chile), Milosevic (Serbia) and, just recently, Charles Taylor (Liberia), which are interconnected in terms of their effects, both positive and negative. The

international context also plays a decisive role—which I will consider later in detail.

Also, questions of the availability of organisational and financial resources are of importance, for example, in terms of the legal system and the availability of qualified personnel and functioning institutions. Further influential factors include (1) the current problems of the country to be overcome, e.g. the economy, as well as daily political interests and power alliances; (2) the significance of the reconciliation processes for the collective identity; (3) the extent and degree of involvement of individuals as offenders, accomplices, instigators, followers or dissidents—i.e. does this involve hundreds of thousands of offenders as in the

case of Rwanda or a “specific” group of people of a political or military elite as in the case of Argentina or Chile; and (4.) the degree of political polarisation and societal stability and peace (Fleschenberg 2004: 34).

Important prerequisites are a free press, a critical number of victim and human rights groups which are able to assert themselves in society and are visible in the political public, a negative assessment of the previous system by a majority of political actors and society and especially the will to break with the continuity of the *ancien régime* among political officials and a large section of the political public (Fleschenberg 2004: 33).

What Kinds of Reconciliation Processes Are There?

There are numerous possibilities, for example: (1) individually through repression, reprisals or biography; (2) legally through national, international or hybrid criminal prosecution or amnesty for responsible parties and offenders, reparations and/or rehabilitation for victims; (3) politically through legislation, lustration or inquiry commissions; (4) economically through restitution or lustration; (5) socio-culturally through commemorative culture, public debates or civil society initiatives such as history workshops and victim organisations; and (6) scholarly through research and political education. Societies have used various vehicles for their reconciliation processes (Fleschenberg 2004: 34). The most well-known methods are:

- Amnesty legislation, for example at the end of the 1980s and the beginning of the 1990s in many Latin American countries as a deal with most of the ruling militaries and dictators, in order to give them an incentive to permit democratisation.
- Truth and reconciliation commissions, as we know them from Latin America,

South Africa and East Timor. These commissions are supposed to make possible the extensive documentation of the burdened past as well as the responsible parties and victims, especially if the mechanisms of criminal prosecution are not (yet) in place. It was problematic in many cases—just as in East Timor recently—that the final reports and their recommendations resulted in implementation by governments in only a few cases—such as criminal proceedings or compensation for victims—or political education work and public discussion by all of society.

- National, hybrid and international tribunals have had various results and effects, as experience has shown with the International Criminal Tribunals for the Former Yugoslavia and Rwanda, or the hybrid tribunals in East Timor and now in Cambodia. Problematic is the question of which offence is punishable in which period of time and which responsible parties are liable to criminal prosecution and punishment.
- Lustration was carried out primarily in

post-Communist central and eastern Europe, as well as in post-revolutionary Portugal. In the process, a certain group of people such as members of the ruling political party or the secret police, which were mainly responsible for carrying out the repression, are generally refused access to public and political office, i.e. to ministries, parliament or the judiciary, in the new democratic system.

These mechanisms are individual components in an open process and do not mutually exclude each other, but rather supple-

ment or build on one another—depending on the fragility or sustainability of the democratisation process. Faced with the challenges of conflict and post-conflict societies, the United Nations, through Secretary-General Kofi Annan, does not recommend that governments codify amnesty for genocide, war crimes and crimes against humanity, but select an approach that compromises among the various socio-political challenges, including the prosecution of responsible parties, the truth, reparations, maintaining peace and building democracy ruled by law (Kofi Annan 2004, quoted in: Fleschenberg 2006: 141).

What Role Does the International Community Play?

The role of the international community—which means individual states, international organisations such as the UN or transnational human rights networks—depends on the situation, both geo-strategically and the way in which local reconciliation processes and their successes and failures are perceived internationally. In the process, the following areas of international support can be distinguished from national reconciliation processes according to Roht-Arriza (2001: 40ff):

- international and transnational activities, transfer of knowledge and cooperation for national and hybrid tribunals, truth commissions, political discourses according to existing human rights institutions and norms through individual governments, international organisations and human rights networks in civil society;
- legal action by the national courts of a country against the responsible parties of another country in civil or criminal cases, e.g. the case of Pinochet and the efforts of Spanish Judge Baltazar Garzon, or proceedings under the US Alien Tort Claims Act, e.g. against the Filipino dictator Ferdinand Marcos or General Karadzic (former Yugoslavia), which

were met in part with a massive response in their home countries, which in the case of Chile and Argentina made possible independent criminal prosecutions;

- the creation of new criminal prosecution institutions such as international ad hoc tribunals for the former Yugoslavia and Rwanda, as well as the newly created permanent International Criminal Court (ICC), whose court decisions have established precedents and norms for international proceedings;

The international community has not always acted coherently, and the United Nations in particular has not always conducted itself as an advocate of truth-seeking processes, accountability and criminal prosecution. Nevertheless, UN workers on location as well as transnational human rights networks have especially supported local human rights and victim initiatives time and again and have given an internationally audible and sustainable voice to their needs. Furthermore, previous reconciliation processes serve as examples for mechanisms which are currently being established for specific cultures and situations and require international support (*ibid.*).

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Dealing with War Crimes and National Reconciliation—Learning from Sierra Leone

Binta Mansaray*

Sierra Leone is situated on the west coast of Africa, a small country with a population of about 5 million. It gained independence in 1961. It has a tropical climate similar to that of Cambodia. It is endowed with natural resources—gold, diamonds and bauxite, to name a few. Sierra Leone was a very peaceful country until the 1990s.

From 1991 to 2002 the country experienced a civil war, which was the outcome of decades of bad governance, political and economic marginalisation of the masses and a lack of respect and protection of fundamental human rights by an oppressive one-party regime. Social malaise and a deep sense of hopelessness in the political establishment and all state institutions led to an insurgency. The insurgents were later joined by the national army to fight against the government in power.

This period was characterised by 11 years of some of the worst human rights abuses ever committed—namely 11 years of raping and gang raping of women and girls, 11 years of forcible recruitment of children into combat and mass abductions of the civilian population, 11 years of widespread and systematic arson attacks that resulted in the massive destruction of whole families and villages, and lives and property. This period was also characterised by brutal amputation and maiming of the civilian population. For years, war-related suffering continued with no end in sight.

To put an end to the bloodshed and to pro-

mote national reconciliation, a political solution was proposed by west African regional leaders and the international community. Several attempts at peace agreements were made. The peace agreement that was most enduring and relatively comprehensive was the Lomé accord signed in July 1999.

The question that arises at this point is, when does the process of forging national reconciliation start? The Sierra Leone case shows that it formally starts with peace agreements. Peace agreements should and must set the framework not only for ending hostilities but also for fostering national reconciliation. If this is true, then the next question is, should negotiating peace agreements be the business of only the warring parties, regional leaders and the international community? From the Sierra Leone experience, the answer is no! Civil society was heavily involved in the negotiation process. Prior to peace negotiations, the government, through the National Commission for Democracy and Human Rights, held a nationwide consultative conference to solicit civil society's views for consideration during the negotiations. Some of the provisions contained in the Lomé agreement, such as the establishment of a truth and reconciliation commission (TRC), were drawn from the recommendations of the consultative conference. Such an approach of involving civil society right from the onset of peace negotiations promotes ownership of the agreement by the people and therefore facilitates national reconciliation.

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A two-track approach was adopted by the Lomé accord—combining non-accountability and accountability measures in order to promote national reconciliation.

Non-accountability measures included provision for the establishment of a government of national unity with warlords participating in government at very high levels—Foday Sankoh, the former rebel leader, was given a position equivalent to a vice president, and all combatants were given a blanket amnesty for all crimes committed up to the day of the signing of the accord. These provisions were unpopular and perceived by some as rewarding the combatants and warlords for serious human rights abuses. Through a sustained public sensitisation campaign by the government and civil society peace activists, the people of Sierra Leone were able to live with this decision.

Two other significant non-accountability provisions were the establishment of a national committee for the disarmament, demobilisation and reintegration of ex-combatants, and a national commission for reconstruction, rehabilitation and resettlement of victims. The former required that ex-combatants be provided a minimal socio-economic assistance through a one-off reinsertion allowance and livelihood skills training. This posed a significant challenge for national reconciliation because it was perceived as payment to ex-combatants for crimes they had committed. The latter provision was laudable because it acknowledged the sufferings of the civilian population and proposed measures to alleviate them. Such acknowledgment proved to be essential for national reconciliation.

The Sierra Leone experience illustrates that no peace agreement can be implemented successfully without the participation of civil society. The Lomé agreement was implemented through the collective efforts of government agencies, civil society, local

traditional leaders, religious leaders, women's organisations, youth organisations, children's agencies, the international community, United Nations peacekeepers and regional leaders. In these ways, a wide range of services, including psycho-social services, were provided to both victims and child soldiers. Community reconciliation was implemented through traditional mediation or conflict resolution such as cleansing ceremonies—traditional beliefs for reconciliation. Reconciliation committees were set up, in large part, through efforts of the Sierra Leone inter-religious council to facilitate community acceptance of perpetrators.

Currently human rights activists are advocating tirelessly for better protection of and respect for fundamental human rights. Civil society is enjoying greater freedom of speech today than at any other time in the history of Sierra Leone. Anyone, regardless of age, anywhere and at anytime, can talk about the war and its effects. There is a healthy and free public debate about the past and how to deal with it. People can debate the causes of the war and assign blame publicly as they see fit. This type of environment also contributes to national healing and reconciliation. This in no way suggests that we have achieved 100 per cent reconciliation. The country still faces reconciliation challenges (difficulty arising from communities' reluctance to accept girl soldiers and war-related girl mothers) despite significant progress on other fronts.

Accountability mechanisms are the TRC and the Special Court. Again, civil society was heavily involved in these processes. For accountability mechanisms to be credible, the people must be involved in their activities.

Whether it is truth commissions or transitional criminal tribunals, their activities must be transparent, and public discussions about the operations of these institutions

must be encouraged. Whether these discussions are favourable or not to the institutions does not matter; what matters is space for the expression of diverse views. The timing of the setting up of accountability mechanisms is critical in promoting reconciliation.

The Sierra Leone Truth and Reconciliation Commission was set up by the Lomé agreement of 1999. The TRC law was passed in February 2000—its mandate included setting up a forum for truth telling by victims and perpetrators in order to establish an accurate historical record of the causes of the war and the human rights abuses committed, and to make recommendations for their non-recurrence. It did not have prosecutorial powers. Its hearings were public and transparent and were broadcast live. It held satellite public hearings in other parts of the country. The commission has completed its work and its recommendations include establishing a trust fund to support a nationwide reparations programme for war victims, restructuring of the armed forces—military and police—and undertaking a law reform and judicial reform programme. Most of these initiatives are already being implemented.

The Special Court for Sierra Leone was created by an agreement between the government of Sierra Leone and the United Nations. Setting up a criminal accountability mechanism was not part of the provisions of the peace agreement. Due to breaches of the peace accord, most notably the abduction by the Revolutionary United Front of 500 UN peacekeepers charged with disarming the fighters, the president of Sierra Leone wrote a letter requesting assistance in setting up a court. This was how the Special Court came about. The court was set up by an agreement in January 2002, a few days after the official end of the war.

Its mandate is to bring to justice those al-

leged to bear the greatest responsibility for serious crimes committed during the war. One of the aims of establishing the court is to contribute to peace and reconciliation through justice, for there are those who say there is no peace without justice.

There was a national debate about whether the TRC was enough to address the war-related human rights abuses. Opinions were divided. Those in favour of the court cited impunity as an element counter-productive of national reconciliation.

Opponents' views were wide ranging: let sleeping dogs lie, the peace process was too fragile, there was no need to open old wounds, the combatants would take up arms again. These were all real and legitimate concerns, but the concern of perpetuating impunity by not bringing people to justice was most compelling.

In order to address issues raised by opponents of setting up a court to try people for crimes committed during the war, civil society advocates of the court formed a working group called the Special Court Working Group. Their mission was to sensitise the people to the necessity of combating impunity.

The court set up a dedicated office—the Outreach Office—to engage and interact with the people by establishing two-way communication and to explain its work and receive feedback on the same. Through its Outreach Office, the court is able to manage expectations—setting up a forum for transparent and honest dialogue about its work—and establish partnerships with civil society for information dissemination. These partnerships include partnerships with victims and ex-combatants alike. This strategy emphasises that in a country that has gone through untold sufferings and trauma of war, engaging with the affected population and encouraging dialogue about the past will foster national reconciliation.

The Sierra Leone case study shows that in order to promote national reconciliation, the voices of those who bore the brunt of the war must be heard throughout the reconstruction and reconciliation processes. Peace agreements must set the

framework for ending hostilities, and national reconciliation and the past must also be confronted by setting up accountability mechanisms in a timely fashion to assist affected countries' transition from war to peace.

Dealing with Genocide and National Reconciliation: Learning from Rwanda

Hildegard Lingnau*

1. The Rwandan Challenge

Rwanda is one of the poorest countries in the world. Its history is marked by a series of persecutions and massacres culminating in civil war 1990-94 and genocide in 1994. After ending the genocide, the victorious FPR (Rwanda Patriotic Front) formed a government of national unity including all political parties except those that prepared and committed genocide. The new government faced an enormous challenge of reconstruction and development. Coming to terms with genocide was perceived as a *conditio sine qua non* for progress in all areas (especially political and economic development). Fatuma Ndagiza, the executive secretary of the National Unity and Reconciliation Commission (NURC) puts it as follows: 'Looking at both human and material destruction caused in 1994, one did not have any other option of handling the situation save that of confronting the reality. We had to begin with the first things first: to embark on reconstruction, reconciliation, justice, restoring human rights observance and good govern-

ance. Our approach had to be both holistic and realistic' (Ndangiza 2003: 3).

The article will present in the following section 2 how Rwanda tried to come to legal terms with genocide: through classic justice, through the International Criminal Tribunal for Rwanda (ICTR) and through *gacaca* jurisdiction. As coming to legal terms is just one way of challenging the effects of genocide, the government complemented the legal efforts by setting up the NURC in 1999, thus trying to promote unity and reconciliation in a much broader way. The work of the NURC will be presented in section 3. Against this background and taking into account contemporary research on dealing with genocide and gross human rights violations, conclusions are drawn and recommendations are formulated in section 4 in order to help other countries (like Cambodia) to come to terms with their past, too, thus enabling them to make their way to a hopefully peaceful and prosperous future.

2. Coming to Legal Terms with Genocide

2.1 The Classical System of Justice

Rwanda after genocide had to challenge an enormous caseload of more than 100,000 persons suspected of involvement in the

genocide being held in prisons or so-called 'cachots'.¹ Given the limited capacities of this small country's classic judicial system

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1. The executive secretary of the NURC describes the challenges as follows: 'Justice is the most crucial aspect when dealing with effects of genocide ... For the Rwandan case, the situation is made ... complicated by the fact that for 1,000,000 people to be killed in less than 100 days, hundreds of thousands or most probably millions of people must have been involved in the killing'. (Ndangiza 2003: 5).

and given the fact that most of the lawyers (prosecutors, judges etc.) were killed or had left the country, it would have been impossible—even within a period of 100 to 200 years—to take every single case to trial.

Neither was it possible to opt for quick solutions (e.g. release against bail, amnesty etc.), since such approaches would have been tantamount to continuation of the decades-long practice of impunity, which was one of the main causes of the 1994 genocide and would thus jeopardise the fragile reconciliation process.

As a means of overcoming the dilemma and speeding up the process of coming to legal terms with the genocide, the 'Rwandan Law on the Organisation of the Prosecution of Crimes of Genocide and Crimes against Humanity' was drafted, which defined four categories for prosecution.

Category 1 applies for all persons who stand accused of planning, instigating or super-

vising genocide or crimes against humanity (the 'masterminds of genocide'). Category 1 offenders are to be prosecuted in the framework of the classic judicial system. The majority of crimes (categories 2-4) are to be dealt with in the framework of an alternative system of justice, called *gacaca* jurisdictions (see 2.3).

In order to facilitate the work of both prosecution and penal authorities, the law also provides for the possibility of substantially reducing (i.e. halving) the sentences of offenders who facilitate prosecution by volunteering a confession.

As a consequence, Rwanda's classic judicial system was now faced with the task of dealing 'only' with category 1 offenders instead of having to prosecute the hundreds of thousand persons who stand accused of genocide crimes. It is estimated that this group consists of some ten thousand persons. This still represents a huge challenge for Rwanda's system of criminal justice.

2.2 The International Criminal Tribunal for Rwanda

The International Criminal Tribunal for Rwanda (ICTR) was created by resolution of the UN Security Council in 1994 to deal with the Rwandan genocide. It and the International Criminal Tribunal for the former Yugoslavia were the first two international courts established for a specific purpose. Despite its excellent endowment (a budget of US\$90 million per year as well as a staff of roughly 800 persons), by the year 2002, the tribunal was able to close the books on no more than nine cases. Still today it is unclear whether and how it will be able to fulfil its mandate by 2008, when it ends. The ICTR has not only come in for criticism for its poor performance record, but also for other reasons:

- persons suspected of involvement in the genocide were employed as ICTR staff;
- testimonies of witnesses have been made

public and witnesses therefore must fear for their safety;

- witnesses have been treated like accused persons and subjected to extremely painful confrontations (above all women called upon to testify in cases of rape), while accused persons have been treated with respect and infinite patience.

The renowned International Crisis Group (ICG) concludes: 'For the majority of the Rwandans, the ICTR is a useless institution, an expedient mechanism for the international community to absolve itself of its responsibilities for the genocide ...' (ICG 2001:2.)

For these reasons, not only the organisations of the survivors of the genocide (IBUKA, AVEGA and others), but also the government of Rwanda have refused (at

least for some time) to cooperate with the ICTR.

The ICG comprehends this positioning and critically assesses: 'The performance of the ICTR is lamentable'. (ICG 2001:1.) 'Every day, the mission of the ICTR becomes more

of an historical exercise, with less and less chance of having an impact on events in the present. To tolerate such a situation, and support it for too long, would be a second betrayal of the people of Rwanda.' (ICG 2001: 2.)

2.3 Gacaca Jurisdictions

Against the background of the limited capacities of the classic system of justice, the years 1997-2001 were characterised by broad discussions of having some sort of alternative justice. Initially, the representatives of the international community were very sceptical, but finally adopted a constructive approach as they realised that there was no alternative. The now constructive discussion led to many efforts to further develop the concept of an alternative (decentralised and participatory) system of justice called '*gacaca* jurisdictions' that should deal with the majority of pending cases (i.e. all persons accused under categories 2-4, i.e. about 767,000 persons). The relevant law was enacted in 2001 and the first (of 12,000) *gacaca* jurisdictions became operational in 2002. The whole exercise will now be finished at the end of 2007.

The *gacaca* approach originates from a traditional, pre-colonial system of conflict management and justice in Rwanda under which lay judges were responsible for dispensing justice in public. The system is called *gacaca* because this word means 'lawn' or 'grass' in Kinyarwanda and designates the place where the proceedings take place (i.e. on the grass). The new *gacaca* thus is a type of modernised village jurisdiction that has been reinvented to complement the classic justice system in the extraordinary situation of having to come to legal terms with genocide.

In March 2001 the 'Organic Law Setting up Gacaca Jurisdictions'² was adopted. According to President Kagame, the law pursues the following goals:

- to find the truth about what happened and to make it public;
- to accelerate the administration of justice;
- to put an end to the culture of impunity;
- to reconcile and unite Rwandans on the basis of justice;
- to make it clear that the Rwandan family can solve its own problems.

Gacaca jurisdictions became operational in 2002. The trials take place where the defendants are accused of having committed their crimes, i.e. where there may still be witnesses able to incriminate or to exonerate accused persons and where, in the end, the process of reintegration and reconciliation will have to take place. The trials are conducted in public once a week. Beside the accused and the 19 community-based lay judges, they must be attended by at least 100 persons of the 'cell' concerned. By involving entire communities and directly confronting accused persons with victims, witnesses and other community members, the *gacaca* jurisdictions are expected to advance the reconciliation process and facilitate the reintegration of offenders into their communities afterwards. Moreover, the *gacaca* law includes important incentives to

2. Loi organique no. 40/2000 du 26.1.2001 portant creation des juridictions Gacaca et organization des poursuites des infractions constitutives du crime du genocide ou de crimes contre l'humanité commises entre le 1er octobre 1990 et le 31 décembre 1994.

confess: since *gacaca* builds on the willingness of the parties involved to confess and to forgive, confessing offenders have the prospect that their sentence may be reduced by half and that they will be released from prison immediately after trial, as the sentences provided for under the *gacaca* procedure may not exceed 15 years, half of which is served in prison, half worked off in freedom in the form of community service, and most of the accused have already been in detention since 1994. Thanks to this clause and to the tireless efforts of the National Unity and Reconciliation Commission (NURC), who went to the prisons and 'cachots' to convince the defendants to confess and to contribute to revealing what happened during 'the events'³ tens of thousands spoke out and confessed their guilt.

Many justified questions and concerns have been expressed concerning the *gacaca* jurisdictions. Some of the most important ones are the following:

- whether the training of the lay judges was adequate;
- whether the population has been sufficiently informed;
- whether respect for the rule of law is ensured (especially respect for principles of due process);
- whether there is enough capacity to pro-

vide trauma counselling;

- whether monitoring of the whole exercise is ensured;
- whether victims will dare to speak out, since there is little incentive for them (there is still no compensation for the victims⁴), but a lot of risks.

All these issues are regarded as critical. However, in view of the constraints described above (especially in terms of time and funding), it was simply not possible to come up with a better solution than the *gacaca* law. For Rwanda, quite obviously, there was no feasible alternative to *gacaca* jurisdictions. On the contrary: it would be a great success if in other cases of genocide or gross human rights violations, solutions like *gacaca* jurisdictions could be found. In most other cases (as for example in the case of Germany after the Holocaust) this opportunity was missed.⁵ It is therefore hoped that this wholly unique experiment will be a success and that this alternative approach to justice will prove able to come effectively to terms with genocide, to allow Rwanda to embark on a sustainable course of reconciliation and development and also to demonstrate to the world that alternative dispute-settlement procedures can be used to supplement the classic system of justice

3. ... But Not Only in Legal Terms

The legal approach (classic justice system, ICTR and *gacaca*) is very limited by its nature:

- in terms of time: it refers only to the past (and cannot refer to the present or

actively prevent wrong-doing in the future);

- in terms of scope: it is limited to individual offenders and must prove each and every crime in detail (instead of in-

3. 'The Unity and Reconciliation Commission has ...gone around the country sensitizing both prison inmates and the community at large to massively participate in the Gacaca process and tell the truth about what happened in their villages. We are encouraging the prisons inmates to confess and repent, but at the same time encouraging the survivors to forgive those who repent and open up a new chapter in their relationship.' (Fatuma Ndingiza, executive secretary of the NURC, 2003: 5f).

4. Rwanda still lacks an indemnification law and the resources required for the purpose. The country is unable to mobilise the funds needed, and the international community has largely refused to provide any such transfers for fear that such payments might be construed as an admission of guilt.

5. See, for example, Andrea Fleschenberg's article in this issue.

volving big parts of the population and taking into account the needs of the victims—which seems to be a *sine qua non* for peaceful coexistence and reconciliation);

- in terms of complexity: criminal law normally does not take into account psychological, social and political dimensions—but truth and reconciliation

commissions are able to do so;

- in terms of speed and with regard to results: truth and reconciliation commissions work quicker and produce results within precise time-frames (whereas trials often need years and do not come to relevant outcomes—not to talk about a whole complex of crimes such as genocide).

3.1 The Work of the National Unity and Reconciliation Commission

‘In Rwanda, the ideology of divisionism and hatred was spread by government instruments and to the whole cross-section of the Rwandan community. The kind of “top-down” strategy. Counteracting it in the same manner, therefore, would be destructive and lead to a vicious circle of manipulation by the elite. We have preferred to employ the popular participatory approach.’ (Fatuma Ndagiza, executive secretary of the NURC, 2003: 3).

The NURC was established in 1999 and charged with the following responsibilities:⁶

- to organise public discussions aimed at promoting national unity and reconciliation;
- to sensitise Rwandans on unity and put it on a firm basis;
- to conceive and disseminate ideas and initiatives aimed at promoting peace and encouraging a culture of unity and reconciliation;
- to denounce any idea or material seeking to disunite the people of Rwanda;
- to educate Rwandese on their rights and assist in building a culture of tolerance and respect of other people’s rights;
- to advise institutions charged with drafting laws aimed at fostering unity and reconciliation;
- to monitor closely whether government organs respect and observe policies of

national unity and reconciliation;

- to monitor whether political parties, leaders and the population respect and observe policies of national unity and reconciliation.

In order to fulfil this mandate, NURC organised

- grass-root consultations (1999-2000);
- national reconciliation summits (in 2000, 2001 und 2002);
- structural learning from other countries’ experiences through exchange and policy dialogue;
- the elaboration and monitoring of policy recommendations; and
- the elaboration of civic education material.

Grass-roots consultations at district level were held across the whole country, culminating in the first national reconciliation summit. The consultations allowed identification of how people manage to live together, where major problems exist and whether and how progress towards reconciliation might be possible. All information, debates and proposals were recorded, documented and published by the NURC, so that it became possible to address the identified problems and challenges—not only in specific cases, but also at the macro political and sector policy level (NURC 2000).

6. Loi organique no. 03/1999 du 12.3.1999 portant creation de la Commission Nationale d’Unité et de Réconciliation.

Another source of methods for reconciliation was structural learning through exchange and policy dialogue with other countries having experience in truth and reconciliation work (especially Germany, South Africa and Namibia) (NURC 2001).

Based on these two foundations, the NURC elaborated macro and sectoral policy recommendations in order to ensure that ethnicity is no longer misused, that the culture of impunity comes to an end, that effective power sharing takes place, that women are entitled and able to participate—to name but a few.⁷

Last but not least, the NURC followed up the policy recommendations and monitored whether the policy changes had been undertaken.

In addition, the NURC also did two very practical things. Together with other government and non-government actors, it elaborated civic education material to be

used in a number of forums (grass-roots communities, with local leaders, students, refugees returning to the country, child-ex-soldiers, women and youth associations, national leaders, parliamentarians, leaders of political parties, civil society organisations, community workers) that is now being extended to the whole of the formal education system in cooperation with the Ministry of Education. Secondly, it set up a fund to support grass-roots reconciliation work.

The spirit of the NURC's work is best expressed by its executive secretary, Fatuma Ndagiza: 'We are convinced we have to be strategic. If we can only manage to reduce evils of social injustice, put in place instruments of good governance, use education as a deterring "weapon", then we can hope to have given the community a tool for reflection and learning. That is why we want Rwandan society to own the whole process of reconciliation' (Ndangiza 2003: 4).

4. Conclusions and Recommendations

Comparative research on Rwanda's and other countries' experiences (Grossmann and Lingnau 2002; Hayner 2002) allowed identification of success factors and formulation of recommendations for dealing with genocide and gross human rights violations:

- respect the ownership of the conflict, but involve all important actors;
- focus on the framework conditions;
- avoid a standard approach but adapt to the specific country situation;
- avoid impunity (in order to avoid lynch law and/or a renewed outbreak of violence);
- do not neglect, but involve and empower, especially women (playing an important role in day-to-day reconciliation and peace building) and young

people (being the future);

- accept setbacks and failures;
- have realistic expectations.

With regard to truth and reconciliation commissions, there are some more specific conclusions and recommendations that could be helpful:

- Truth and reconciliation commissions should be independent and impartial.
- The commission's work should be broad based and inclusive (DAC 1995: 17) (for example, countrywide grass-roots consultations) in comparison with trials, which deal with only a few crimes of individuals.
- The commission's work should focus on stabilisation by helping to integrate

7. One success is the passing of a law that punishes all sorts of discrimination.

- groups into society (instead of nurturing revenge feelings).
- The proceedings of the commission should be documented and published and made available to everybody interested.
- The work of truth and reconciliation commissions should not end with catching up on the past but produce precise policy recommendations to prevent crime and genocide in the future.

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The Process of Truth, Reconciliation and Justice in Timor Leste

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Timor Leste is the world's newest nation, having achieved independence on 20 May 2002. It has suffered a long history of violence and political suppression, 450 years under Portuguese occupation and 24 years under Indonesian occupation. During that long period, colonisers destroyed relationships between Timorese and Timorese by using the politics of divide and rule.

This resulted in many victims and crimes against humanity. Not only did the colonialists commit crimes against Timorese, but also Timorese were pitted against each other. Especially from 1974 to 1999, Timorese committed many crimes against each other. Many Timorese have been both victims and perpetrators. Many Timorese who were victims in 1974-75 became perpetrators in 1999. The years of conflict have given rise to a very complicated situation in Timor Leste. In order to move forward, a new platform is needed to build peace and to heal the wounds of victims. There have been many processes conducted by the United Nations, the government of Timor Leste and Indonesia. The main ones are described below.

1. Commission of Inquiry. In 1999, the United Nations established an International Commission of Inquiry to gather and compile systematically information on possible violations of human rights and acts that might constitute breaches of international humanitarian law, committed in Timor Leste since January 1999. The commission pointed to the special responsibility borne by the United Nations in regard to justice and reconciliation because the violations

of human rights and international humanitarian law were directed against a decision of the Security Council and contrary to agreements reached between the government of Indonesia and the United Nations to carry out the decision of the Security Council. The commission made recommendations regarding investigation of the violations, establishment of responsibility, punishment of those responsible and promotion of reconciliation.

2. Serious Crimes Unit. In 2000 the United Nations Transitional Administration in East Timor (UNTAET) took concrete steps towards justice and reconciliation in Timor Leste, including the establishment of Special Panels for Serious Crimes under UNTAET Regulation 2000/15, to initiate a judicial process to bring the perpetrators to justice. During its mandate, the Serious Crimes Unit (SCU) recorded reports of 1,339 murders committed in Timor Leste in 1999. The SCU completed investigations that resulted in the indictment of 391 persons in relation to 684 murders, for which the SCU requested and obtained 285 arrest warrants. The Special Panels for Serious Crimes, consisting of both international and Timorese judges, conducted 55 trials involving 87 defendants, of whom 85 were found guilty.

The process, however, remains incomplete: the murders for which indictments have been issued represent only about two-fifths of the number of killings committed in 1999. In addition, the 87 defendants tried represent only a fraction of the number of individuals indicted, 303 of whom live in

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Indonesia and are therefore outside the territorial jurisdiction of Timor Leste. Overall, there remain outstanding 186 murder cases that have been investigated but in which no one has been indicted, and 469 additional murder cases for which investigations could not be conducted owing to the closure of the investigative arm of the SCU six months prior to the termination of the unit.

3. KPP-HAM and Indonesian Ad Hoc Tribunal. In regard to Indonesian accountability, the Indonesian authorities established a Commission of Inquiry into Human Rights Violations in East Timor (KPP-HAM) in 1999 and an ad hoc court in 2004. However, the prosecutions before the Ad Hoc Human Rights Court for Timor Leste were manifestly deficient, and the judicial process before this court has not been effective in delivering justice for the victims of serious violations of human rights and the people of Timor Leste.

4. Commission of Experts. Pursuant to a request of the Security Council that he inform it of developments in regard to the prosecution of serious violations of international humanitarian law and human rights in Timor Leste in 1999, the secretary-general of the United Nations appointed a Commission of Experts on 18 February 2005 under Resolution 1599. The Security Council reaffirmed the need for credible accountability for such serious violations and looked forward to the commission's report exploring ways to address this issue.

The commission submitted its report, which contains a comprehensive and detailed analysis of the work of the Serious Crimes Unit and the Special Panels for Serious Crimes in Timor Leste and of the Indonesian Ad Hoc Human Rights Court on Timor Leste in Jakarta. The Commission of Experts found that, although the

process had ensured a notable degree of accountability for those responsible for the crimes committed in 1999, it had not yet achieved full accountability of those who bore the greatest responsibility for serious violations in 1999.

5. Commission for Truth and Friendship. On 14 December 2004, Presidents Gusmão and Yudhoyono declared their intention to create a Commission of Truth and Friendship for the purpose of establishing conclusive truth in regard to the events of 1999. Under its terms of reference, the CTF is also mandated to review the report of the Commission for Reception, Truth and Reconciliation (CAVR) and the records of the SCU and the Special Panels for Serious Crimes, the KPP-HAM and the ad hoc court in Jakarta. In addition, the commissioners are holding consultations with relevant institutions and individuals in Indonesia and Timor Leste.

6. Commission for Reception, Truth and Reconciliation (CAVR). Uncovering the truth is very important in this process. It is only by uncovering the truth about human rights violations that have occurred in the past that ways of preventing them in the future can be found. Besides, justice, which is very much needed in order to build a foundation of peace, needs the admission of truth and the holding of each person responsible for their actions. For that reason, in Timor Leste there has been established a commission called *Commissao de Acolhimento, Verdade e Reconciliacao* (CAVR) or Commission for Reception, Truth and Reconciliation, under UNTAET Regulation 10/2001. After independence, the role of the commission was strengthened by paragraph 162 of the Constitution of the Democratic Republic of Timor Leste. The main tasks of the CAVR are to seek the truth, facilitate community reconciliation and write a final report with recommendations.

The CAVR's role

The commission seeks the truth about human rights violations committed by all sides between 25 April 1974 and 25 October 1999. It is hoped that through seeking the truth, what happened in the past can be understood clearly, and this can become a strong basis to move forward. Only after revealing the truth and admitting to what has happened in the past can we as a nation ensure that these human rights violations will never be repeated.

The CAVR offers the opportunity to members of the community to tell voluntarily their story about human rights violations and have it recorded. These statements assist the CAVR to understand the truth about human rights violations. The CAVR has taken statements from 8,000 people. Its research team undertook interviews with perpetrators, victims and witnesses, as well as visiting various places where human rights abuses occurred. The research focused on the following main themes: political imprisonment and disappearances, women and conflict, forced displacement and famine, massacres, children in conflict, internal conflict 1974-1976, international actors, Indonesian military structure, forced disappearances and executions.

The CAVR held public hearings to reveal the testimony of victims and experts. The goal of public hearings was to restore and rehabilitate victims' dignity, through public admission about the suffering they experienced; to educate the public about human rights; and to clarify past human rights abuses, the factors that caused them and patterns of violations. In order to get a better understanding of the truth about what happened and what the consequences were for the people, the CAVR also requested specific organisations and individuals to make submissions. Public hearings at the national office were held on the six themes

of political imprisonment, women and conflict, forced displacement and famine, party conflict, massacres and illegal executions, international actors and children in conflict. Thousands of people participated in the public hearings, which were broadcast by TV and radio to the whole country.

The CAVR held community reconciliation hearings in order to assist reintegration of Timorese back into their communities. For this, the CAVR gathered statements from people who felt that they harmed the community in 1999 or before. The CAVR held a community reconciliation meeting only if the person requesting it was not involved in a serious crime. For serious crimes, a legal process was undertaken by another authorised body.

Community reconciliation meetings were led by a panel of three to five members consisting of regional commissioners and local community leaders. "Deponents" who wanted to reconcile were given the opportunity to speak about their mistakes and to listen to the perspective of the victims and the local community. If the request for forgiveness by the perpetrator was accepted by the victim and the community, an agreement was made, which included an act of reconciliation that the deponent had to fulfil. The CAVR documented the agreement between the parties, and the decision was then registered with the district court. During CAVR's mandate, it facilitated 1,400 community reconciliations.

The community reconciliation process (CRP) combined two systems—the traditional system and the judicial system. The main reconciliation initiatives were at the grass roots, based on the philosophy that community reconciliation is achieved through a community-based and participatory mechanism. They combined the tra-

ditional system, transitional law, arbitration, mediation and criminal and civil law. This was important, because in Timor Leste the traditional system still exists and is as strong as the judicial system. So it makes sense to use these mechanisms to contribute to reconciliation and reintegration. This recognised the importance of reconciliation as part of a process of building peace based on justice.

A person who committed a less serious crime in the community had to approach the commission voluntarily to ask for initiation of a CRP by submitting a statement. The statement included: a full description of the relevant acts; an admission of responsibility; an indication of the relationship between the act and the political conflict; indication of others involved, both as perpetrators and victims; a renunciation of the use of violence to achieve political ends; and a formal request to participate in a CRP in a specified community.

Determining whether a case was appropriate for a CRP, the commission needed to submit all requests to the Office of the General Prosecutor for a preliminary assessment and analysis. The Office of the General Prosecutor then decided and responded to the commission. If the office decided that the case was appropriate for reconciliation, the commission could hold a CRP. (If not, the commission informed the person who submitted the request that it could not hear the case. This was related to the principle of justice that serious criminal offences, in particular murder, torture and sexual offences, should not be dealt with through CRP.) The commission then formed a panel to lead a CRP. The panel consisted of local community leaders, traditional leaders and representatives from the church, women and youth organisations.

The CRP took place in the community where the perpetrator violated the victims'

rights. The panel heard from the deponents, victims and the community, which could provide more relevant information. Then the panel facilitated negotiations between the deponents and the victims, which resulted in an agreement that stipulated an act of reconciliation.

The act of reconciliation usually consisted of community service, reparations, a public apology or another act of contrition. The panel had no power to compel the deponent and the victims to comply; it only recommended a particular act of reconciliation. If both parties agreed with the recommendation, the panel drafted an official agreement called the CRP Agreement. If the deponent and victim could not come to an agreement, the panel was required to refer the matter back to the Office of the General Prosecutor.

Once an agreement had been signed, the deponent was legally obligated to fulfil its conditions. Failure to fulfil the obligations constituted a criminal offence for which the penalty was a maximum of one year's imprisonment or a fine of up to US\$3,000 or both. There were two reasons for the discontinuation of a CRP hearing—if the deponent refused to answer any questions without justification or if credible evidence was given at the hearing that the deponent was involved in serious crimes. The hearing would stop and the evidence would be recorded and referred back to the Office of the General Prosecutor. The participants—deponents, victims, community and panel—had their own perspectives and views on the impact of the CRP. The participants had different emphases, but they all agreed that reconciliation was needed. Generally most of the participants supported the CRP.

At the beginning of the commission's work, most Timorese, including the commission itself, felt that it would not be easy to facilitate a CRP within a community. If the com-

mission adopted a system in which perpetrators had to request a CRP voluntarily and confess their acts (crimes) in relation to the past conflict, it was believed that it would not happen. Because it is not easy for a criminal to come forward voluntarily to confess offences in front of the victims and the community. But gradually, as the CRP was implemented, the community, especially deponents, realised the importance of reconciliation for reintegration.

During the first three months that the commission worked in the sub-districts, very few deponents came forward. In the second period, many deponents requested a CRP. The number increased in many places in the middle and in the western part of the country, and most of the crimes related to the 1999 conflict. It was different in the eastern part of the country, where there were fewer human rights abuses committed in 1999.

The commission facilitated CRP hearings for 1,400 deponents. The attendance of community members at the hearings varied with the size of the villages in which the hearings were conducted. At the end of the commission, there were many deponents requesting reconciliation, but the commission could not meet these request because of the lack of time. There was a recommendation to continue this reconciliation process as a mechanism to resolve future conflict within the community. In interviews, many deponents said that the commission had been successful in bringing about reconciliation. They stated that CRP eased social tensions and reduced their social isolation. It was quite evident that this had come as a great relief for deponents and families who had felt a similar measure of ostracism.

The success of CRP was recognised not only by the deponents but also by refugees in Indonesia. When I was involved in a commission visit to refugee camps in In-

donesia, some refugees stated that CRP were a very good process. 'I am interested in participating in a CRP. I want to return to Timor to participate in CRP, but afterwards I want to return to Indonesia. Even though Timor Leste is my own country, I have decided to become an Indonesian citizen. But I need to reconcile with the people I harmed, so in the future I will have no problem with them. Can I participate in a CRP in Timor Leste?'

This was very important feedback, but the commission could not do anything. CRP were only for reintegration, so if they wanted reconciliation, they needed to go to Timor and reintegrate with the victims in their original community. Timor Leste is a very small country with a population of only one million. Most Timorese know each other, and the conflict in 1999 is still in their minds. To achieve forgiveness in many CRP meetings, it was evident that the key was that the deponent must tell the truth. In many cases, victims were satisfied on this score. But in many other cases, the deponents did not tell the truth, and this caused the victims to withdraw.

At the inauguration of the commission's national office on 17 February 2003, the president of Timor Leste stated that peace and stability are longed for by the people after several decades of suffering. In order to achieve peace and stability, we need to be united on the goal of reconciliation. We need to work at a process of reconciliation in which justice is upheld, but we must avoid revenge, hatred and anger. Reconciliation in Timor Leste is a complex process, which needs careful consideration of interests: on the one hand, the interest of justice and the suffering of the victims and on the other hand the need to heal the nation. At the same time, he described reconciliation by saying, 'Why the need for reconciliation? We need to know the truth, we need to remember, we need to come to terms with and accept, we need to learn

from, we need to forgive, we need to heal and we need to move forward’.

Reconciliation has an important role to play in dealing with the past. Reconciliation has rich and powerful meanings and it has objectives that are holistic and integrated. At a closing ceremony for CAVR regional commissioners and staff on 30 April 2004, the President of Timor Leste said that when the commission dissolved, this would not mean that Timor Leste doesn’t need any more reconciliation. He stated that Timorese need to promote reconciliation. ‘Reconciliation needs to grow in our lives and in all Timorese hearts.’

Reflecting on what the president said, reconciliation is a process for building peace and justice by knowing the truth, remembering and learning from the past, forgiveness, healing the wounds of victims and moving forward. It is also a process for reintegration and building new relationships and to develop a new nation, but also healing the wounds of victims. Just as the conflict took place during 24 years, so reconciliation also needs a long time.

Because it will be a long process, I think it is important to collect and preserve history by keeping records and memorials. I am glad that during its four-year mandate the CAVR collected much information about

human rights violations from 1974 to 1999. Even though it was not everything, at least this commission has helped to save some evidence. Many Timorese involved in past conflict are now getting older, and if we can’t do anything to collect their information, then we will lose some of the truth of our history. So it is very important for all Timorese to collect more evidence and keep records.

Archives have significant value for historical accountability. They will be used by researchers, prosecutors and victims alike with the aim of analysing and making known the dimensions of particular human rights violations. Archival evidence is important for the memory of thousands of victims and survivors of human rights abuses, their relatives and others who must individually confront the truth of what transpired. Retaining the memory of victims and survivors is also important to preserve at least some semblance of identity for those who suffered extreme depredations. Archival records of human rights violations will likely assume a new and critical importance as this evidence becomes pivotal in the adjudication of cases, and post-authoritarian governments can only be helped if they confront the crimes of the past and end impunity with the aim of building new democratic societies based on the rule of law.

Final Report and Recommendations

At the end of its work, the CAVR submitted a full report called *Chega* (Enough) of 2,500 pages to the president, the parliament, the government of Timor Leste and the United Nations. This report encompasses the work of the CAVR for reconciliation and its findings on human rights abuses between 1974 and 1999. The CAVR also made recommendations regarding reforms that are needed in order to ensure that violations that happened in the past

are not repeated and to respond to the needs of the victims.

It documents the Indonesian excesses against the Timorese civilian population: massacres; disappearances; sexual violations and sexual slavery; forced displacement leading to mass famines; bombing of the civilian population, including the use of napalm; illegal detention, imprisonment and torture; and the forced recruitment and deployment

of child soldiers. Policies of transmigration and forced population control sought to increase the number of Indonesians in Timor Leste while decreasing the Timorese birth rate. The Indonesian occupation included large numbers of military, police, intelligence and local administration personnel who sought complete control over the territory and the people and the annihilation of the Timorese resistance. Their rule has been characterised as constituting gross violation of human rights, crimes against humanity and genocide.

The work of the CAVR gave the more than 10,000 people who gave statements hope that there would be justice for their suffering and losses. Remedies, restitution and compensation were recommended in clear detail. The report was given to the president in October 2005, and he gave it to the parliament on 28 November 2005 and to the secretary-general of the UN in January 2006. The report has been released internationally and to the people of Timor Leste. The archives remain as living testimony about the Indonesian occupation and the crimes committed against the people of Timor Leste. The report of the Commission of Experts ordered by the United

Nations has been passed to the Security Council for deliberation and decision. It recommends, inter alia, international trials in Jakarta if they fail to retry perpetrators within six months and a reopening of the Serious Crimes Unit in Timor Leste to complete its unfinished caseload.

For dissemination of the final report, the president of Timor Leste established a follow-up institution called Technical Secretariat Post-CAVR with three main mandates: finalising the unfinished work of CAVR, disseminating the final report and maintaining and preserving the CAVR archives. So far, the institution has disseminated the final report to governments and civil society around the world. Within Timor Leste the report has been disseminated to communities in seven districts and later it will be completely disseminated to all the people. I hope that all Timorese and the international community will not just keep this report as a bible but also actively promote discussions to inform public opinion on how to implement those recommendations to deal with the past holocaust of Timor Leste, even though the government has failed to act on these recommendations.

Future Challenges

Although Timor Leste is a small country, many commissions—national, bilateral and international—have been established to deal with our past, but Timorese today still call for justice. This is because the human rights violations in Timor Leste were not committed only by Timorese but involved other perpetrators in other countries. We the Timorese still have many challenges in bringing justice to the victims.

The CRP undertaken by the commission were generally successful. But it will be difficult to convince perpetrators to come forward and confess their crimes and convince

the victims to forgive if the key actors of serious crimes against humanity are not prosecuted and brought to justice. It is unlikely that this will happen since government leaders have made a political decision to cultivate good relations with Indonesia by creating the Commission for Truth and Friendship. Many Timorese see this as running counter to the demands for justice. In Timor Leste itself our president has filed *Chega*, the final report of the CAVR. Since then, we haven't heard any thing from our parliament or from the international community.

It seems one commission after another has been established, but justice seems to be moving further away. Although there have been attempts to reconcile perpetrators of lesser crimes with their communities, there has been a singular lack of success to pros-

ecute those Indonesians and their militias accused of crimes against humanity and genocide. The lack of accountability and impunity has created an impatient call for justice by the many victims and their families.

Extraordinary Chambers in the Courts of Cambodia: Background, Structure, Challenges and Purposes

Jörg Menzel*

Background: Terrible Crimes and a Long Way to Justice

The Khmer Rouge under their leader Saloth Sar, most commonly known by his 'nome de guerre' Pol Pot, were in power in Cambodia between April 1975 and January 1979.¹ They came into control of Cambodia after a long and brutal civil war (Deac 1998) and by overthrowing the regime of General Lon Nol, who himself had staged a coup against the government of Prince Norodom Sihanouk in 1970.

After seizing control in Phnom Penh, the Khmer Rouge immediately evacuated the capital and all major cities. They transformed Cambodia into an agrarian society based on an extreme version of Maoist collectivism. In fact Cambodia became a huge labour camp and state-sized prison. During the Khmer Rouge regime Cambodia was largely isolated from the outside world. Constitutional and judicial structures were not functional (Chandler 1976); the whole state operated on the basis of the orders of 'Angkar', which was a synonym for the revolutionary party or even Pol Pot himself.

Early reports on the killings and dying in Cambodia (Ponchaud 1978) were initially

often criticised as exaggerations, but now it is undisputed that during the regime many Cambodians lost their lives because of system-related reasons. Numbers are controversial (see Heuveline 1998; Kiernan 2003; Etcheson 2005). The number most often mentioned is 1.7 million system-related fatalities, which is horrific considering the fact that the whole population was probably not much more than 6 million people in 1975. Most people died of starvation and diseases for which no treatment was available, but many were directly murdered. 'Killing fields'² have been found all over the country. In Phnom Penh the Khmer Rouge established a special prison known as S-21 or, from its location, 'Tuol Sleng'. About 14,000 people, often victims of the inner-party purges within the increasingly paranoid regime, were tortured here and killed on the spot or in the Choeung Ek killing field outside town. Only seven survivors are documented among the prisoners of Tuol Sleng (Chandler 2000; Vann Nath 1998), but the photos and skulls of thousands of victims are now displayed in the Tuol Sleng Museum and a stupa at Choeung Ek Genocide Memorial, both being major tourist destinations in a world

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1. For historical accounts, see Becker (1984); Etcheson (1984); Chanda (1986); Jackson (1989); Chandler (1991); Kiernan (1996/2002); Vickery (1999). Biographies of Pol Pot are Chandler (1999) and Short (2004).
2. The term became famous by the movie *The Killing Fields* (1984) of director Roland Joffé. On the mapping of mass graves all over Cambodia, see Etcheson (2005: ch. 7).

that still associates Cambodia with ultimate state excess.

After the Khmer Rouge lost power in Phnom Penh as result of a Vietnamese invasion, a trial in absentia was held of Pol Pot and Khmer Rouge Foreign Minister Ieng Sary (De Nike *et al.* 2000; Fawthrop and Jarvis 2004: ch. 3). This trial ended with death penalties—which were never executed. Apart from this trial, often labelled a show trial, almost no attempts were made to bring members of the former regime to justice, although some arrests and imprisonments occurred (Gottesman 2003: 61-62; Huy Vannak 2003: 125). On the international level, despite information on the crimes of the regime becoming solid (Kiljunen 1984), the Khmer Rouge continued to represent Cambodia in the United Nations, as the western world and local powers were determined to condemn the invasion by Vietnam (Fawthrop and Jarvis 2004: ch. 2).

When an international peace plan for Cambodia (Paris Agreement) was negotiated in the beginning of the 1990s (Ratner 1993), it was even agreed to reintegrate the Khmer Rouge into the political process of the country. This plan failed, however: Khmer Rouge leader Khieu Samphan was severely beaten by a crowd on the occasion of his 'official' arrival back in Phnom Penh. Some time later, the Khmer Rouge pulled out of the peace plan and resumed fighting. It took some more years before the then two prime ministers of Cambodia sent a letter to the secretary-general of the United Nations in 1997, asking the UN to help with a trial against the former Khmer Rouge leaders. Pol Pot himself was meanwhile arrested by his own followers in 1997 and 'sentenced' to lifelong house arrest for ordering another inner-party purge. He died nine months later, reportedly of natural causes.

Negotiations between the Cambodian Government and the United Nations turned out to be difficult (see Steve Heder in Ledgerwood 2002: 176; Heder and Tittmore 2001: 11; Donovan 2003: 551; Fawthrop and Jarvis 2004: 155; Etcheson 2005: ch.9; Kelly Whitley in Ciorciari 2006: 29).. The government insisted on a Cambodian court that should be internationally assisted, whereas the United Nations favoured a genuine international court, consisting of non-Cambodian judges and preferably located outside Cambodia (Ratner 1999; Fawthrop and Jarvis 2004: ch. 7). At least once the process seemed to have failed, when the United Nations secretary-general announced the end of discussions in 2002. He was pressured back to the negotiation table, however, and a final agreement between Cambodia and the United Nations was quite surprisingly reached in early 2003. Ratification of the agreement and the necessary amendment of the 2001 national law on the extraordinary chambers were delayed because of a general political deadlock in the aftermath of parliamentary elections in 2003, but were among the first decisions made by parliament after it convened again in 2004. Afterwards the search for the money took some time, as foreign states were asked to contribute the most of the US\$56 million budget of the court.³ Starting from 2005, organisational steps were taken. A courthouse was finally chosen and staff recruitment started. Judges and prosecutors took their oaths in front of King Sihamoni on 3 July 2006. Despite all the apparent or rumoured internal and external political obstacles, the Extraordinary Chambers in the Courts of Cambodia (ECCC) have started to operate.

A significant setback was to follow shortly, however: Khmer Rouge leader Chhit Chouen ('Ta Mok'), who because of his

3. A significant number of countries pledged to contribute, with Japan being the biggest donor (\$21.6 million). In July 2006, about \$6 million was still not secured.

reputation for brutality was nicknamed 'the butcher' and who had been in pre-trial detention since 1999 and was one of the most obvious candidates for prosecution, died in a military hospital on 22

July, aged 82 years. Everybody was reminded that it is indeed 'five minutes to midnight' for a trial of the leaders of the Khmer Rouge and those most responsible for their crimes.

Structure: A Hybrid Court with Some New Concepts

The ECCC are a special court under Cambodian law (see Ernestine Meijer in Romano 2004: 207; Ciorciari 2006). They are established under the law on the Extraordinary Chambers as amended in 2004 and the agreement between Cambodia and the United Nations of 2003 (both available in English at <http://www.cambodia.gov.krt/>). The crimes are defined in the ECCC law, and the procedure is that of Cambodian law, with residual relevance of international standards. The maximum punishment is life imprisonment.

The ECCC are a so-called mixed tribunal, with chambers consisting of national and international judges. As the outcome of the difficult negotiations between the Cambodian government and the United Nations, there will be three Cambodian and two international judges in the first instance and four Cambodian judges and three international judges in the second instance. Decisions have to be made by four judges in the first instance and five judges in the second. This so-called 'super-majority', a concept never applied in any international court before, is to guarantee that no decision can be made without at least one international judge agreeing. In the prosecutor's office one Cambodian and one international prosecutor will work together, and they have to agree on their decisions. If they disagree, the decision will be submitted to a pre-trial chamber which works as well according to the super-majority concept. Prosecutors and judges were chosen by the Cambodian Supreme Council of the Magistracy, but in

respect to the international judges and prosecutors they had to pick from a short list submitted by the secretary-general of the United Nations.⁴ The crimes to be prosecuted by the ECCC are limited in a number of ways (see Aubrey Ardema in Ciorciari 2006: 55-79).

First, only crimes between 17 April 1975 and 6 January 1979 are in the scope of the court. Crimes that happened in civil war before and after that time (the war went on until 1998!) are outside the jurisdiction of the court.

Second, only senior leaders of the Khmer Rouge and those most responsible for their crimes can be prosecuted. Khmer Rouge who do not fulfil these criteria will not be prosecuted, and crimes of others than the Khmer Rouge are not within the jurisdiction.

Third, the crimes to be prosecuted are enumerated and consist of the classical crimes of international criminal law, namely genocide, crimes against humanity and war crimes. The crime of aggression is excluded, but violations of the Conventions for Protection of Cultural Property and on Diplomatic Relations are included. In addition, some major crimes under the Cambodian Criminal Code of 1956 can be prosecuted, because this code is regarded to have still been in force between 1975 and 1979.

It is clear that the ECCC will not have mass

4. Short biographies of all judges and prosecutors were published by the *Phnom Penh Post* (www.phnompenhpost.com).

business to conduct. How many cases they will try is difficult to predict.⁵ Anything above the number of 10 would probably be a surprise. The government has always made clear that it should only be a few cases. A prime candidate is Kaing Guek Iev (widely known as 'Duch'), the commander of the infamous prison Tuol Sleng prison (see Dunlop 2005). He was not a senior leader, but most likely has main responsibility for some of the crimes of the Khmer Rouge. Evidence against him is plentiful because of the documents found in Tuol Sleng, and he has confessed to his actions. He is the only person currently in pre-trial detention.

Other prime suspects are Khieu Samphan (former president of Democratic Kampuchea), Nuon Chea (former 'Brother No. 2') and Ieng Sary (foreign minister of the Khmer Rouge regime). All of these candidates are currently living freely either in the western town and Khmer Rouge stronghold Pailin, or in Phnom Penh, and all reject at least personal guilt (see e.g. Khieu Samphan 2004). Furthermore, Ieng Sary was granted a formal pardon when he defected from the Khmer Rouge in 1996, which puts a large question mark on his availability for prosecution.⁶ Other potential candidates are frequently mentioned, but prediction of the investigators' priorities and assessments are difficult for the time being.

The tribunal will be a novelty not only in the Cambodian court system, but also in international criminal law. The Khmer Rouge tribunal is one missing test case for the concept of 'mixed tribunals' (see Romano *et al.* 2004; Ambos and Othman 2003; Dickinson 2003). This concept was more or less first discussed for Cambodia,

but because preparations there took quite some time, it was put into practice elsewhere earlier.

East Timor, Kosovo and Sierra Leone are the places where mixed courts have already been established. The details in concept differ as much as the experiences in practice. The ECCC will also be a novelty in many respects. In contrast to the court in Sierra Leone, to which the tribunal can probably best be compared in an overall perspective, the national judges will outnumber the international judges. Some have argued that this court will not be under efficient control by the United Nations and therefore will be highly problematic in structure considering the circumstances in Cambodia. Amnesty International has been critical in that sense, for example.⁷ This is basically the original position of the United Nations, as developed by its 'Group of Experts'. It is too early to make such negative judgments, because there is still a realistic chance of positive outcomes (see also Williams 2004: 227).

If the Cambodian tribunal is at least somewhat successful, the concept of 'mixed tribunals' might become a relevant option for future situations elsewhere. Whereas the establishment of international criminal courts under Chapter VII of the UN Charter, as in the cases of Yugoslavia and Rwanda, seems not so much of an option any more considering their huge budgets and limited outcomes and the establishment of a permanent International Criminal Court, 'mixed tribunals' could be an alternative to the involvement of the ICC also in the future. The potential advantages of such mixed courts are a higher degree of ownership of the states concerned and trickle-down effects in situations of a transition to democracy and the

5. For a preliminary assessment see Heder and Tittmore (2001), identifying seven potential candidates (two of whom are no longer alive).

6. According to the UN-government agreement (Art. 11 [2]), the ECCC are to decide the scope of this pardon.

7. Amnesty International, ASA 23/005/2003, 23 April 2003; for a reply see Stanton (2003).

rule of law. Dealing with the past is a task of each state that wants to overcome a time of dictatorship or state-sponsored crime. Taking responsibility in this respect instead of simply extraditing some perpetrators to an international court in The Hague or elsewhere is—at least in general⁸—an approach

that might be appropriate if not preferable. It needs to be shown, however, that such mixed courts can work successfully. The international criminal law community will therefore watch carefully what happens in Cambodia in the near future (Wald 2006: 556).

Challenges: Difficult Environments and Legal Problems

The importance of the Khmer Rouge tribunal for Cambodia and its legal system can hardly be overestimated. It is widely acknowledged that the legal and judicial system of Cambodia is in need of substantial reform. It will be a challenge because the tribunal will operate under Cambodian law, which might cause substantial difficulties in respect to procedure. Currently, Cambodia does not have a codified criminal procedure code, but only two fragmentary laws from the beginning of the 1990s. The draft of a modern criminal procedure code, mainly prepared in the context of French development cooperation, has recently been sent by the Council of Ministers (government) to parliament for adoption. As long as it is not in force, it is very likely that serious problems in respect to procedure will occur. The court may then need to rely on international standards but, as every international criminal lawyer will confirm, these standards are also not particularly certain since rules differ in the international criminal courts around the world.

There are many more serious challenges for the Khmer Rouge tribunal. Only some will be mentioned here. Apart from possible political complications, the legal qualifications and independence from political interference of the Cambodian judges and prosecutors are in question. Will a court that is embedded in the Cambodian jus-

tice system be up to the task? Additional difficulties have to do with the different backgrounds of the international personnel, because in criminal law judges and other legal personnel from common law and civil law systems sometimes have communication problems. In this court international judges and prosecutors meet national judges and prosecutors and civil lawyers meet common lawyers. The challenges for such a cross-cultural event are evident (Open Society Initiative 2006: 97).

Court logistics seem also problematic in various ways. Adequate translation is a primary concern because Cambodian judges need access to international law documents and international judges need access to Cambodian witnesses and documents, and all have to be enabled to communicate with each other in a qualified way. Witness protection is also a major problem, and there are already reports that many Cambodians are still too scared to appear as witnesses in court. Psychological assistance to victims and outreach into the Cambodian public are much discussed topics.

Regarding the evidence, it does not make things easy that the crimes to be prosecuted all occurred about 30 years ago (see e.g. Julia Fromholz in Ciorciari 2006: ch. 4). Not only many of the perpetrators, but also many of the victims and witnesses are dead or have only imprecise memories. Docu-

8. Exceptions are always possible according to circumstances, as the (obviously reasonable) transfer of the trial of Charles Taylor from the Sierra Leone court in Freetown to The Hague illustrates.

ments have had much time to be lost as well. It will be helpful, however, that the Documentation Centre of Cambodia has systematically collected documents and other evidence for years.⁹ Plenty of evidence is available from the S-21 prison, where staff did not manage to take away or destroy all documents when the Vietnamese invaded in early 1979.

From a legal perspective, as mentioned, the court will have to assess if the pardon for Ieng Sary, which was granted in 1996, prohibits proceedings against him. Other 'candidates' for prosecution are old and health reasons might be obstacles (as the Milosevic trial has recently reminded us), apart from the fact that most of them are still free and some might try somehow to avoid arrest. Last but not least, the limited budget puts additional pressure on the three-year initial time frame for the trial. In October 2006, the international NGO Open Society Justice Initiative has already claimed that the budget is insufficient according to its preliminary analysis.

An interesting legal question the tribunal will have to deal with regards the crime of genocide. The policies of the Khmer Rouge between 1975 and 1979 have often been labelled as genocide in Cambodia and in the outside world alike. The Vietnamese-backed new government in Cambodia immediately spoke of genocide in 1979, and from that time on many used the term, sometimes in particular in order to stipulate an obligation under international law to prosecute these crimes (see e.g. Hannum 1989). It is, however, not that clear whether

such a qualification is correct under current international criminal law.¹⁰ As we know, 'political genocide' is a blind spot of the crime of genocide (Van Schaack 1997). Since the Cambodian law on the ECCC explicitly refers to the Genocide Convention, the definition stipulated there is the relevant one. Article II of that convention defines genocide as certain crimes committed 'with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group'. As strange as it may seem, if a government is guilty of killing all its real or imagined opponents in a systematic way and thereby kills substantial parts of its own people, it is not genocide under the convention. Killing a 'political' enemy, all members of the *ancient regime* or an invented bourgeoisie called 'new people'¹¹ is not genocide under that definition (Wald in Open Society Justice Initiative 2006: 94). Politically motivated crimes are not included, but political genocide is mostly exactly what happened in Cambodia. In the Cambodian case there may be some evidence that Buddhist monks and the religious minority of the Muslim Cham people were particularly a target (Osman 2002/2006). The same is true for ethnic minorities, in particular the Vietnamese. Therefore there might be evidence to assist genocide charges, but there still remains the problem of finding evidence in respect to the people accused. Apart from this, the problem remains that mostly 'normal' Cambodians suffered and died during that time. 'Auto-genocide'¹² is a term created for this, but conventional wisdom does support the argument that this is the crime of genocide as defined by international law and the Genocide Convention in particu-

9. The Documentation Centre of Cambodia was originally founded as a field office of a genocide project of Yale University and is now an independent NGO. It has collected an immense amount of documents, researched other evidence (mapping of killing fields etc.). It runs a useful web site (<http://www.dccam.org>) and publishes a periodical (*Searching for the Truth*). On the work of DC-Cam see also Etcheson (2005: ch. 4).
10. On 'genocide' in Cambodia see for example Hannum (1989); Schabas (2001); Wald in Open Society Justice Initiative (2006: 85). To suggest there would be a consensus among legal academics that the Khmer Rouge committed genocide (Kiernan 2002: Foreword) is simply wrong.
11. 'New people' was the term the Khmer Rouge used for the urban population that was evacuated to the countryside in 1975; for a vivid description of the discrimination of new people see Stuart Fox and Bunheang Ung (1998).
12. Term first used by Jean Lacouture, *New York Review of Books*, 31 March, 1977.

lar. It will be interesting to see how the court handles this problem. Actually, the question of genocide is not that important for the outcome of the trials because political mass killings are crimes against humanity and as such not less punishable than genocide. The importance of the question is now, after the

court is established, more symbolic, because there is a widespread perception that 'if it is awful, it must be genocide' (Helen Fein, quoted in Open Society Justice Initiative 2006: 85. In the eyes of the general public genocide is still considered the 'crime of crimes' (Schabas 2000).

Purposes: Justice, Reconciliation, Historical Truth and Exercise in Law

Some have blamed the Cambodian government (e.g. Luftglass 2004), others have criticised the United Nations (e.g. May 2004) for the long delay in bringing the Khmer Rouge leaders to justice. After an agreement was reached, many doubted that the court would ever come into operation, and there are still too many uncertainties to give a prognosis. Former King Sihanouk, who had an equally difficult as problematic relationship with the Khmer Rouge over decades, is among the public figures in Cambodia openly criticising the concept and arguing that the money should be spent for irrigation systems or something similar. It seems interesting, however, that all surveys available conclude that the majority of Cambodians are in favour of a 'Khmer Rouge Tribunal' (KID 2004; McGrew 2000; Linton 2004). One should therefore seriously take into consideration what positive functions such a court can fulfil. In early 2000, before even the first version of the law on the Extraordinary Chambers was adopted, a Cambodian NGO leader summarised the potential good services of such a tribunal:

If this tribunal is conducted well, in accordance with international standards and principles of fair trial, it can at least have the four following good results: first, to provide justice [to those] who are victims of this regime; second, to heal Cambodian society and end nightmares of Cambodian victims; third, to find the truth, so that Cambodians and the rest of the world can

know why 1.7 million people died; and finally, I hope that this tribunal can serve as a model to show Cambodian people what the principles of a fair trial are. (Sok Sam Ouen, director of Cambodian Defenders Project, *Phnom Penh Post*, 2 February 2000.

All of these points still seem to deserve to be taken seriously, and together they may indicate what such a court can be about despite the long delay. It may help to reflect for a moment on the possible purposes of this tribunal. Success will have to be judged on the basis of perceptions of what had to be achieved and the judicial outcome of 'convictions' is far from everything in such a context.

First: Justice for Victims. Some justice will be served by bringing some of the top leaders to justice. Apart from some spontaneous revenge killings after the collapse of the Khmer Rouge regime, perpetrators have never been punished. In many cases they still live next door to victims or families of victims. The aim of the trial is to 'bring to justice' at least some of the most responsible Khmer Rouge. It thereby reflects a tendency in modern international criminal law that ultimate state crime should principally not stay unpunished. This is the central message of the establishment of the International Criminal Court (see also Ordentlicher 1991; Dugard 2000). After decades, it is evidently not possible any longer to bring each and every person in-

volved in the crimes of that time to justice, but prosecuting at least the remaining top leaders may serve justice on a symbolic level.

It should be clear from the beginning that the Khmer Rouge Tribunal will be only 'justice light' even if it works well. The only form of transitional justice delivered is criminal justice, and even that is necessarily not comprehensive.¹³ Full justice can probably never be achieved after a fully fledged state excess, but it is definitely an impossible goal with a time gap of 30 years. Many people guilty of crimes are either dead or not within the jurisdiction of this court. Other forms of justice simply do not take place during this trial and will not take place at all any more. Millions of Cambodians lost their relatives, their health, their jobs and their property during the Khmer Rouge regime. They will not get anything back of their losses in this trial, nor will they be compensated in other ways. The Cambodian approach to transitional justice is minimalist: a symbolic criminal trial against a few main perpetrators. This is not much, but it is, from the author's perspective, better than nothing.

Second: Reconciliation. It seems that many Cambodians hope that the trials will bring some form of reconciliation for society. There may be doubts whether a trial as such is able to heal a society or end nightmares. A third of the survivors of the Khmer Rouge regime are estimated to suffer from some form of post-traumatic stress disorder. A trial will not cure them all, and it might be argued that it is a somewhat dangerous shock therapy, since the trial will bring back memories and force people to reflect again on a terrible period of their lives that they probably had hoped to for-

get about. This, however, might indeed be necessary in order to find some peace.

Apart from that, it will be necessary to define what reconciliation is about. Reconciliation is a term that has been widely used and abused in Cambodia and around the world in order to legitimise political deals that would otherwise be considered unethical. However, appropriate reconciliation seems not possible on the simple basis of forgiveness. A court trial is, on the contrary, a clear message that Cambodian society does not want simply to 'reconcile' with the Khmer Rouge, but that it wants at least the top leaders and perpetrators to be taken to account and punished according to their crimes. In other words, there seems no restorative justice in society without some retributive justice in respect to ultimate perpetrators.¹⁴ Neither Buddhism nor other cultural circumstances seem to prevent such an attitude, which is much in line with worldwide developments. A proposal to hold a special ceremony that includes a mass confession of Khmer Rouges combined with an official forgiveness has not gained much support (Linton 2004: 222-224), which must be a relief for anybody concerned about legal development in Cambodia, because forced confessions are without doubt one of the biggest curses in its criminal justice culture. Honesty about the past and responsibilities (achieved without 'bribing' suspects to confess everything in order to be pardoned) is an essential precondition of 'sustainable' reconciliation. Court litigation of the most serious offences of a past regime is one aspect of such a process, and in cases of ultimate crimes it typically will not be replaced entirely, even where truth and reconciliation commissions are established. In Cambodia, the establishment of such a commis-

13. On the different aspects of transitional justice, see Teitel (2000).

14. Retributive justice is a term basically used for traditional criminal punishment, whereas restorative justice focuses on restoring the well-being of victims and the relationship between perpetrators and victims or society as a whole. On these concepts in respect to the ECCC, see e.g. Kek Galabru in Open Society Justice Initiative (2006: 151).

sion has not been seriously pursued. Reconciliation and truth are, however, hopes connected with the tribunal (and its outreach into Cambodian society).

Third: Historical Truth. Considering all the books and research already available on the Khmer Rouge, one might argue that it is not necessary to conduct a trial to find the truth about the events between 1975 and 1979. Furthermore, there may be doubts of a general kind whether courts can take over the function of history classes. Every mass murder leaves the question of 'Why did it happen?' (see Gellately and Kiernan 2003; Hinton 2005). Courts are not in the position to give comprehensive answers to such a simple but complex question. Criminal courts can only clarify glimpses of history. They ask for individual guilt of the accused, not the criminal nature of a system as such. Some historians who have worked hard for years to prove genocide (notably Kiernan 2002) will probably experience that despite all the evidence of the genocidal nature of the regime, it might be difficult to come to verdicts on the charge of genocide. However, the trials will at least be an opportunity for Cambodians to reflect on their country's past. Apart from the ritual remembrance of the crimes of the 'Pol Pot-Ieng Sary clique' and events like the yearly 'National Anger Day' (see Linton 2004: 63), Cambodian society has tried hard in recent decades not to reflect on this topic, and the knowledge available from (mostly English language) research should not be confused with the knowledge and understanding of even the educated Khmer population. The lack of historical knowledge has made it easy for Cambodians to continue to believe that the root causes of the crimes are basically to be found in outside interferences from powers as China, Vietnam or the United States. The

tribunal might be an opportunity to come to a more honest assessment of the country's own history. This does not mean to reject the idea that Cambodia was a victim of Cold War absurdities, with countries such as the USA or China carrying heavy responsibility, but to acknowledge that Cambodians killed Cambodians in that time, without being ordered to do this by outside powers and at least to some degree driven by extreme Cambodian nationalism.

Fourth: Exercise in Law. Finally, there might be a positive effect for the whole legal and judicial reform process in Cambodia. It is widely acknowledged that the Cambodian legal and judicial system is in a state of despair. During their time in power, the Khmer Rouge not only abolished the legal system but also killed nearly everyone with legal expertise. Due to communist ideology at that time, which did not value 'rule of law' as a necessity, the recovery process for the legal system was not a priority in the 1980s. Nowadays it is formally on the top of the political agenda,¹⁵ but facts such as the ridiculously low budget of the Ministry of Justice still do not reflect a change in concept. Some progress is gradually being made in the preparation and adoption of laws, but implementation regularly falls short.

Most Cambodian judges never underwent a substantial legal training, and the establishment of a Royal School of Judges and Prosecutors in 2003 will change that only in the long run. For the time being, courts are among the least trusted institutions in the country, generally considered to be corrupt, politically influenced and incompetent. Every report of national and international human rights organisations, development banks and surveys within the business community confirm the malfunction-

15. Legal and judicial reform is at the centre of the 'Rectangular Strategy', which Prime Minister Hun Sen presented as the governmental approach to development in Cambodia on 16 July 2004.

ing of the justice system. Even the quasi-official Cambodian *Who's Who* is frank about the deficiencies.¹⁶

The tribunal may be, if it operates successfully, a role model for appropriate criminal proceedings. Cambodian Deputy Prime Minister Sok An, who is in charge of the tribunal within the government, recently even considered it to be a possible model court for Cambodia. That might be an exaggeration because 'normal' courts in Cambodia will not have a comparable budget for a single case, and normal judges (earning around \$ 300 to 400 a month) are far from the \$65,000 that the Cambodian judges in the ECCC receive. The 'trickle down' effects are, however, one of the main arguments in favour of the current concept of the ECCC in Cambodia. This court will take place in the middle of Cambodia; its work will be observed by national and international media and will stimulate discussion within the (small) legal community of the country. Bringing the Khmer Rouge leaders to justice might be at least a symbolic challenge to the 'culture of impunity', which has often been described as one of the major problems in current Cambodian society (e.g. Leuprecht 2004). Officials

from Prime Minister Hun Sen to foreign ambassadors have expressed their expectation that the tribunal will help to overcome the culture of impunity (Etcheson 2005: ch. 10). Because of the attention it will get, the court can not only be an interesting study object as a hopefully positive role model, but can even have impact if problems occur, because the clear exposure of problems might result in additional pressure to improve the system.

In respect to an improvement of legal standards in Cambodia, the court has already started to fulfil its purpose. In preparation for the tribunal, a number of training sessions and workshops have been conducted, teaching judges, prosecutors and lawyers general standards of fair trial etc. The actual impact of such short-term training might be questioned, but the small number of judges and lawyers in the country makes it at least possible to reach a comparatively high percentage of legal professionals with such programmes. Discussion of legal and judicial reform has sparked already, and everybody from the government to human rights organisations expresses the expectation that this tribunal will be an important step in that process.

Concluding Remarks

As a German, the author is well aware how difficult it is for a state and society to deal with a criminal past. The atrocities committed by Germany in the time of the National Socialist dictatorship were brought into the courts immediately in the 1945 Nuremberg trials, which today are widely considered to be the birth of modern international criminal law.¹⁷ However, neither in society nor in law do such events fade away with just one trial. Courts in Ger-

many and around the world are still faced with cases relating to this part of German history. Recently the 'Distomo case', in which Greek courts held Germany responsible for war crimes committed during World War II in Greece, reminded us of this legacy (see German Federal Constitutional Court 2005; Rau 2006). Within society, the responsibility of the 'parents generation' was one of the important topics in German society starting somewhere in the

16. *Who's Who in Cambodia*, published under the auspices of the Information Ministry, Phnom Penh, 2006, p. 299: 'The judicial branch is supposed to be independent of the other two branches. However, in reality, the judicial branch in Cambodia is highly corrupt and can be easily pressured from the executive branch.'

17. For a historical account with special attention to Cambodia, see Ratner and Abrams (2001).

1960s, about 20 years after the crimes of the National Socialist regime.

For Cambodia and Cambodians, the ECCC are already and will be an event of major importance. The trial will be a challenging confrontation with the past and present of its society. Despite all scepticism, many Cambodians seem to be in favour of such a trial, and this indicates that there is a feeling at least that the past can not simply be buried. However, the trial will be important not only for society, but also for its legal system. The fact that, with one exception, even the most prominent surviving members of the former Khmer Rouge leadership currently live freely within the country has become a symbol of a culture of impunity¹⁸; and there is some expectation that the Khmer Rouge tribunal might help to give a push to the legal and judicial reform process as a whole.

For the outside world, the trial will not only be another step in the rapid evolution of international criminal law. It will also be an opportunity to look more closely at Cambodia and its legal system. Legal development in Cambodia is traditionally hardly noticed in the outside world. The tribunal might help to change this. Besides, the tribunal will be an opportunity at least to reflect on the failures of international politics in the 20th century, in which big powers made small states like Cambodia (Shawcross 1980) sometimes a sideshow in their universal Cold War. It is not without justification that the Cambodian government continues to remind us that the United States bombarded big parts of the

country in an atrocious way and thereby even helped the Khmer Rouge in their struggle for power, and that the United Nations considered the Khmer Rouge as legitimate representatives of Cambodia throughout the 1980s, at a time when their atrocities were already well known. The outside world will not be on trial in the Extraordinary Chambers, but it should take the opportunity to critically reflect on its own responsibilities.¹⁸ If Cambodia and the United Nations are now working together to make this court happen, this may be seen as part of a reconciliation process in itself. Such a view might also make it easier to accept the difficulties in cooperation, because no reconciliation has ever been easy.

For the time being, nobody is able to predict the outcome of the ECCC. It should be clear that such a court can not fix all problems in Cambodia deriving from the Khmer Rouge times, and expectations should not be too high. There are uncertainties not only about the actual impacts on society and legal system but even about the more technical success of a trial bringing some perpetrators to justice. The court will operate in a difficult political and legal environment of challenges, expectations and critical observation. History tells us that no court dealing with fundamental state crimes of a prior regime has been without problems, and nobody should expect everything to go smoothly in Cambodia. But it is, despite all problems and challenges, the last chance to bring at least some of the Khmer Rouge leaders to justice and it might be an opportunity for Cambodian society.

18. Criminal responsibility of US leaders including Henry Kissinger for the Cambodia bombings is discussed by Barrett (2001).

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The International Dimension of the Khmer Rouge Regime and Cambodia's Tragedy

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Having been part of the United Nations process in Cambodia in two capacities, first as an UNTAC peacekeeper and secondly as the secretary-general's political representative, I would like to concentrate on two aspects of the problem: namely the origin of the Khmer Rouge tragedy, and

why it took so long, 27 years, before the Khmer Rouge leaders will be brought to trial. If we compare the Khmer Rouge problem with a serious illness, I would like to concentrate on diagnosing the origin of this illness, and secondly on why it took us so long to deal with its final treatment.

Cold War-Induced Holocausts

When I arrived in Cambodia as part of the UNTAC (United Nations Transitional Authority in Cambodia) peacekeeping operation in April 1992, I was greeted by faces of people for whom war and genocide had almost become a way of life. Although UNTAC came to Cambodia more than 10 years after the genocidal Khmer Rouge had been driven from power, the psychological trauma it caused still haunted Cambodia and its people. In the days that followed my initial shock, I realised more and more that Cambodia had been a pawn in the Cold War and its aftermath, a tragic victim of its geopolitical location. My conviction was strengthened when I returned to Cambodia as the representative of the secretary-general during 1994-97. In the past three years I therefore wrote my memoirs at Cornell University in the United States which will be published shortly. The rest of my discourse will feature some of

my findings while writing this book.

As we are all aware the Cambodian problem was very much a Cold War-induced problem. While at Cornell University, I was inspired, inter alia, by Professor Walter Le Fevre, a prominent historian at the university, who stated:

Truth was a tragically relative term in the Cold War era. Many Americans were sent to die by the tens of thousands, while Asians, Latin Americans and Africans were sentenced to death by the millions, because US officials disagreed with foreign leaders about what each believed was true in terms of the needs of their own national interests.

Three genocides in particular come to mind to give credence to his thesis: in Indonesia, Timor Leste and Cambodia. Cambodia's recent history can be divided into three phases.

First Phase: The Origin of the Khmer Rouge Problem: 1960-1975

At the height of US involvement in South-east Asia in the 1960s, Indonesia and Cambodia were in similar situations. At home

both President Sukarno and Prince Sihanouk tried to maintain a political balance between a right-wing military and a

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growing communist movement—and were forced to turn to the left as a result. Both incurred the wrath of the US by charting an independent foreign policy. For Cambodia, when the United States escalated the Vietnam War in 1964-65, neutrality became impossible to sustain. The existence of the Ho Chi Minh trail passing through Cambodia considerably upset the United States, which sought to persuade Cambodia actively to support US goals in the Vietnam War, and relations between the two countries continued to deteriorate.

Both Sukarno and Prince Sihanouk were overthrown by anti-communist militarist elements that the United States covertly supported. But Prince Sihanouk proved more resilient than Sukarno, who died under house arrest under his successor, Suharto, the anti-communist general who would rule Indonesia with an iron hand for the next 32 years. The regime change from Sukarno to Suharto had been accompanied by a massacre of some 700,000-800,000 suspected communists. This I would call the forgotten massacre. It was forgotten because the west was happy that Suharto, a staunch anti-communist, took power in Indonesia. Never mind the massacre of suspected communists. It was forgotten even by scholars. Prince Sihanouk, on the other hand, survived and, until his abdication in October 2004, continued to play a role in various capacities. Thirdly, as my friend Jose Caetano has enlightened us yesterday, when President Suharto invaded Timor Leste in 1974, he also got the tacit nod from President Ford of the USA, as he did it under the pretext of the US-led Cold War fight against communism, as represented, he convinced the US president, by Fretilin.

I would now like to elaborate on the eloquent presentations made by their excellencies Senator Ung Huot and Professor

Som Samnang. During the 1960s, the policies of both China and the US contributed to the tragic rise of the Khmer Rouge in Cambodia—China by unequivocally supporting the Khmer Rouge and the US, during the Nixon administration, by undertaking both overt and covert actions to penalise Prince Sihanouk's neutrality,¹ which indirectly contributed to the meteoric rise of the Khmer Rouge, enabling it to usher in a terror regime unequalled in modern times.

In order to penalise Prince Sihanouk's recalcitrance and the continued use of Cambodian territory by the Vietnamese communists, Nixon, shortly after he assumed the US presidency in 1969, authorised massive 'secret' bombings of Cambodia, beginning on 18 March 1969. In total, more than 500,000 tons of bombs were dropped in the four years of US air raids, compared to 160,000 tons on Japan during all of World War II. It was estimated that the bombardments killed somewhere between 50,000 and 150,000 people, most of them civilians.² The bombings unleashed a huge flow of refugees into the cities, radicalised the youth in the rural areas and drove many people into the ranks of the Khmer Rouge.

Secondly, on 18 March 1970, while Prince Sihanouk was out of the country, his prime minister, General Lon Nol, launched a coup d'état that ushered in a right-wing government sympathetic to the United States and South Vietnam. This occurred five years after Suharto took over from Sukarno in Indonesia. The people of Cambodia, especially the farmers, rose up in support of their beloved monarch, but to no avail. Prince Sihanouk, who was enraged by the coup, responded by forming a front and a government in exile in Beijing. Making a 180-degree turn vis-à-vis his former enemy Pol Pot,

1. Norodom Sihanouk, as related to Wilfred Burchett. 1972 *My War with the CIA*. New York: Pantheon Books.
2. Ben Kiernan, 'The American Bombardment of Cambodia', *Vietnam Generation*, 1, 1 (Winter 1989), p.32.

the leader of the then embryonic Khmer Rouge fighting the Sangkum Reastr Niyum government, the prince announced his collaboration with both the North Vietnamese and Pol Pot, embracing him in Beijing and lending the Khmer Rouge moral credibility. Prince Sihanouk urged Cambodians 'to struggle against the U.S. imperialists who have invaded our Indochina and are oppressing its peoples and breeding injustice, war and all kinds of calamities, hostility and disunity, troubles, crimes and misery among our three peoples—Khmers, Vietnamese and Laotians'.³

These ties meant that a massive flow of weapons from China and North Vietnam went to the Khmer Rouge; such weapons had hitherto been denied them, as China still respected Sihanouk's neutrality since the Bandung Asian African Conference in 1955, in which Premier Chou En Lai promised Prince Sihanouk that he would respect Cambodian neutrality. It was a turning point in Cambodian history. As a result, the Khmer Rouge grew from about 3,000 guerrillas fighting Sihanouk to around 30,000 guerrillas allied to him.

The Second Phase: Cambodia's Descent into Hell

In the second phase, from April 1975 to January 1979, Cambodia descended into hell. As this period is well known to the participants, most of them being victims of the atrocities of the Khmer Rouge regime themselves, I will not dwell on the details of this tragic period in Cambodian history. Suffice it to say that, the Khmer Rouge launched increasingly vicious attacks against Vietnam—their erstwhile strong supporter—slaughtering thousands of Vietnamese villagers in Tay Ninh province in 1977. Pol Pot's paranoia subsequently caused him to turn against his own soldiers, especially those in the eastern zone bordering Vietnam. He accused them of behaving like 'Khmer bodies with Vietnamese minds' and killed at least 100,000 during the period May to July 1978.

To escape these purges, many former Khmer Rouge soldiers, especially from the eastern zone, fled to Vietnam, where their

leaders, Hun Sen, Heng Samrin and Chea Sim, raised a rebel army and formed a government in exile in Snuol, just inside Cambodia, the Kampuchean National United Front for National Salvation, also known as the Salvation Front. On 25 December 1978, 12 Vietnamese divisions, totalling 100,000 troops, together with the Cambodian patriotic forces of 20,000, entered Cambodia and on 7 January 1979 overthrew the Pol Pot regime. The Cambodian people then established the People's Republic of Kampuchea (PRK), which soon gained control of over 90 percent of the country and an even higher percentage of its population. Vietnam's intervention in Cambodia, with the help of patriotic Cambodian forces, proved critical in removing the Khmer Rouge regime. No other country was then willing or ready to take on the Khmer Rouge. Certainly not the United States, which was still smarting from its unprecedented defeat by the Vietnamese.

The Third Phase: Internationalisation of the Cambodian Problem

Unfortunately, the ouster of the Khmer Rouge regime ushered in the third phase of Cambodia's recent history, 1979 to Oc-

tober 1991, in which the Cambodian tragedy became internationalised. The bizarre and paradoxical relations between the

3. 'Message and Solemn Declaration by Samdech Norodom Sihanouk, Cambodian Head of Nation, Beijing, 23 March 1970, mimeographed; found in Cornell University's John Echols collection.

United States, China, the Soviet Union and Vietnam had serious ramifications in Cambodia, which became a pawn in the proxy war, prolonging the tragedy of Cambodia's hapless people. Here the Cold War pitted the United States, China and ASEAN against the Soviet Union and Vietnam. The former group won. For Cambodia there were no Nuremberg trials. Instead of trying the Khmer Rouge, the United Nations accorded it recognition, leading to a prolonged period of international amnesia over the Cambodian tragedy.

Of course the PRK did everything possible to create awareness domestically and internationally of the Khmer Rouge atrocities. Among others, the Tuol Sleng torture camp became a museum, and a monument dedicated to the memory of the holocaust was erected at the killing field of Choeung Ek. It also tried Pol Pot and Ieng Sary in absentia in a People's Revolutionary Tribunal and condemned them to death, but the international community did not recognise this trial.

They had other things on their minds. Rather than being brought to trial after its defeat on 7 January 1979, the Khmer Rouge, incredibly, was 'rewarded' by continued recognition as the legitimate government of Cambodia for another 11 years, until the Paris agreements were signed. I will now elaborate on the root causes of the 27-year delay in bringing the Khmer Rouge to trial.

In 1979 the battle shifted to New York, where I was stationed at the time. Intense lobbying by the United States, China and the then anti-communist ASEAN portrayed

the ouster of the Khmer Rouge as an act of aggression by Vietnam, and the PRK was condemned. Incredibly, year after year, a resolution was passed by the UN General Assembly to continue seating the Khmer Rouge, since 1982 draped in a cloak of respectability provided by its allies Funcinpec and the KPNLF, as the legitimate representatives of Cambodia. I was present at the lavish parties at which Prince Sihanouk entertained delegates to the General Assembly at the Helmsley Hotel and made speeches to campaign for the continued seating of the Coalition Government of Democratic Kampuchea (CGDK) instead of the PRK as the legitimate government of Cambodia.

I witnessed these moves first hand and asked myself how I would have felt if I were a Khmer and had suffered tremendously under the Khmer Rouge, only to see the Khmer Rouge flag continue to flutter majestically over the skyline of Manhattan until the Paris agreements were signed. Closer to home, the same held true at the Bangkok headquarters of the UN Economic and Social Commission for Asia and the Pacific (ESCAP).

Meanwhile, the government of the PRK later the State of Cambodia (SOC), went unrecognised, and an economic blockade denying badly needed aid was imposed on the country. The PRK's isolation continued until the Paris agreements were signed 12 years later. In the field, a low intensity civil war continued to rage in which the Khmer Rouge, perched on the border of Thailand, continued to receive both lethal and non-lethal aid.

The Role of the United Nations Security Council

Here let me pause and consider the role of the United Nations and, in particular, who controlled the powerful Security Council of the United Nations. The United Nations

today has 191 member states, but on political issues, only the Security Council matters. It is dominated by the five members with veto powers: the US, Russia, the

UK, France and China, representing the big five victorious powers in World War II, now 61 years ago. Among the five, the United States exercises the most power in the Security Council, especially after the end of the Cold War. The reality of the United States as the only superpower was clearly evident during the Iraq war, and most recently during the war in Israel/Lebanon, when a cease-fire was delayed for one month even though Europe, the Organisation of Islamic States and even the Pope demanded an immediate cease-fire.

The dominance of the US in the Security Council was already evident during the Cambodian tragedy. At the time, the US vendetta against Vietnam was obviously dominant in its policies vis-à-vis Cambodia. In those days, however, the domination of the US was countered by the Soviet Union, also with veto power, even though the latter was outvoted in the General As-

sembly. The Security Council's double standards in solving crises were evident in its role denying the seat of Cambodia to the de facto Cambodian government, contrasted with the silence of the United Nations when Tanzanian troops invaded Uganda, also in 1979, and forced the genocidal Idi Amin into exile. In the same year, the international community also remained silent when Indian troops invaded the then East Pakistan and helped in the establishment of Bangladesh.

The debates in the General Assembly since 1979 and the sophisticated diplomatic manoeuvrings in the corridors of the UN had a harsh impact on ordinary Cambodians. The political ostracism and economic isolation imposed on Cambodia by the General Assembly's decision led to another 10 years of suffering by the Cambodian people after the ouster of the Khmer Rouge.

The Paris Agreements: A Flawed Solution?

While the UN General Assembly was divided on Cambodian representation, the UN Secretariat had been involved in trying to solve the Cambodian conflict from the beginning. However, a real breakthrough became possible only when the Cambodians judged themselves ready for it. In 1987, Prince Sihanouk and Hun Sen, leaders of the two opposing forces, came together for two historic meetings near Paris that finally broke the stalemate. After that, a confluence of favourable factors, including the thawing of the Cold War, brought a solution closer to reality. The Cold War finally ended with the dismantling of the Berlin wall and of communism in eastern Europe. In 1989 Vietnamese troops completed the final stage of their withdrawal from Cambodia.

Even though the Cold War was over, one of the principal obstacles to a solution was the

continued insistence of certain big powers on a 'comprehensive solution', which, translated into lay terms, meant to include the Khmer Rouge as a key player in the peace process rather than a culprit to be tried. Finally the Paris agreements were signed in October 1991, which offered a way out of the impasse of the 1980s, when two governments—the SOC and the CGDK, each recognised by a different set of countries in the United Nations—existed in Cambodia. According to an idea first mooted by Prince Sihanouk, later taken up by US Congressman Stephen Solarz from New York, and finally officially proposed by Australian Minister of Foreign Affairs Gareth Evans, the UN itself would take control of the administration of Cambodia until it had successfully conducted the elections and could hand over authority to the newly elected government. This idea became the cornerstone of the Paris agreements.

The Paris agreements created two further entities, each of which legally held executive powers in Cambodia during the transition period: UNTAC and the Supreme National Council (SNC). Both were novel concepts in international law. In the SNC, four entities held equal power: the SOC, Funcinpec, KPNLF and, yes, the Khmer Rouge. Thus, the Khmer Rouge was allowed to act as an equal partner in the SNC and to participate in the elections.

The Paris agreements and UNTAC were convenient vehicles for the big powers to extricate themselves from the Cambodian proxy war once the Cold War was over. However, other scenarios can be imagined that could have had a profoundly different impact on the course of events in Cambodia. For instance, suppose the Cambodian seat in the UN had been left empty throughout the 1980s rather than allowing the Khmer Rouge, cloaked in the CGDK mantle, to continue occupying it. For humanitarian reasons, aid could have flowed to both sides of the conflict rather than only to the CGDK partners while an economic blockade was imposed on the suffering people within the country, which is what actually happened. Another scenario would be that by 1988 there was reason to believe that changes in geopolitics, in particular in Sino-Soviet relations, meant that China's interest in the Khmer Rouge was decreas-

ing. There was also evidence that one or another western country, perhaps Australia or France, could have broken ranks and recognised the PRK. Even Prince Sihanouk was quoted as saying that 'Washington should be realistic' and 'flexible', taking into account the real situation in Cambodia.

Because of these lopsided provisions, whereby the Khmer Rouge was granted full legitimacy, UNTAC failed to solve the Khmer Rouge problem. In the famous 'bamboo pole incident', Akashi and Sanderson, the two leaders of UNTAC, were denied access to Khmer Rouge territory in Pailin by a young unarmed Khmer Rouge soldier who refused to lift a bamboo pole to let their vehicles through. The Akashi convoy chose to obey the soldier which was a defining moment in UNTAC-Khmer Rouge relations. The Khmer Rouge considered UNTAC a paper tiger. The Khmer Rouge also refused to be disarmed, which was the main reason for UNTAC's failure to demobilise the four armies, one of its major tasks in Cambodia. Finally, despite cajoling and persuasion by the UN and others, the Khmer Rouge steadfastly refused to take part in the elections. This, to me, was a blessing in disguise because it prevented the Khmer Rouge from securing seats and probably cabinet posts, which would have added insult to injury to the long suffering Khmer people.

The Eventual Solution of the Khmer Rouge Problem

The responsibility for dealing with the Khmer Rouge was thus put on the shoulders of the new Royal Government of Cambodia, which came to power after the UNTAC elections. When UNTAC left, the Khmer Rouge held a larger territory than when it arrived; such was the result of UNTAC appeasement of the Khmer Rouge. On 7 July 1994, the parliament passed a bill to outlaw the Khmer Rouge. The coddling of this faction would finally

cease. There was unconfirmed speculation that the bungled coup attempt by Norodom Chakrapong and his friends on the same day might have been linked to efforts to stop this outlawing of the Khmer Rouge. In 1996 Khmer Rouge leader Ieng Sary defected to the government with the bulk of the forces in the Pailin area. The rump Khmer Rouge in the Anlong Veng area continued to oppose the government. Finally, in 2003, with the death of Pol Pot and the

surrender of its remaining leaders, the Khmer Rouge movement was finally dissolved. While the Khmer Rouge's rise to power and significance was very much a product of foreign intervention, its final demise was basically accomplished by Cambodians alone.

In 1997, Prime Ministers Ranariddh and Hun Sen wrote to the United Nations seek-

ing assistance in bringing the Khmer Rouge to trial. The United Nations responded positively, thus ending an 18-year international amnesia about the Khmer Rouge problem. Protracted negotiations ensued. It gives me great personal satisfaction to be here at this historic moment when the Khmer Rouge, after such a long delay, will, with the help of the United Nations, finally be brought to justice.

The Cambodian Approach: Finding the Truth and Reconciliation through the ECCC

Sean Visoth*

The Extraordinary Chambers in the Courts of Cambodia is the youngest member in the family of international and hybrid tribunals. This baby is only newly born. Our national and international judicial officers were appointed by the Supreme Council of the Magistracy in May and sworn in on 3 July, and the co-prosecutors (Ms. Chea Leang from Cambodia and M. Robert Petit from Canada) began their work on 10 July 2006. In a few days' time the co-investigating judges (Mr. You Bunleng and M. Marcel Lemonde from France) will take up their posts.

I have been asked to address the Cambodian approach, and so would like to share with you the perspective of the Royal Government of Cambodia in seeking to achieve justice regarding the crimes of the Khmer Rouge, in which we have been guided by three fundamental principles.

The first is respect for and the search for justice. We condemn the crimes of the Khmer Rouge as crimes of genocide and crimes against humanity. We seek justice for their victims, and for the entire Cambodian people, and we wish also to contribute to the development of international humanitarian principles, condemning genocidal crimes and seeking to prevent their recurrence. The Cambodian people express their deep thanks to the international community for joining this justice-seeking process over the last few years, even though most had turned their heads away during the Pol Pot regime and immediately afterwards.

The second principle is maintaining peace,

political stability and national unity, which Cambodia has achieved only in recent years. Even though we can not say we have ensured 100 per cent social law and order and 100 per cent security, we are proud of moving forward in the process of strengthening political stability, peace and security, and this is a valuable achievement for our beloved motherland after a whole generation of conflict. Whatever we do must not damage our peace and stability, and throughout the process over the past four years of designing the Khmer Rouge trials, we have always sought to gain consensus, based on respect for the highest national interests. Such consensus was demonstrated in the unanimous vote achieved in both houses of our legislature in 2001 when the law establishing the ECCC was passed, and again in 2004 when the agreement with the United Nations was ratified.

The third principle is respect for national sovereignty, enshrined as a fundamental principle in the Charter of the United Nations. Our raising the principle of respect for our national sovereignty is reasonable, and we have struggled hard for this principle, which has been implemented in the ECCC in the following ways:

Appointment of judges: both national and international judges have been appointed by the Cambodian Supreme Council of the Magistracy, although the secretary-general of the United Nations nominated the international judges for selection by the council.

Composition of the trial chambers: both

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chambers are composed of Cambodian judges in the majority. In the trial chamber there are five judges, of whom three are Cambodian; in the Supreme Court of appeal seven judges, four are Cambodian. This is balanced by the requirement that decisions will be made based on an unprecedented formula of a 'super majority' or qualified majority, which requires four votes out of five or five out of seven to make a decision.

Initiation from within: The history of international criminal tribunals from Nuremberg on shows they were organised with foreign judges and initiated and imposed from without. But our mechanism,

known as the Extraordinary Chambers, is organised within the structure of the Cambodian courts, using both Cambodian and international law, and following Cambodian procedure, while assuring international standards.

The United Nations and the Royal Government of Cambodia came to agreement on this unique formula – the Cambodian model – for the ECCC. We expect the ECCC to be a model court for Cambodia, serving to contribute to the overall process of legal and judicial reform. In addition, if we are successful, we see our model as a contribution to the family of internationalised courts that others may wish to follow.

United Nations Assistance to the Extraordinary Chambers in the Courts of Cambodia

Michelle Lee*

I will briefly address how the United Nations is assisting the Royal Government of Cambodia in seeking a measure of justice in respect of the atrocities committed under the Khmer Rouge regime.

I will start with a note on the specificity and importance of the Cambodian model. The international community had for some time favoured the pure international model for tribunals set up to try grave breaches of international criminal law. The ICTY and ICTR were neither based in the country where the respective atrocities were committed, nor were they staffed by judges from those countries, in whole or in part. As such, their impact on local communities was somewhat limited. These tribunals were also very capital- and human resources-intensive, placing a heavy burden on member states, who as a result were perhaps less likely to be responsive to emerging needs in transitional justice.

As H.E. Sean Visoth has pointed out, the ECCC is a Cambodian court based in Cambodian territory, staffed with a majority of Cambodian judges applying Cambodian and international law. Further, it was the Cambodian government which requested UN assistance in 1997 in order to set up this tribunal, and not the other way round. It is also very pared down in terms of human and capital resources. In these respects, it is not only different from the international criminal tribunals, but also from the other so-called 'hybrid' models that were either set up under a United Nations

transitional administration (East Timor and Kosovo), and not at the request of a sovereign state, or did not have a majority of national judges (Sierra Leone). The Cambodian model has the potential for a greater impact at a reduced cost, and therefore it is a model we must explore to the full, and strive for its success.

What can the United Nations contribute to the functioning of such a model? First, expertise: the Khmer Rouge period caused the destruction of much of Cambodia's human capital and infrastructure, and it has been a difficult road to bring these back up to standard. Much of the expertise necessary to run an international tribunal is simply not available within Cambodia. The United Nations has set up a number of international and hybrid tribunals and is happy to provide such expertise with a small team of international staff assisting the administration and judicial officers.

Second, international standards: the credibility of the Cambodian model hinges on the ECCC functioning under the highest legal and ethical standards. The first milestone has already been reached with the nomination by the secretary-general, and appointment by the Supreme Council of the Magistracy, of world class judicial personnel ready to assist their Cambodian counterparts. They will ensure that high legal standards and proper legal argument are integral to the judicial proceedings that will commence before the ECCC in due course. Both Visoth and I are also working hard to

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set up various support mechanisms to ensure high standards. For example, we are working together with the principal defender to ensure that parity of arms is central to the proceedings and that defence counsel engaged before the ECCC abide by a strict code of professional conduct. The ECCC must be an example in the application of the rule of law.

This brings me to my last point, legacy: there is no doubt that the success of the ECCC will also be judged on whether it

will have left a positive mark on the landscape of the rule of law in Cambodia, or whether it will have been a transient experience with little long-term impact. In this, the United Nations as a whole must work together and support the government in ensuring that the lessons learned and the methodology applied in the proceedings before the ECCC trickle down to the local courts, imbuing the fabric of society with the concept that the legal system is a positive resource, which works towards fairness and is accessible to all.

Moving Forward through Justice

Helen Jarvis*

Important efforts to uncover and document the truth of what happened under the Khmer Rouge have been made since the very first days after their overthrow. In early 1979, the notorious S-21 prison was turned into the Tuol Sleng Genocide Museum, and what is often termed 'the killing field' on the outskirts of Phnom Penh, where it is understood that 15,000 of Tuol Sleng's inmates were slaughtered, became the Choeung Ek Memorial, where their remains are respected and honoured in a memorial stupa. At that time, significant potential oral and physical evidence of the crimes committed (including exhumations and forensic analysis) was gathered as the basis for the 1979 People's Revolutionary Tribunal. In the early 1980s, a massive research effort compiled testimony in petitions from more than one million Cambodians from almost every province in the country, attesting to the losses they had suffered personally—in their family, village or cooperative.

Since 1995, the Cambodian Genocide Programme and the Documentation Centre of Cambodia have painstakingly assembled and analysed documents as well as mapping graves, prisons and memorial sites throughout Cambodia. Their research has so far documented 19,403 mass graves at 302 locations, 189 prisons and 80 memorials.

Mindful of the need to preserve these sites, in December 2001 the government issued a circular concerning the preservation of remains of the victims of the genocide committed during the regime of Democratic Kampuchea, and preparation of the former

Khmer Rouge stronghold of Anlong Veng to become a region for historical tourism and for education of present and future generations of Cambodians, as well as foreign visitors.

In addition to these organised research activities, many, many Cambodians have told their stories—orally to their families, in books for publication or for personal record and in artistic representation in the form of drawings, paintings, song, music and film.

What has changed in the past few months is that this wealth of documentation is now to be accompanied by the missing partner—an internationally recognised judicial accounting process. The Extraordinary Chambers in the Courts of Cambodia are now a reality. Two co-prosecutors (one Cambodian and one international—Canadian Quebecois) have begun their work. Two co-investigating judges (one Cambodian and one international—French) will start work in a few days. Judges have been sworn in and are currently examining draft internal procedures and regulations, which they expect to finalise by October. The buildings and grounds for the offices and for the court itself are being prepared. There is public information, such as the booklet you have received today and a web site, and ECCC staff and judicial officers are giving constant interviews to radio, TV and the print media.

The process of judicial accounting is being done late, and much has been lost in the intervening almost 30 years since the end of the Khmer Rouge regime. Physical evidence has been washed away, documents

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have been lost, memories have faded and, above all, many people have died—people who should be on trial, people who should have the chance to tell their stories in court and millions who should have had the chance to see justice done.

We all know that ‘justice delayed is justice denied’, and Cambodians have waited too long for this judicial accounting. I will not today discuss the reasons why the ECCC was not established sooner—that is a complex tale, and other speakers have addressed it. But I will take the chance to say that we in the ECCC feel strongly that, despite the delay, we must proceed with our work, and we believe that the alternative—to leave untried and unpunished crimes of such magnitude—is simply unthinkable.

The negative results of the delay are well known and often discussed. But I would like you to consider some balancing benefits. Firstly is the amount of documentation that has been compiled, as I mentioned

above. This is now providing important building blocks for the work of the court.

Secondly, unlike other countries where the process of judicial accounting has taken place in the immediate post-conflict situation, or even in the context of continuing conflict, in Cambodia we are fortunate that the work of the court can unfold in a situation of peace, national stability and after a great deal of national reintegration has taken place.

The ECCC has now begun its work. Many people have expressed impatience and scepticism, but many more are optimistic and indeed are counting on us to bring what they have been waiting for so long. We realise the heavy obligations we have, and we hope we can fulfil their expectations.

The Public Affairs Office has selected the words ‘Moving forward through justice’ to express succinctly our objective and hope for what the work of the court can bring to Cambodia.

Closing Remarks

Sok An*

This is the first opportunity I have had to speak to an international audience on this topic since the historic swearing in of national and international judicial officers for the Extraordinary Chambers held on 3 July 2006—an event which marked the commencement of the substantive judicial work of the court.

Many people doubted that this day would ever come to pass. Certainly there were many times during the almost 30 years since the crimes were committed, and also even during the years after we asked for international help in mid-1997, that the goal of establishing this court seemed tantalisingly close yet still elusive. Nevertheless, we were always convinced that the goal could be reached.

Although sometimes it seemed we were moving two steps forward and one step back, thanks to the support of many both within the country and overseas, we have finally established the court we were seeking to build. The Extraordinary Chambers in the Courts of Cambodia (ECCC) are a mixed or hybrid tribunal—firmly located in the national courts but involving both national and international law; national and international judges, prosecutors and staff, and national and international financing.

During the past two days you have had the benefit of hearing from speakers from other countries—Germany, East Timor, Sierra Leone and Rwanda—all of which have had their own traumatic experiences. Like our friends in those countries, we in Cambodia can never forget such events, but we can try our best to understand them, to

explain them to our children and, above all, to try to bring those most responsible to account for their crimes. Unless we make such efforts, we fail to honour those who suffered.

It has been most valuable for Cambodians attending this conference and hearing about it through the press to be able to put their own past into context and to know that others around the world have suffered as we did and have had to work out their own ways to deal with the burden of this past.

I know that HE Sean Visoth, director of administration of the ECCC, has spoken in more detail about our guiding principles, namely our determination to render justice for the victims of the tragedy; prevention and non-recurrence of the genocide; maintaining peace, political stability and national unity; and respect for national sovereignty.

I would like to take this opportunity to say a few words about how we in Cambodia have approached the task of integrating these guiding principles, as Cambodia can perhaps offer some lessons from our experience in the long and complex process of national reconciliation.

The Paris Peace Agreement of 1991 accorded political legitimacy to the Khmer Rouge and, when UNTAC left Cambodia in 1993, the new coalition government had to cope with the Khmer Rouge continuing policy of civil war and destabilisation. We then launched a multi-faceted strategy involving political, legal, economic and military campaigns, including the 1994 legisla-

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tion to outlaw the Khmer Rouge, and efforts to encourage its members to defect and split.

The 'win-win' policy initiated by our Prime Minister Samdech Hun Sen had five facets: 'divide, isolate, finish, integrate and develop', through which the Khmer Rouge political and military structure was ended, but those Khmer Rouge who defected were assured of their physical safety and survival, the right to work and to carry out their professions and the security of their property.

Today the former Khmer Rouge have resumed their lives within the general community, and all the former factions have taken up the challenge of working together to develop the country. This precious achievement must not be undermined by the judicial process, which is limited in scope to the senior leaders of Democratic Kampuchea and those most responsible for serious crimes.

In Cambodia this emphasis on national reconciliation has not meant that we have forgotten our past, and we have undertaken many efforts to document the record of what happened during Democratic Kampuchea. But what is still not yet achieved is rendering justice for the victims of that genocidal regime. It is a task that has been on our minds since 1979, when we established the People's Revolutionary Tribunal. Unfortunately, due above all to the geopolitical situation at the time, the testimony and the verdicts from that court were simply ignored outside our country, and the task of achiev-

ing justice is one that we have had to keep on our agenda over the past years.

Now, as we finally have established the ECCC, we keep firmly in our minds that this judicial process must not damage the process of reconciliation that I have described above. In Cambodia we seek justice in order to heal the wounds in our society.

We know that the next three years will not be easy, but I see on the faces of both the UN and the Cambodian staff of the ECCC that they are committed and determined to discharge the heavy responsibility that now rests on their shoulders—to establish a court that can bring justice to the victims and that meets international standards.

Now, as we move into the actual judicial work of the Extraordinary Chambers, is the time for all Cambodians, and all fair-minded people around the world, to do our utmost to make the Khmer Rouge trials a successful process. Let us pledge to work together towards this end.

In conclusion, may I congratulate the Cambodian Institute for Cooperation and Peace and the Friedrich Ebert Stiftung for organising this conference and for taking the initiative to bring delegates from other countries to share their experiences with us. I am sure that the Cambodian participants have taken note of a number of valuable lessons, and we hope that the Cambodian experience has been able to offer some insights also to the international community.