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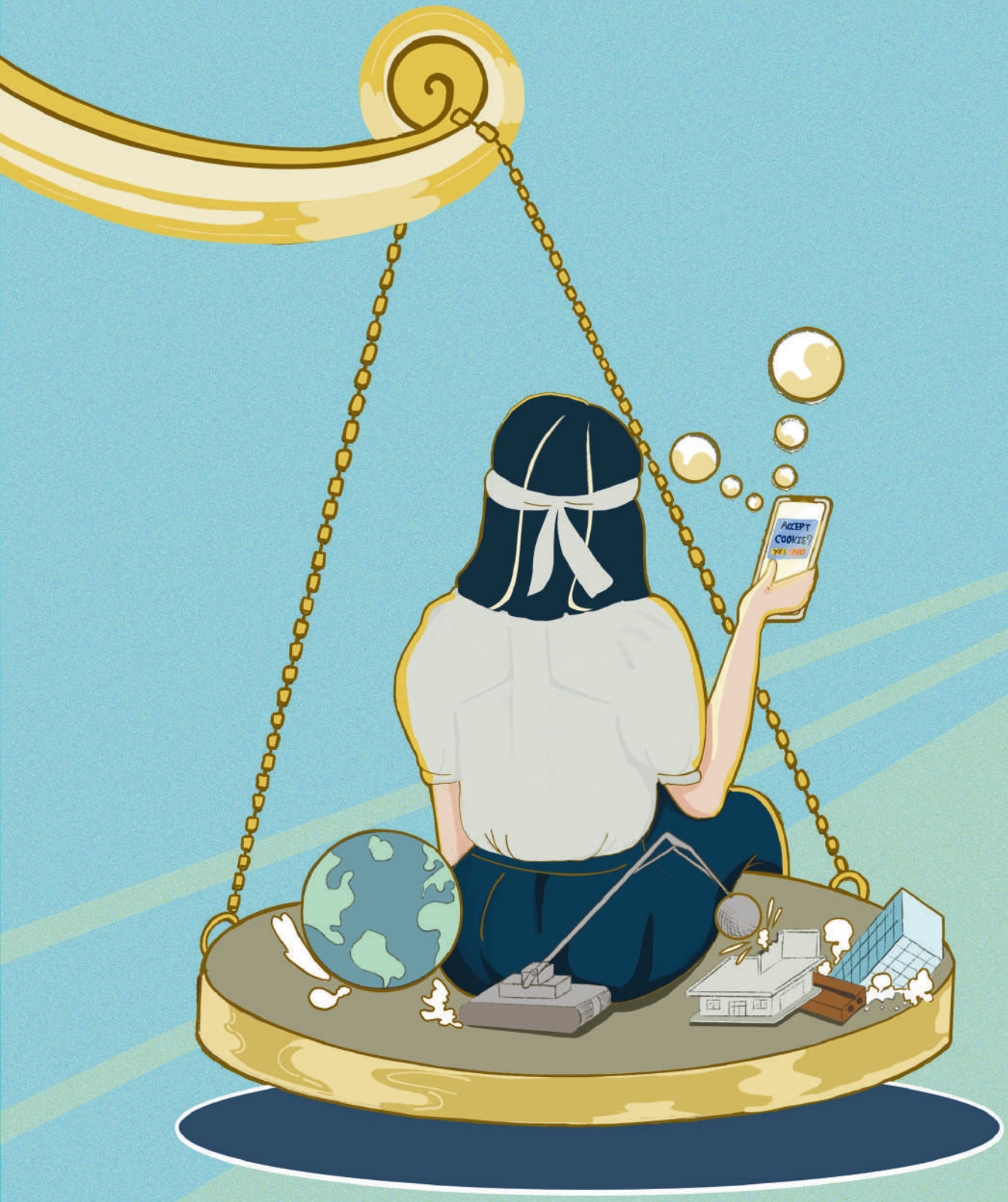
ROYAL UNIVERSITY OF LAW AND ECONOMICS

LAW BRIEF:

Navigating the Legal Landscape



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ABOUT KONRAD-ADENAUER-STIFTUNG

Freedom, justice, and solidarity are the basic principles underlying the work of the Konrad-Adenauer-Stiftung (KAS). KAS is a political foundation, closely associated with the Christian Democratic Union of Germany (CDU). As co-founder of the CDU and the first Chancellor of the Federal Republic of Germany, Konrad Adenauer (1876-1967) united Christian-social, conservative and liberal traditions. His name is synonymous with the democratic reconstruction of Germany, the firm alignment of foreign policy with the trans-Atlantic community of values, the vision of a unified Europe, and an orientation towards the social market economy. His intellectual heritage continues to serve both as our aim as well as our obligation today. In our European and international cooperation efforts, we work for people to be able to live self-determined lives with freedom and dignity. We make a contribution underpinned by values to help Germany meet its growing responsibilities throughout the world.

KAS has been working in Cambodia since 1994, striving to support the Cambodian people in fostering dialogue, building networks, and enhancing scientific projects. Thereby, the foundation works towards creating an environment conducive to social and economic development. All programs are conceived and implemented in close cooperation with the Cambodian partners on central and sub-national levels.

Learn more through KAS Cambodia Website

ROYAL UNIVERSITY OF LAW AND ECONOMICS

The Royal University of Law and Economics (RULE) is the first higher education institution in Cambodia. It was originally founded in 1949 as the National Institute of Law and Economics, and then it was renamed as the Faculty of Law and Economic Sciences and integrated into the University of Phnom Penh in 1957. The university was closed during the Khmer Rouge Regime (1975-1979), and re-opened in 1982 as the Administrative and Judicial School and then the Royal University of Law and Economics in 2003.

RULE currently has four faculties (the Faculty of Law, the Faculty of Public Administration, the Faculty of Economics and Management, and the Faculty of Informatics Economics) and a Dual Degree Department proposing dual bachelor's and master's programs in law and economics with partner universities located in Western Europe, including an international faculty comprising of tenured professors from world's leading universities, participating in RULE's internationalization strategy.

The university currently welcomes over 19,000 students, mostly enrolled in law programs, a number in constant expansion as a testimony of the quality of its academic offer and the dynamism of the high education sector in Cambodia. For more information, visit RULE general website https://rule.edu.kh/en/ or the Dual Degree Department website https://ddprule.org/

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FOREWORD

Welcome to the inaugural volume of Law Brief, themed "Navigating the Legal Landscape." It is with immense pleasure that we present this comprehensive collection of articles, authored by the distinguished fellows of the KAS For Legal Youth (KASFLY) program. Since 2017, KASFLY has been an educational and training initiative for students and young professionals in the legal field. Our foundational belief is to act as one of the select platforms for a law capacity-building program.

This program provides lifelong learning skills on both professional and personal levels, accompanied by academic activities, to empower emerging and recent graduates as they prepare for their early professional careers in the legal sector in Cambodia.

The Law Brief is a compilation of legal articles penned by KASFLY Fellows. Each fellowship entails a series of trainings that bolster critical thinking, research and analysis, and academic writing skills. The fellows have pinpointed issues of interest and have conducted research to comprehend the underlying causes, offering solution-oriented legal recommendations. This issue encompasses four sections covering 12 articles. The first section concentrates on commercial transactions—the bedrock of modern legal practice—spanning topics from competition law to real estate, and examining the solvency and liquidity of banks and microfinance in Cambodia. In an age overshadowed by digital transformation, data and privacy concerns have surged to the forefront. The second section is devoted to this pivotal domain, highlighting the fellows' comprehensive exploration of data protection, privacy rights, and the legal frameworks that regulate them. The third section addresses national law, where our fellows have explored the intricacies of legal systems within Construction and Demolition Waste (CDW) Management and the enforcement of arbitration awards in Cambodia. Finally, the fourth section delves into the evolving issues of international law concerning human rights. Here, the fellows have composed engaging articles on the complex areas of International Humanitarian Law (IHL), International Criminal Law (ICL), and International Human Rights Law (IHRL).

We extend our profound thanks to our editors, Mrs. Tann Boravin and Mr. Paul Mornet, and to each fellow for their exceptional contributions to this anthology. Their dedication and passion have greatly enriched the dialogue on these significant legal subjects.

We wish you an enlightening and thought-provoking read!

Warm Regards,
Jason Chumtong

NOTES ON CONTRIBUTORS

EDITORIAL TEAM

TANN Boravin has worked as a researcher and lecturer at the Center for the Study of Humanitarian Law based at the Royal University of Law and Economics (RULE), Cambodia, since 2017. She has written research articles on the rights of migrant workers, the right to higher education, and freedom of association that have been published in regional and international academic journals, including the Journal of Southeast Asian Human Rights. She is also an experienced field researcher who has participated in several international research projects. Currently, she is a co-investigator of a two-year research project on the concept of human dignity in Cambodia. Also, she has a keen interest in Cambodia's transitional justice process, particularly the Extraordinary Chambers in the Courts of Cambodia (ECCC), for which she is a book project editor. In her capacity as a lecturer, she teaches international humanitarian law and coached undergraduate students to compete in the annual Red Cross International Humanitarian Law Moot Court Competition since 2018. She received her LL.M. with distinction (with a scholarship from the Raoul Wallenberg Institute) in international human rights law from Lund University (Sweden). She also holds dual bachelor's degrees in Law (RULE) and International Studies (Royal University of Phnom Penh). She is also a member of the Sydney Southeast Asia Centre at the University of Sydney.

Paul MORNET is the director at RULE of both the dual master's program in international business law (RULE-ULB) and the dual master's program in public international law (RULE-UP8) since 2019. He has over 12 years of experience as a lecturer in Cambodia, conducting courses in international law, international relations, and political sciences at the undergraduate and graduate levels. He has been an associate professor at PUC Faculty of Social Sciences and International Relations since 2015, giving lectures on Political Ideologies, Globalization, Regional Integration, and the Theories of International Relations. He is also a consultant on high education in Cambodia for various international organizations. He obtained a BA in law and MA in international relations and law from Université Jean Moulin Lyon III in France (Magna Cum Laude) and is currently a PhD candidate.

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IM Vireakboth works as a researcher for the Compatibility Study Project, a collaborative effort between the International Committee of Red Cross Cambodia and the English Language Based Bachelor of Law Program aimed at developing comprehensive guidelines for assessing the compatibility of national law and obligations under international humanitarian law treaties. As a passionate advocate for human rights and humanitarian law, he has over 3 (three) years of experience in these fields, including competing and advising teams both domestically and internationally in three different international law competitions dissecting fictional cases relating to international criminal law, international human rights, and humanitarian law. He currently holds a bachelor's degree in law from the Royal University of Law and Economics, and his research interests include regulatory loopholes in international humanitarian law and a lack of access to the right to a fair trial.

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SECTION 1 COMMERCIAL TRANSACTION

A GUIDE TO ASSESSING MERGERS UNDER THE CAMBODIAN COMPETITION LAW

MAO Virakboth

I.INTRODUCTION TO THE LEGAL ISSUE

After languishing in legislative limbo for almost two decades, the Competition Law was finally adopted on 05th October 2021, as part of Cambodia's commitment to the World Trade Organization (WTO) and the ASEAN Economic Blueprint 2025.[1]
This recent legislative accomplishment reaffirms Cambodia's unwavering support for the free-market system. And it further reinforces the understanding that competition is the key to encouraging innovation, economic efficiency, and improving consumer welfare — through the access to cheap, varied, and high-quality goods and services.[2]

Nonetheless, while the significance of a comprehensive competition law cannot be overstated, there remain hurdles to overcome when implementing the competition law in Cambodia. One such hurdle relates to the lack of clarity for assessing merger transactions and determining when they are anti-competitive. This can be attributed to the broad, open-ended language in which the Competition Law — and competition laws in general— is written.

Determining whether a merger transaction is anti-competitive is not clear-cut, as it does not strictly depend on the satisfaction of immutable facts. To the contrary, such determination largely involves value-based assessment, and leaves much room for interpretation as to when competition is considered to be substantially or significantly harmed. Thus, enforcement of merger control under the Competition Law runs the risk of being inconsistent and arbitrary, lacking any reliable foundation.

In light of these challenges, this research paper advocates in favor of internal merger guidelines, which offer a clear analytical framework for assessing merger transactions under the Competition Law. These guidelines are to incorporate assessment criteria commonly adopted by competition authorities in advanced jurisdictions—most notably the European Commission.

[1] Koty, "Cambodia's First Law on Competition: What Investors Need to Know".
[2] The Competition Law, Art. 2.

II. BACKGROUND

In order to understand any legal issue, it is necessary to gather and scrutinize existing laws and regulations that are relevant to that specific problem. Within the context of merger control, analyzing the current laws under the competition regime would allow us to pinpoint areas that need further clarification through regulatory guidelines. And ultimately, it would also help us develop guidelines that fit within the existing legal framework.

Article 11 of the Competition Law serves as the legal basis for Cambodia's merger control.[3] It stipulates that any merger transaction "which has or may have the effect of significantly preventing, restricting or distorting in a market shall be prohibited"[4]. Additionally, Article 11 of the Competition Law also subjects merger transactions to examination, inspection, and assessment as to their effects by the Competition Commission of Cambodia (CCC).[5] However, the Competition Law itself is silent as to how merger transactions are to be assessed.
Since 2021, the Cambodian government has adopted many other regulations to expand on the merger control regime—the most substantial of which being Sub-Decree No. 60 on the Requirements and Procedures for Business Combinations (Sub-Decree No. 60). This regulation requires, among other things, that companies file for approval from the CCC prior to the completion of merger transactions—provided that the relevant thresholds are met.[6] And before approval can be given, these merger transactions are subject to an extensive multi-tiered review process by the CCC.[7]

While Sub-Decree No. 60 no doubt marks a significant leap towards the eventual implementation of merger control in Cambodia, it is troubled by the same ambiguities as the Competition Law. This regulation also does not provide any useful indications as to how merger transactions are to be assessed in order to determine whether they are anti-competitive.

III. WAY FORWARD: RECOMMENDED ASSESSMENT CRITERIA FOR MERGER GUIDELINES

Absent legislative clarity surrounding the assessment of merger transactions under the Competition Law, one option is the adoption of regulatory merger guidelines. By design, such merger guidelines are to provide an analytical framework for assessing merger transactions, as well as to offer practical criteria to conduct such assessments.
The use of merger guidelines is by no means a unique solution; many other advanced jurisdictions have also adopted detailed, non-binding regulatory guidelines to ensure uniform application of law. These jurisdictions include— but are not limited to — Canada[8], the United States[9], the United Kingdom[10], and Australia[11]. However, despite the availability of many existing merger guidelines for Cambodia to emulate, this research paper specifically advocates for the adoption of guidelines similar to those used by the European Commission.

Turning to European legal principles as a source of guidance is in no way a unique proposition, especially in the realm of competition law. A majority of competition laws enacted since the 1980s have— to varying extent—been influenced by European jurisprudence.[12] Likewise, Cambodia has also been also influenced by European legal principles, either directly or indirectly, when establishing its own competition regime.[13] This is particularly evident by the "object-and-effect" standard deployed in Article 8 and Article 9 of the Competition Law in determining the illegality of vertical agreements and abuse of dominant market position.[14] This "object-and-effect" standard is typically identified with the Treaty for the Functioning of the European Union (TFEU).[15] Thus, the existing European influence in the Competition Law lends itself well to the continued adoption of European principles and ideas in assessing mergers transactions, albeit with minor adjustments to conform to local contexts.

Another argument in favor of emulating the EU's merger guidelines relates to the harmonization of national competition laws and the global integration of markets. Studies have shown that of the 130 jurisdictions that have adopted a comprehensive competition regime, a majority of them have competition laws and principles that closely resemble the EU's.[16] By adopting European principles in its merger assessments, Cambodia can build toward the global harmonization of the competition regime, and avoid its Competition Law from being de facto trade or investment barriers.

It bears emphasizing however that while this research paper advocates for the emulation of the European Commission's merger guidelines, it by no means views that European legal principles can be applied in Cambodia like cookie-cutters or a simple copy and paste, disregarding the country's local contexts. While the EU's merger assessment criteria are used as a foundation, this research paper will suggest modifications as deemed necessary, in light of the existing regulatory framework in Cambodia and their feasibility in application.

A. MARKET DEFINITION

For the European Commission, market definition constitutes the central element in merger assessments, often providing the starting point for investigating the potential anti-competitive effects of a given transaction.[17] It is used to identify the actual competitors of the companies involved in a merger transaction that are capable of constraining their

[3] Ibid., Art. 11
[4] Ibid.
[5] Ibid.
[6] Sub-Decree No. 60 on the Requirements and Procedures for Business Combinations, Art. 4.
[7] Sub-Decree No.60 on the Requirements and Procedures for Business Combinations, Art. 5.
[8] Merger Enforcement Guidelines.
[9] Vertical Merger Guidelines; Horizontal Merger Guidelines.
[10] Merger Assessment Guidelines.
[11] Merger Guidelines.
[12] Pollard, "More Than a Cookie Cutter: The Global Influence of European Competition Law", 330.
[13] Ng, "From Divergence to Convergence: The Role of Intermediaries in Developing Competition Laws in ASEAN," 162–193; Fruitman and Songkheang, "The Journey to the Cambodian Competition Law", 321–336.
[14] The Competition Law, Arts. 8-9.
[15] Abrenica and Bernab, "The Case for the Philippine Competition Law", 163-164.
[16] Bradford et al.,"The Global Dominance of European Competition Law over American Antitrust Law".
[17] Gore at al., Economic Assessment of Mergers under European Competition Law, 31.

behavior and preventing them from behaving independently of competitive pressure.[18]
The emphasis on market definition is understandable, and one which should be adopted by Cambodia. Frequently, how broadly or narrowly a market is defined determines whether a merger is deemed anti-competitive and unlawful.[19] Consider, for example, a market in which there are only two competing firms. A merger between the two is likely to be anti-competitive, since it would create a monopolist, capable of raising prices for consumers without competitive restraints. However, if the market is viewed to have ten competing firms instead of two, the hypothetical merger raised earlier would have a significantly lower risk of appreciably harming competition—due to the number of remaining firms able to deter the merged firm from raising prices.
A reliable approach to market definition is demand-substitution, which focuses on the extent to which customers are able to find goods or services that are interchangeable or substitutable in order to meet their demands.[20] Determining the interchangeability of two or more products is, in turn, done by asking whether a monopolist of one product would be able to implement a small, but lasting increase in price, without having to worry about consumers switching to other products.

How this thought experiment works can be illustrated by an example of a merger involving two car manufacturers that produce different car models: Model A and Model B. An issue to examine would then be whether the two car models belong in the same market. To determine this, it is necessary to ask whether the consumers of Model A would switch to Model B when confronted with a small increase in price for Model A. The underlying assumption here is that if Model A and Model B are indeed competing goods in the same market, there would be no reason for most customers to not switch to a cheaper model, due to their perceived interchangeability.
However, if a sufficient number of customers fails to switch to Model B to the extent of making the price increase of Model A unprofitable, Model A would be considered to be in a separate market from Model B, despite both of them being cars.

While emulating the EU's conceptual framework behind market definition is certainly easy, a practical challenge for Cambodia lies in the collection of quantitative data to measure whether different goods or services are substitutable by consumers. Assessing demand-substitutability typically involves the use of economic and statistical data in order to measure cross-price elasticities for the demand of different products. Such data is generally not readily available in Cambodia.[21]

Nonetheless, market definition does not strictly rely on quantitative data; Cambodia may also consider gathering qualitative data obtained through an analysis of the products' characteristics and intended use.

Additionally, market definition can be ascertained through the views of the consumers and competitors, consumer preferences, and any barriers and costs associated with switching to potential substitutes.[22]

B. MARKET SHARE AND MARKET CONCENTRATION

In merger assessments, the European Commission considers the market shares of the involved parties and the overall concentration level in the affected market.[23] This latter is measured by the Herfindahl-Hirschman Index (HHI), calculated by summing the squares of the individual market share of all the firms in the market.[24]

Generally-speaking, where the companies concerned hold high market shares in an already concentrated market, there is a higher risk that they will be able to exercise market power and soften competition — following the completion of the merger transaction. [25]

This understanding is also somewhat reflected in Article 8 of Sub-Decree No. 60, which introduces a screening process, limiting the need for secondary review to only merger transactions considered most likely to significantly harm competition.[26] This article provides that where the collective market shares of the parties or the HHI fails to reach a certain threshold, the merger transaction shall be automatically approved during the primary review process—without having to undergo an additional, secondary review period.[27]

Thus, the use of market share and market concentration for merger assessments aligns with Cambodia's existing regulatory framework. Any deviation between Cambodia's and the EU's merger control regimes would mainly be the determination of the exact market share and the HHI level that would trigger anti-competitive concerns.

However, much like with market definition, there may be practical challenges for Cambodian authorities in collecting empirical data to determine market shares and (subsequently) overall concentration levels. With the exception of highly regulated sectors[28], which publish detailed statistical data on an annual basis, most industries do not have publicly available information to easily determine market shares.

Having said the above however, Cambodian authorities may still consider estimates from market participants themselves, studies commissioned from industry consultants and/or trade associations (if any).

[18] Ibid.
[19] Ibid.
[20] Commission Notice on the Definition of Relevant for the Purpose of Community Competition Law.
[21] Ibid.
[22] Khemani, Anderson, and Bamford, A Framework for the Design and Implementation of Competition Law and Policy, 13.
[23] Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings.
[24] Ibid.
[25] Ibid.
[26] Sub-Decree No.60 on the Requirements and Procedures for Business Combinations, Art. 8.
[27] Ibid.
[28] These highly-regulated sectors include the banking and financial sectors, where the National Bank of Cambodia often publishes reports on an annual basis. These reports are accessible here: https://www.nbc.gov.kh/english/publications/annual_reports.php

C. TYPE OF MERGER TRANSACTION

According to European jurisprudence, the type of merger transaction being contemplated has an important implication for competitive assessments. The European Commission typically distinguishes between two types of merger transactions: horizontal mergers and non-horizontal mergers. The latter can be further subdivided into vertical mergers and conglomerate mergers.[29]

Horizontal mergers refer to mergers between firms producing competing goods or services.[30] Vertical mergers — on the other hand — involve companies operating at different levels of the supply chain or distribution chain.[31] An example would be when a manufacturer of a particular product merges with its distributors. Finally, conglomerate mergers are mergers between firms whose relationships are neither horizontal nor vertical. These firms generally produce unrelated goods or services.[32]

Frequently, the likelihood of competitive harm differs depending on whether the merger is horizontal, vertical, or conglomerate. It is generally viewed by the European Commission that between the three, horizontal mergers have the highest likelihood of harm, while conglomerate mergers have the least likelihood.[33]

The understanding that different types of mergers have varying degrees of potential harm is also reflected in and consistent with Sub-Decree No. 60, which also sees the need to distinguish between the three types of merger transactions. In particular, Sub-Decree No. 60 sets higher thresholds to justify the need for an extensive, secondary review of vertical and conglomerate mergers.[34] However, the rationale behind this distinction is not explicitly stated under the regulation.

The principal theory as to why horizontal mergers are most likely to significantly harm competition is because they immediately reduce the number of independent competitors in the market. The reduction of competitors, in turn, has the unwanted effect of increasing the market power of the existing firms and making collusion between them easier.

Unlike horizontal mergers, both vertical and conglomerate mergers do not immediately reduce the number of competitors in the market.[35] However, this does not necessarily mean that they would not entail any harm to competition; there still exist circumstances in which vertical and conglomerate mergers may be anti-competitive in nature. Vertical mergers, for instance, may result in either input foreclosure or customer foreclosure. The former refers to the situation where the merger is likely to raise the costs for downstream rivals by restricting their access to an important input.[36]

For example, consider a case where a dominant beer manufacturer merges with a supplier of critical inputs such as hops. In this situation, the dominant beer manufacturer may be able to deny other beer manufacturers access to hops, thus reducing their ability to compete.
Customer foreclosure— on the other hand — denotes the situation wherein a merger reduces the ability of upstream rivals to make sales by restricting a significant portion of the downstream customer base.[37] Consider again the hypothetical merger between the beer manufacturer and the hops supplier. Assuming that the beer manufacturer is the largest consumer of hops in the market, this merger would foreclose a significant share of the customer base for other hops suppliers.

Similarly, conglomerate mergers can also lead to foreclosure effects. This occurs when a firm with a dominant market position leverages its strong market position from one market to another. The leveraging of market power can be achieved through the practice of tying and bundling — requiring customers to purchase additional goods and services, on top of the goods and services that customers initially wanted to buy.[38]

Based on the EU's experience, assessing the potential foreclosure effects of both vertical and conglomerate mergers should take into account the ability and the incentive of the involved companies to foreclose market access post-merger.[39] And assessments should also cover the extent to which the foreclosure effect would harm competition in the affected markets.[40]

D. EASE OF ENTRY

The European Commission generally considers a merger transaction unlikely to significantly harm competition, where it is sufficiently easy to enter into the market.[41] Thus, examining all the possible barriers to entry also constitutes an important element in merger assessments.

Likewise, Cambodia should also adopt the same understanding as the European Commission. The overall importance of ease of market entry is best illustrated by using the following example. Consider a horizontal merger between two Kombucha producers with the largest market shares. By leveraging their dominant market position, they were able to profitably raise the price of their kombucha products above competitive levels. Noticing the profitability in selling kombucha and the relative ease of market entry, more and more firms would decide to produce kombucha—until the increased supply of kombucha products reverts the price back down to competitive levels.

[29] Guidelines on the Assessment of Non-Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings.
[30] Khemani, Anderson, and Bamford, A Framework for the Design and Implementation of Competition Law and Policy, 41.
[31] Ibid., 42.
[32] Ibid.
[33]Guidelines on the Assessment of Non-Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings.
[34] Sub-Decree No.60 on the Requirements and Procedures for Business Combinations, Art. 8.
[35] Guidelines on the Assessment of Non-Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings.
[36] Ibid.
[37] Ibid.
[38] Ibid.
[39] Gore at al., Economic Assessment of Mergers under European Competition Law, 391.
[40] Ibid.
[41]Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings; Khemani, Anderson, and Bamford, A Framework for the Design and Implementation of Competition Law and Policy, 48.

Generally, entry would be a sufficient competitive constraint where it is likely, timely, and sufficient.[42] The likelihood of entry depends on a number of factors. They include regulatory barriers, the technical advantages enjoyed by the incumbent firms (such as preferential access to essential facilities or resources), intellectual property rights, and brand loyalty to the incumbent firms.[43]

The timeliness of entry addresses the question of whether entry would be swift and to deter the prolonged exercise of the market power.[44] As with the European Commission, the CCC should be left with discretion in determining timeliness, based on the characteristics of the market. The sufficiency of entry, on the other hand, requires that entry be of sufficient scope and magnitude to deter and defeat the anti-competitive effects.[45]

IV. CONCLUSION

The open nature in which the Competition Law is written is no doubt meant to reflect the impossibility of providing an exhaustible list of circumstances in which merger transactions are per se anti-competitive. Determining whether merger transactions are anti-competitive depends on a case-by-case assessment of all the relevant facts pertaining to their potential effects on the market.

While recognizant of the well-intended rationale behind the broad language used in the Competition Law, it makes this area of law highly susceptible to misapplication. And contrary to the stated goals of the Competition Law, this may subsequently deter innovation, produce economic inefficiencies, and worsen consumer welfare. It is for this reason that Cambodia should adopt non-binding, merger guidelines, which balance the need for consistent application and legal discretion.

With an abundance of existing guidelines from different jurisdictions to emulate, Cambodia should take inspiration from those of the European Commission, owing to its compatibility with the current regulatory framework and the need to build towards the collective harmonization of competition regimes around the world.

[42] Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings.
[43] Ibid.
[44] Ibid.
[45] Ibid.

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PROTECTION MEASURE UNDER REAL ESTATE DEVELOPMENT BUSINESS TRANSACTION

YI Sreypov

I.INTRODUCTION TO THE LEGAL ISSUE

In terms of the management of the real estate development business, Cambodia has the Ministry of Land Management, Urban Planning, and Construction; hereafter MLMUPC, which acts as a technical entity on the construction, and the Ministry of Economic and Finance acts as a regulatory entity on the real estate sector.[1] Afterward, in 2021, there was a newly established regulator, the real estate and pawn shop regulator which replaced the role of the Ministry of Economics and Finance; hereafter MEF. When the regulator was established, there were very few regulations governing the real estate sector.

The real estate development business keeps increasing in Cambodian society and is a significant sector that needs attention from competent authorities because of its financial value and public interest. The real estate development business refers to residential development, co-owned building development, and land parcel development. Cambodia has Prakas no.089 SHV.BK on Real Estate Development Business Management dated January 20, 2020; hereafter Prakas no.089, which is an old regulation announced by the MEF. Prakas no.089 gives power to the competent authority in charge of overseeing the real estate development business. Afterward, a sub-decree on management on Real Estate Development Business Management was adopted by the proposal from the new regulator in 2023.[2] There is no particular session stated about protection measures for the purchaser under Prakas no.089; however, we could find those measures under a different chapter of Prakas no.089 through various obligations and qualifications imposed on the project and the investor or the seller. Cambodia has few laws and regulations to govern the real estate development business in Cambodia. Meanwhile, protection measures for the purchaser are also limited.

The cost of buying a house, a piece of land, or another real estate commodity is significant; thus, it is reasonable that the purchaser pays the seller in anticipation of receiving high-quality goods in return.

[1] Kingdom of Cambodia, Law on Financial Management in 2007, NS/RKM/1206/035., 29 December 2006, Article 5; Kingdom of Cambodia, Law on Construction, NS/RKM/1119/019., 2 November 2019, Article 5, Article 11.
[2] Kingdom of Cambodia, Royal Government of Cambodia, Sub-decree on the real estate development business management, Subdecree 50RNKR.BK., 2 March 2023.

This is why real estate development transactions require interference by the law. In order to enhance the real estate development business condition in Cambodia, the regulation needs to focus on safeguarding the purchaser. The questions in Cambodia law concern whether the law could ensure the purchaser's asset quality and whether it has good supervision on the real estate development business company such as imposing a proper prudential requirement and business inspection. Further legal solutions and analysis are required to complete the gaps in Cambodian regulation. China has the Ministry of Housing and Urban Development as a regulator in the real estate sector, and Singapore has the Council for Estate Agency which was established around 2010 while Cambodia has just established the regulator in 2021.[3] Furthermore, Chinese regulation focuses on compliance with technical standards to ensure the quality and safety of the project. Currently, a big real estate company in China, Country Garden, has possibly become a big issue in China's economy and real estate sector but the reason behind its collapse is overall related to the banking system and loans.[4] Since the real estate industry in China and Singapore is quite developed and has a strong emphasis on strengthening the technical standard, the approach will employ their regulation to fill up Cambodian regulations.

II. THE IMPROVEMENT ON DEFICIENCY OF THE REAL ESTATE PROJECT QUALITY GUARANTEE IN CAMBODIAN REGULATION

Very few provisions under Prakas no.089 state how the law could guarantee the quality of the real estate product. The real estate developer who aims to do business on residence development and co-own building is required to submit the construction permit and comply with the technical aspect of MLMUPC.[5] What could be added to Cambodia's regulations in place to ensure the quality of the real estate project?
As can be seen, the Chinese real estate market is quite advanced. An important part of China's economy is the real estate industry which accounts for 7 percent of China's GDP.[6] Chinese regulation outlines all the specific standards and criteria that the real estate developer needs to fulfill. Real estate project development and construction should conform to the provision of the relevant laws and regulations and technical specifications of construction project quality, safety standards, construction project survey, design, and construction as well as the agreement in the contract.[7] As is evident, Chinese regulation has a strong emphasis on strengthening the technical standards to assure project quality. The developer would be more cautious about the project quality if the construction project had additional stringent standards. The real estate sector regulator should consult with MLMUPC about what are the specific standards and technical aspects of a particular project, and the developer should comply with them to ensure the good quality and the safety of the real estate project. The real estate regulator will amend the current regulation or adopt a new regulation on business management in order to comply with a new sub-decree and modify the jurisdiction form to MEF to the regulator. Thereby, specific standards and criteria should be clearly stated under a new regulation on business management.

Article 21 of Prakas no.089 states that the first type of license project can be sold out if the developer finishes the construction completely attached with a letter of close construction, a letter certifying the construction quality, and/or evaluation from an expert in advance. Chinese law gives another layer of right to the purchaser which allows them to request for re-inspection of the building structure if they believe the building quality is below the standard; additionally, The real estate development company shall be liable for paying damage when the buyer suffered loss.[8] Even though Parkas no.089 required the project to be certified in construction quality and/or evaluated by expert officials in advance, the quality of the project is still a concern in Cambodia. It also does not state the person who bears the responsibility for real estate products. The developer is the one who handles the development project and sells it to the public; thus, it should be their responsibility to pay for or fix the damage. Therefore, the responsibility bearer who is a business developer, the compensation's obligation, and the purchaser's right to fill for re-inspection should be part of both party's rights and obligations under a regulation on business management.

III. ADDITIONAL REQUIREMENT TO BE A LICENSE APPLICANT

In Cambodia, real estate developers are the natural and legal persons who operate real estate development businesses. Real estate development businesses, such as residential development and co-owned building development require technical skills; for instance, construction skills. The real estate developers' qualifications should be taken into account in order to ensure real estate quality.

In this regard, Chinese regulations address this concern. The establishment of a real estate development enterprise shall have more than 4 full-time technical personnel with certificates of qualifications of real estate specialty and construction engineering specialist; additionally, it needs to comply with the conditions for enterprise establishment prescribed by relevant laws and administrative regulations.[9] The real estate sector is crucial for the public and the real estate developer directly relates to the real estate product; thus, it requires skillful personnel to employ in real estate companies.

[3] N/A, Ministry of housing and urban development of the people republic of China, the State Council, 3 September 2014.
[4] Alexandra, Stevenson, Why This Company's Financial Crisis Threaten China's Economy, The New York Times, August 2023.
[5] Kingdom of Cambodia, Ministry of Economy and Finance, the real estate development business management, Prakas 089MEF.BR.K., 20 January 2020, Article 15&10.
[6] Chenran, Tian, China property market: Government play pivotal role in the real estate market, ACUITY Knowledge Partner. April 13, 2023.
[7] The People's Republic of China, the State Council, Regulation on Urban Real Estate Development and Management Control, decree No. 248. 20 July 1998, Article 16.
[8] The People's Republic of China, the State Council, Regulation on Urban Real Estate Development and Management Control, decree No. 248. 20 July 1998, Article 32.
[9] Ibid, Article 15.

Therefore, Cambodian law should require developers to hire technical personnel with certificates of qualifications when they request a business license.

IV. THE LACK OF JUSTIFICATION FOR REJECTING THE LICENSING APPLICATION

In order to operate the real estate development business, developers shall request a business license from the department in charge.[10] Article 12 of Prakas 089 states that competent authority may decide to grant a license or reject the application. However, it does not state cases in the application should be rejected, but only states the cases in which the license could be suspended and withdrawn.[11] Therefore, competent authority does not have the basics to decide on what cases should the application be rejected in the first place. If the project is suspended along the way, the buyer might take up the loss.

Chinese regulation does not address this concern but the Singapore regulation does. The real estate market in Singapore is anticipated to increase at a CAGR of 6.57 percent in 2023 and Singapore is rated as one of the top 15 for real estate investment.[12] The Singapore law states grounds that licenses should not be granted in certain cases such as developer does not fulfill the prerequisite of a particular project that is required under the law or a person in a position of responsibility has been found guilty of a crime involving fraud or dishonesty, has served time in prison or now serving time in prison, or the developers still ineligible for bankruptcy relief.[13] These grounds of rejection should be added under licensing regulations to ensure that the project would be less suspended or withdrawn.

V. DETERMINATION OF THE APPROPRIATE BUSINESS INSPECTION

Under Prakas no.089, the competent authority could do the onsite visit to ensure compliance with the Prakas. However, no provision explicitly states rules and procedures for onsite inspection. Therefore, it is challenging for the official in charge of onsite inspection to carry out the mission.

The Singapore law states different types of investigation that the inspector could carry out.[14] For example, it divided the investigation into types: the special investigation, examination affair, investigation, and enforcement power. Furthermore, it also states the element that should be met to carry out particular investigations. For instance, the special investigation carries out when three elements are met: (a) is carrying on its business in a manner detrimental to the purchasers or other persons dealing with the licensed housing developer; (b) has insufficient assets to cover its liabilities; or (c) is contravening any of the provisions of this Act or any rules made under this Act.[15] Recently, the Trust Regulator of Cambodia issued a Prakas on the business inspection for the trust sector.[16] The Cambodian competent authorities supervising the real estate sector should have certain regulations stated about the formalities and procedure of business inspection in the real estate sector. It should include types and requirements to investigate rights, obligations, and power that could be undertaken by the stakeholders.

According to the criminal procedural code of Cambodia, civil servants, and public agencies that are authorized by any separate law to do an inquiry on an offense shall be placed under the authority of the prosecutor. The formalities and procedure for providing qualification shall be determined by the joint Prakas of the Ministry of Justice and the concerned ministry. It is also one issue about complying with the higher hierarchy of the law.[17] Therefore, the joint Prakas of the Ministry of Justice and other concerned ministries need to stipulate procedures for providing the qualification of the official in charge.

VI. THE CONCLUSION

As a regulator, it plays the role of enhancing market confidence.[18] In this stage, the real estate regulator will develop its regulation to govern its sector because Cambodia's regulations on real estate development business management are really limited. Regarding the research, there are some aspects that could be improved in the Cambodian regulation. Since project quality is a component of enhancing public confidence, Cambodia should strengthen the technical standard to assure project quality and emphasize the liability bearer of the developer whenever the project quality is poor. To sustain the project, the establishment of a real estate development business should require technical personnel with certificates of qualifications of real estate specialty and construction engineering specialist. Furthermore, the ground for rejecting the application should be stated clearly in relevant regulations to avoid suspension or withdrawal of the license during the process of implementation. In this regard, the regulator may insert obligations and requirements in any regulation relating to the management of real estate development business or business licensing. Regarding the business inspection, the new joint Prakas needs to stipulate the procedure for providing the qualification of the official in charge to ensure appropriate business inspection, and the formalities and procedure of business inspection should be adopted as guidance for the official in charge.

[10] Kingdom of Cambodia, Ministry of Economy and Finance, the real estate development business management, Prakas 089MEF.BR.K. 20 January 2020. Article 12.
[11] Ibid, Article 14.
[12] N/A, Best Countries to invest in real estate 2023, hcorealestate.com. February 23, 2023. ; N/A, Singapore real estate market size industry, Mordor Intelligence.
[13] The Republic of Singapore, The law revision commission, Housing Developers (Control and Licensing), Bill 35/1964. Act 1965. Clause 5.
[14] Ibid.
[15] The Republic of Singapore, The law revision commission, Housing Developers (Control and Licensing), Bill 35/1964. Act 1965.
[16] Kingdom of Cambodia, Non-bank financial services authority, the formalities and procedure of trust inspection, Prakas no.051 F.S.A.BR.K. November 3, 2022.
[17] Kingdom of Cambodia, Senate of Kingdom of Cambodia, Criminal Procedure Code of Cambodia 2007, NS.RKM/0807.024. August 10, 2007. Article 82.
[18] Kingdom of Cambodia, Law on the Organization and Functioning of the Non-Bank Financial Servinces Authority, NS/RKM/0121/003 (2021).

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N/A "Ministry of housing and urban development of the people republic of China" the State Council, 3 September 2014. http://english.www.gov.cn/state_council/2014/09/09/content_281474986284089.htm.

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ABA 24/7 Stob Ou Baek K'am
Photo: ABA Bank, 2023

THE LIMITATION IN PRACTICE SOLVENCY AND LIQUIDITY MANAGEMENT

HORM Momheng

I.INTRODUCTION TO THE LEGAL ISSUE

In the past few years, Cambodia has been known as the fastest growing in its financial sector with its price stability compared to other nations in the ASEAN region. According to the Association of Banks in Cambodia, there are 59 commercial banks and 82 microfinance institutions (MFIs) by the first quarter of 2023[1] while there were around 36 commercial banks and 58 MFIs in 2015.[2] Alongside this, with such an increasing number of commercial banks, the banking system is doubly expanded in terms of operation, credit and deposit amounts, and the size of the investment. Thus, it is very significant for the central bank to continue strengthening its regulation of the Banks; especially, to address current economic circumstances such as the rise of interest rates, and global prices, and to be in line with international regulation after the pandemic. Moreover, the rise of interest rates can cause a change in banks' assets and liabilities that could worsen their solvency and liquidity conditions and could possibly disrupt the whole banking system.[3] That is why, solvency and liquidity management is important to ensure prudential regulation in Cambodia.

Consequently, there have already been many regulations in place for this matter which are led by the National Bank of Cambodia (NBC). However, there are some limitations causing problems in practicing prudential regulations including (1). The limitation of comprehensive training (2). The lack of accountability and accuracy for compliance practice and (3). The emergence of an unexpected external issue (the rise of interest rates). Hence, this paper begins with a showcase of Cambodia's regulations on solvency and liquidity management through existing Prakas and explains the three emerging issues that impact the practice of Cambodia's prudential regulation.

[1] The Association of Banks in Cambodia, "Banking Environment."
[2] National Bank of Cambodia, "2015 Annual Report."
[3] Coelho, "Rising Interest Rates and Implication of Banking Supervision."

II. SOLVENCY AND LIQUIDITY MANAGEMENT IN CAMBODIA

In definitions, solvency is the ability of a company to meet its long-term debts, and financial obligations, as well as a measurement tool of the financial health of the bank[4] while liquidity promotes the short-term resilience of the bank's liquidity risk profile by ensuring that the bank has an adequate stock of unencumbered high-quality liquid assets (HQLA) that can be converted into cash quickly and immediately in private markets to meet its liquidity needs for 30 calendar days liquidity stress scenario. It will improve the ability of the banking system to absorb shocks arising from financial and economic stress, whatever the source, thus reducing the risk of spillover from the financial sector to the real economy.[5]

Simply put, solvency and liquidity management are the ability where the BFIs can forecast the cash flow to the repayment of their liabilities to their customers in the short term (up to 30 days onward) and long term (more than 30 days onward) to prevent the loss of trust from depositors, investors, and lenders of the bank.

A. SOLVENCY MANAGEMENT

The NBC required banks and financial institutions (BFIs) to always observe their solvency ratio with the formula of Risk Weighted Asset against Net Worth.[6] As a result, the Prakas No. B7-00-46 on Banks' Solvency Management was promulgated on 16th February 2000 and due to the development, enhancement, and complexity of solvency calculation, NBC had replaced and repealed some articles of this Prakas to ensure the accuracy of the calculation method, calculation elements, and classified the Risk Weighted Assets by Prakas No. B7-04-206 on Amendment of Prakas Related to Banks' Solvency Ratio dated 29th December 2004 and Prakas No. B7-07-135 on Related to Banks' Solvency Ratio dated 27th August 2007. The solvency ratio is not less than 15% (Fifteen Percent) with the calculation of Net Worth against Risk-Weighted Assets. In case banks are not able to maintain a 15% of solvency ratio, they will face a penalty from NBC. In practical terms, the banks normally maintain their solvency ratio around 17% to 20%. So far, if the ratio decreases under 17%, it shall be a warning alert where the bank must take action immediately to increase the ratio.

In some conditions, due to the high-risk exposure of the bank increasing such as high Portfolio at Risk (PAR), Deposit Withdrawal in huge amounts, or a deficit of Net Worth (Tier 1 and Tier 2 Capital), NBC will consider and/or increasing solvency ratio to the bank from 15% to higher ratio as NBC judgment to guarantee and maintenance of the financial stabilities, and liable to the bank's lenders, investors, depositors and financial system.

B. LIQUIDITY MANAGEMENT

For liquidity management, the new Prakas No. B7-015-349 on Liquidity Coverage Ratio was promulgated on 23rd December 2015 to repeal 4 Prakas of NBC as stated in article 13 of this Prakas as follows:

- Prakas No. B7-00-38 on Liquidity for BFIs
- Prakas No. B7-02-187 on Amendment of Prakas Relating to Liquidity for BFIs
- Prakas No. B7-04-207 on Amendment of Prakas Relating to Liquidity for BFIs
- Prakas No. B7-07-163 on Licensing of Microfinance Deposit-Taking Institutions point 4 of article 3.

This Prakas aims to promote short-term resilience of the institution's LCR profile, ensuring has an adequacy stock of unencumbered liquid assets that can be converted into cash at no or little loss of value in markets to meet its liquidity need for 30 days liquidity stress scenario, and ensuring the prompt corrective action are taken by the institution's management when the LCR is potentially falling below the minimum requirement.[7]

It obligated the deposit-taking banks and institutions to maintain LCR at least 100% of its calculations which is greater than 100% of the calculated result by 1st January 2020.[8] In order to facilitate and support the bank calculation and implementation of full compliance with the requirement, the phase-in period as well as the time when NBC let the institutions familiarities with the new template of LCR calculations and at the same time let the institution compliance step by step to the requirement as the following table:[9]

With Effect Form	1st Sept 2016	1st Sept 2017	1st Sept 2018	1st June 2019	1st Jan 2020
Minimum LCR	60%	70%	80%	90%	100%

[4] Hayes, "What Is Solvency?"
[5] BIS, "Basel III."
[6] National Bank of Cambodia, "Prakas on The Banks' Solvency Ratio."
[7] National Bank of Cambodia, "Prakas on Liquidity Coverage Ratio."
[8] National Bank of Cambodia, "Prakas on Liquidity Coverage Ratio - Article 4."
[9] National Bank of Cambodia, "Prakas on Liquidity Coverage Ratio - Article 5."

Thus, the calculated results are required to be submitted to NBC monthly basis before the 10th of each following month. In case the institution breaches the requirement, the institution shall take action immediately to restore the situation and the calculated result to the above minimum requirements and prepare for the penalty from NBC as stated.

III. THE LIMITATION IN PRACTICE SOLVENCY AND LIQUIDITY MANAGEMENT

A. THE LIMITATION OF COMPREHENSIVE TRAINING

After a new Prakas was established, NBC provided training to all BFIs breaking all BFIs into many cohorts so that they could effectively comply with the new Prakas. Somehow, the training can be very technical for some operators due to internal culture, system, human resources, and structure which causes them to hardly implement the new regulations; specifically, the accounting framework is one of the examples. The justification of the capital calculation is different from one Prakas to another which brings difficulty and complexity for operators to follow, and it is very costly to further train related in-charge officers for each standard. For example, the two new regulations such as:

- Prakas No. B7-023-337 on Regulatory Capital of BFIs which aim to identify the structure, component, and method of calculating regulatory capital to strengthen the quality and quantity of capital held by the institution to absorb losses both on an ongoing concern basis and to meet the claim on a gone-concern basis. This new Prakas also aims to repeal Prakas No. B7-010-182 on The Calculation of Bank's Net Worth, and Circular No. B7-011-001 on the implementation of Prakas on the Calculation of the Bank's Net Worth, and

- Prakas No. B7-023-338 on Credit Risk for Capital Adequacy Ratios in Deposit Taking Bank and Financial Institutes aims to provide a measure of the credit risk for the implementation of a capital adequacy framework and calculation component on Risk-Weighted Assets (RWA).

As above mentioned, even there was a training session delivered to related in-charge officers but there is a limitation of understanding. The systems of each bank are different and require more time to modify their system to recognize those criteria which cannot bring a reasonable conclusion for the BFIs practice. Furthermore, the familiarity period is also short for the BFIs to familiarize themselves with the new template and clearly understand the meaning as well.

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B. THE LACK OF ACCOUNTABILITIES AND ACCURACY FOR COMPLIANCE PRACTICE

Technically, there are three lines of defense in the implementation of compliance practices. The first line (Treasury, Credit, Finance Department, and/or other relevant department – based on bank practice) lies as the first line of defense and prepares establishment policies and procedures to manage, collect, measure, and control the exchange rate, funding, check/cheque clearing, deposit, tradable instruments, facilities, provision, loan restructuring, and other related matters of the bank. So, they would identify timely the decrement of both ratios which will impact the bank.
The Compliance and Risk Department as the second line of defense also involved in the post-testing of that prudential ratio especially solvency and liquidity to ensure that the calculation, the submission is accurate, accountabilities, and on time to NBC and avoid compliance and risk management risk impact from the first line of defense.
Apart from the first and the second lines of defense, the Internal Audit department plays a key role as the third line of defense to ensure both lines are performing their roles and responsibilities with regards. Internal Audit is the last one to conduct an inspection within its independent tool to assess the area of its covers. Furthermore, External Audit is counted as the fourth line of defense at different ISO to ensure all the areas are properly performed.

Even though the BFIs management prudential ratio through three lines of defense very well, it still has many factors to improve how they are working on ensuring the most accountabilities and accuracy such as the lack of human capacity and human resources of the bank limitation, overlap of internal and external reports of the bank, dependency, and data generation accountabilities of the bank.

C. THE EMERGENCE OF UNEXPECTED EXTERNAL ISSUE

There is not an error within the Prakas but the limitation in practice of the regulation is somehow caused by the external issue. One of the main concerns is the rise of interest rates. Cambodia is a high-dollarization nation therefore it is undeniable that if there is a rise in interest rate in the federal system, it also affects Cambodia's system.[10] The US dollar remains part of the Bank's assets and liabilities. Thus, if there is rapid growth in interest rates, it may affect the loan's quality adversely as banks will take a

[10] Duma, Dollarization in Cambodia.

greater risk for their short and long-term assets which is very uncertain while the liability side is also increasing. Therefore, with such conditions if the bank has low liquidity assets, it will be exposed to the risk. Currently, there is no such risk to be concerned yet but we are unsure about the future as the interest rate is rising in the US recently due to the Ukraine War and oil turmoil.[11] Thus, immediate intervention is up to regulators only and the crisis is very unpredictable.

IV. CONCLUSION

The financial crisis in 2008 is the best example of the financial crisis where it began from cheap credit and lax lending to fuel the real estate bubble. When the bubble burst, the bank was left holding trillions of dollars in worthless investments in subprime mortgages.[12] By early 2023, The Silicon Valley Bank, Signature Bank, and First Republic Bank in March 2023 were a result of a silent bank run caused by venture capitalists, the second largest in US Bank Run's History.

The Basel Committee on Banking Supervision (hereafter referred to as BCBS) is the primary global standard setter for prudential regulation of banks and provides a forum for cooperation on banking supervision matters its mandate is to strengthen the regulation, supervision, and practices of banks worldwide with the purpose of enhancing financial stability.[13] Besides the standard on Solvency and Liquidity Calculation for Banks and Financial Institutes (hereafter referred to as BFIs), BCBS also established many calculation standards for BFIs such as Calculation on Risk Weighted Assets, Net Stable Fund, Large Exposure, and many other standardizes for BFIs regulated.

The National Bank of Cambodia/the Nation's Central Bank (hereafter referred to as NBC) is the monetary and supervisory authority of Cambodia. The Principle of the National Bank of Cambodia's mission is to determine and direct the monetary policy aimed at maintaining pricing stability to facilitate economic development within the framework of the kingdom's economic and financial policy.[14] NBC had established many regulations to regulate BFIs under its supervision. Besides the Prakas on Banks' Solvency Management and Prakas on Liquidity Coverage Ratio, NBC also established many Prakas such as Prakas on Loan to Related Parties, Prakas on Fixed Assets of the Banks, and many other general and specific Laws and Regulations.

By all of these regulations, we can see that the update of solvency and liquidity management is an ongoing priority that every regulator should take into account as there are still remaining limitations above mentioned and they shall be enhanced by the following methods from the regulator as follows:

- The regulator shall have training as soon as possible to guide and clarify implementers after the regulations are released.

- The regulator shall ensure that related stakeholder is all educated on the regulations and knowledgeable enough to implement the Prakas
- The BFIs shall ensure and deliver the staff to training with full capacity and internal sharing after the session ends.

- The BFIs shall ensure strict monitoring with different calculation methods to compare if the calculation is correct without any bias.

[11] Ou, "US Fed Rise Pushed Up Cambodian Rates."
[12] Singh, "The 2007-2008 Financial Crisis in Review."
[13] BIS, "Basel Committee Charter."
[14] National Bank of Cambodia, "Law on the Organization and Conduct of the National Bank of Cambodia."

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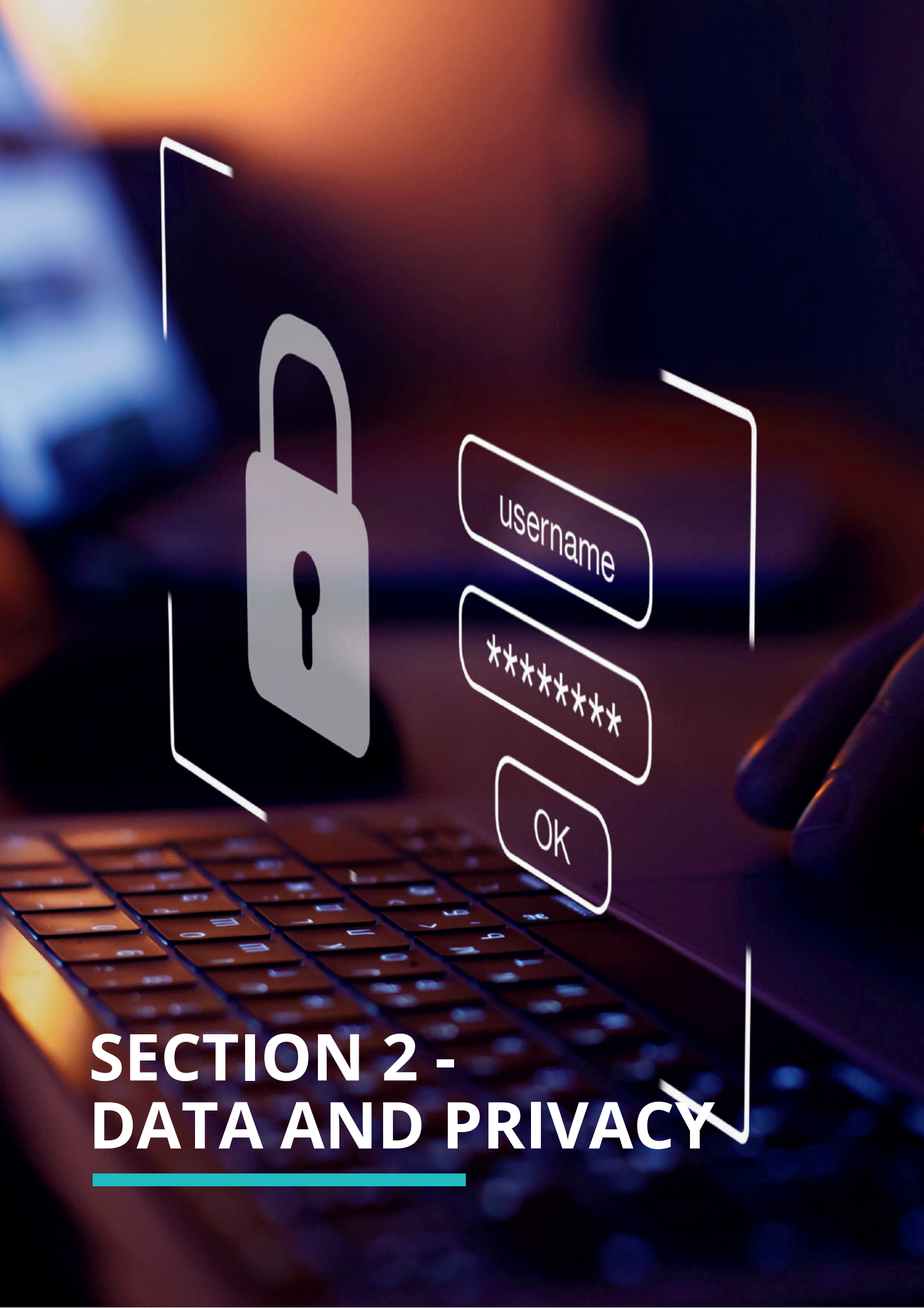

SECTION 2 - DATA AND PRIVACY

CAMBODIA'S LEGAL FRAMEWORK FOR GOVERNING CONSENT PRACTICES IN PROCESSING PERSONAL DATA FOR MARKETING AND ADVERTISING

DUONG Virak

I. INTRODUCTION TO THE LEGAL ISSUE

In today's data-driven digital age, the collection, processing, and utilization of personal data have become fundamental to marketing and advertising practices. This abundance of personal information holds tremendous value for businesses, enabling them to tailor their campaigns, target specific audiences, and deliver more personalized experiences. However, the handling of personal data also raises important concerns regarding individuals' privacy rights and the necessity of their consent.

The practices of obtaining consent for processing personal data for marketing and advertising purposes vary significantly, influenced by technological advancements, industry practices, and legal frameworks. In the rapidly evolving digital landscape of Cambodia, the legal framework governing consent practices for processing personal data is still in its early stages. While several laws and regulations touch upon data protection and privacy, there is a noticeable lack of comprehensive provisions specifically addressing consent mechanisms for marketing and advertising purposes. The absence of clear legal requirements and regulatory guidance regarding consent practices for processing personal data in marketing and advertising may result in individuals' consent not being freely given, specific, or fully informed. This poses challenges for individuals' rights to privacy and control over their personal information, as well as potential risks of unauthorized use or misuse of their data.

To address these concerns and shed light on the current legal landscape that address consent practices in Cambodia's marketing and advertising industry, this research paper aims to analyze and evaluate the existing legal framework. By examining relevant laws and regulations, the study seeks to identify Cambodia's consent mechanisms and compare them with international standards, particularly the General Data Protection Regulation (GDPR) implemented by the European Union.

To accomplish this, the research will explore the following key questions:

1. How do the prevailing legal provisions in Cambodia address consent mechanisms for the processing of personal data in marketing and advertising?
2. How do these existing laws and regulations compare to international standards, particularly the GDPR?

By examining these research questions, this study aims to contribute to the understanding of legal frameworks that govern consent practices in Cambodia's evolving digital landscape and advocate for the development of an effective legal framework that safeguards individuals' rights while promoting responsible data usage in Cambodia's marketing and advertising industry.

II. UNDERSTANDING PERSONAL DATA AND CONSENT

In order to comprehensively examine the legal framework governing consent mechanisms for processing personal data, it is crucial to first establish a solid understanding of personal data and consent. This section provides key terms explanations of personal data and consent, highlights the importance of consent in data protection, and explores the practices and challenges surrounding the obtaining of consent for processing personal data for marketing and advertising purposes.

1. PERSONAL DATA AND CONSENT KEY TERMS

Personal data refers to any information that relates to an identified or identifiable individual. It encompasses a wide range of identifiers, such as names, addresses, phone numbers, email addresses, social media profiles, and online identifiers.[1] Personal data can be collected through various means, including direct interactions, online activities, and automated processes.

Consent, within the context of data protection, refers to the voluntary and informed expression of an individual's agreement to the processing of their personal data for specific purposes.[2] It should be freely given, specific, and informed, signifying that individuals possess a clear understanding of the processing activities and have the option to grant or withhold consent without facing any undue pressure.

It is essential to acknowledge that consent may have different connotations depending on the context in which it is applied. In legal settings, consent can be a broader concept, encompassing agreements and permissions beyond data processing, such as contractual agreements, medical procedures, or participation in research studies. As this paper primarily focuses on the data protection context within Cambodia's legal framework and the EU's GDPR, the definitions provided will be analyzed within that specific context.

2. IMPORTANCE OF CONSENT IN DATA PROTECTION

Consent plays a pivotal role in data protection as it empowers individuals to exercise control over their personal data. It establishes a legal basis for organizations to process personal data[3] and establishes a framework for transparency and accountability.[4] Consent ensures that individuals have a say in how their information is used, promotes respect for their privacy rights, and fosters trust between individuals and data controllers. Moreover, it aligns with internationally recognized principles, such as those outlined in the GDPR, which emphasize the significance of freely given, specific, and informed consent.[5]

3. PRACTICES OF OBTAINING CONSENT FOR PROCESSING PERSONAL DATA

The practices of obtaining consent for processing personal data for marketing and advertising purposes vary considerably. Traditional approaches often involve explicit opt-in mechanisms, where individuals are presented with clear choices and are required to provide active consent, such as ticking checkboxes on paper forms or online registration pages. These approaches typically provide individuals with information about the purpose of the data processing and offer the option to opt in or opt-out.

In the digital landscape, organizations have adapted consent mechanisms to keep pace with evolving technologies. This includes the use of pop-up notifications, cookie banners, and consent management platforms. These interactive mechanisms aim to inform individuals about data collection and processing activities, particularly related to tracking technologies and targeted advertising. They provide individuals with options to give or withhold consent and offer granular choices to manage their preferences.

However, despite the presence of these mechanisms, challenges and controversies surrounding consent practices in marketing and advertising persist. The complexity of data processing activities, the imbalance of power between individuals and data controllers, and the inherent tension between commercial interests and privacy rights contribute to these challenges. Instances of unclear consent requests, inadequate information provided to individuals, and the potential for manipulative practices raise concerns about the effectiveness and integrity of current consent practices.

[1] Regulation (EU) 2016/679 (General Data Protection Regulation), Art. 4(1).
[2] Ibid., Art. 4(11).
[3] Ibid., Art. 6(1)(a).
[4] Ibid., Art. 5.
[5] Ibid., Art. 4(11).

III. LEGAL FRAMEWORK FOR GOVERNING CONSENT PRACTICES IN PROCESSING PERSONAL DATA

To comprehensively examine the legal framework for governing consent mechanisms for processing personal data in marketing and advertising, it is essential to explore the existing legal framework of Cambodia and the GDPR implemented by the European Union.

1. CAMBODIA'S LEGAL FRAMEWORK

The legal framework governing consent and data protection in Cambodia is currently evolving, although it does not have a specific comprehensive data protection law equivalent to the EU's GDPR. While there are existing laws and regulations that address data protection and privacy, there is a notable lack of comprehensive provisions specifically addressing consent mechanisms for marketing and advertising purposes.

a. Cambodia Constitution

The Cambodia Constitution, although lacking specific provisions on data protection, generally is believed to lay the groundwork for the implied protection of personal data under the right to privacy.[6] Article 40 of the Constitution guarantees the rights to privacy of residence and the confidentiality of correspondence,[7] even though it does not explicitly define privacy, consent, or data protection. This recognition implies a broader notion of privacy that encompasses data control and confidentiality. Thus, the Constitution acknowledges the need to protect every individual's privacy, extending to the realm of personal data.

b. Cambodia Civil Code

The right to personality, as enshrined in Articles 10, 11, 12, and 13 of the Cambodia Civil Code, is commonly understood to provide implied protection for personal data.[8] Article 10 defines personality rights,[9] incorporating privacy, and establishes the basis for protecting personal rights, despite its lack of direct focus on consent and data protection. This framework contributes to the broader legal landscape concerning data protection.

c. The Law on Telecommunications

The Cambodia Law on Telecommunications doesn't explicitly mention consent and data protection but Article 65(b) guarantees the subscribers' privacy and safety in using telecommunications services.[10] While not addressing consent directly, it indirectly impacts data protection practices in the telecommunications sector.

d. The Law on Consumer Protection

The Cambodia Law on Consumer Protection focuses on consumer rights and fair competition. However, concerning matters of consent and data protection practices, the law currently lacks provisions addressing these critical issues, despite its overarching goal of consumer protection. Instead, the law only concentrates on preventing dishonest practices within business transactions.[11]

e. The Law on Electronic Commerce

Although not explicitly about consent, Article 22 prohibits the unauthorized use of personal information in electronic transactions,[12] indirectly addresses the necessity of obtaining proper authorization for data use. Additionally, Article 32 of the same law imposes obligations on data holders to protect electronic personal information,[13] emphasizing data security, and integrity, and imposing restrictions on unauthorized access.[14] These provisions can be relevant in the broader context of consent and data protection, emphasizing the principle of obtaining proper authorization or consent for the use of personal information in electronic commerce transactions.

Overall, while Cambodia's legal framework lacks explicit consent provisions, the existing laws establish a foundation for broader data protection principles, emphasizing the importance of safeguarding personal data.

2. EU'S GENERAL DATA PROTECTION REGULATION (GDPR)

In contrast to Cambodia's legal framework, the GDPR provides a comprehensive and robust framework for data protection and consent within the European Union. The GDPR sets out specific requirements and standards for obtaining valid consent, aiming to enhance individuals' control over their personal data and strengthen their privacy rights.[15]

Article 4 of the GDPR defines crucial terms, ensuring consistent interpretation of terms such as "personal data," "data subject," "processing," and "consent," which are fundamental for GDPR's application.[16]

Article 5 of the GDPR outlines the principles of data protection that organizations must adhere to. These principles include lawfulness, fairness, and transparency in data processing;[17] purpose limitation;[18] data minimization;[19] accuracy of data;[20] storage limitation;[21] integrity and confidentiality of data;[22] and accountability,[23] requiring organizations to demonstrate compliance with the GDPR's principles.

[6] Nitesastra, "Personal Data Protection and Privacy Law in Cambodia"
[7] Constitution of the Kingdom of Cambodia, Art. 40.
[8] Cambodia Counsel, "Data Privacy"
[9] Civil Code of the Kingdom of Cambodia, Art. 10.
[10] The Law on Telecommunications, Art. 65(b).
[11] The Law on Consumer Protection.
[12] The Law on Electronic Commerce, Art. 22.
[13] Ibid., Art. 32(1).
[14] Ibid., Art. 32(2).
[15] EU GDPR, Art. 1.
[16] Ibid., Art. 4.
[17] Ibid., Art. 5(1)(a).
[18] Ibid., Art. 5(1)(b).
[19] Ibid., Art. 5(1)(c).
[20] Ibid., Art. 5(1)(d).
[21] Ibid., Art. 5(1)(e).

One of the key articles in the GDPR that governs consent is Article 6. This article establishes the legal basis for processing personal data, including consent as one of the lawful grounds for processing.[24] It outlines the requirements for valid consent, such as being freely given, specific, informed, and an unambiguous indication of the data subject's wishes,[25] with explicit consent for sensitive data.[26]

Furthermore, Article 7 of the GDPR specifically addresses the conditions for consent.[27] It highlights that consent must be a clear affirmative action by the data subject, separate from other terms and conditions, and individuals have the right to withdraw their consent at any time.

Articles 13 and 14 of the GDPR focus on transparency and the provision of information to data subjects. These articles outline the information that organizations must provide to individuals at the time of data collection, emphasizing the importance of clear and easily understandable communication regarding data processing activities.[28]

Additionally, Article 17 of the GDPR grants individuals the right to erasure, also known as the right to be forgotten.[29] This article allows data subjects to request the deletion of their personal data under certain circumstances, such as when the data is no longer necessary for the original purpose,[30] when consent is withdrawn,[31] or when processing is based on legitimate interests and the individual objects to it.[32]

The GDPR's comprehensive approach extends beyond establishing consent requirements; it enforces these requirements with significant consequences for non-compliance. Businesses and organizations that fail to adhere to the stringent consent principles can face severe penalties. The GDPR empowers supervisory authorities to impose fines that are proportionate to the violation, up to 20 million euros or 4% of annual global turnover, whichever is higher.[33] This robust penalty framework highlights the EU's commitment to ensuring data protection is not just a best practice, but an enforceable obligation.

By referencing these specific articles, the GDPR provides a comprehensive framework for consent, transparency, and data protection. Its provisions serve as benchmarks for evaluating consent practices and data protection mechanisms in other jurisdictions, including Cambodia.

IV. COMPARISON OF CAMBODIA'S LEGAL FRAMEWORK AND EU'S GDPR

The comparison between Cambodia's legal framework governing consent mechanisms for processing personal data and the GDPR of the European Union reveals substantial disparities in their approaches and provisions. Evaluating how Cambodia's existing legal framework aligns with the principles and requirements of the GDPR is crucial.

The status of the GDPR as one of the world's most stringent data protection laws holds significant relevance to Cambodia's digital landscape. Its global influence directly impacts Cambodia's digital ecosystem and its interactions on the international stage. In a world where data exchanges span the globe, the GDPR stands as the gold standard for data protection practices.

Harmonizing Cambodia's data protection practices with the GDPR positions the nation as a responsible player in the digital realm. This is particularly crucial when engaging with partners and clients from regions that prioritize data privacy. Given that entities adhering to the GDPR's rigorous standards are more likely to collaborate with like-minded partners, it's crucial to recognize the challenges businesses in Cambodia might face when interacting with international counterparts accustomed to GDPR-compliant practices. The misalignment could hinder cross-border data flows and limit the potential for international business growth. Thus, aligning Cambodia's data protection framework with the GDPR not only ensures regulatory compliance but also fosters an environment conducive to seamless international collaborations. This advantage can lay the foundation for mutually beneficial partnerships, where Cambodian and international entities, to confidently engage in data-driven activities without concerns about misaligned practices.

Furthermore, Cambodia's extensive engagement in the global digital landscape means that it frequently interacts with individuals residing within the European Union. Despite not being an EU member state, Cambodia is influenced by the extraterritorial scope of the GDPR. As Cambodian entities engage in transactions, collaborations, or marketing activities involving EU residents, compliance with GDPR principles ensures seamless data transfers and a credible international presence. Beyond operational efficiency, aligning with the GDPR's scope safeguards Cambodian entities against legal uncertainties and potential risks. Non-compliance could lead to substantial fines and reputational damage. By acknowledging and aligning with the GDPR's scope, Cambodian entities can confidently navigate international operations while mitigating the risk of unintentional non-compliance.

The global influence and extraterritorial scope of the GDPR provide Cambodia with a valuable opportunity to enhance its data protection practices. Through alignment with the GDPR's stringent standards, Cambodia can establish itself as a responsible participant in the global digital economy, ensuring

[22] Ibid., Art. 5(1)(f).
[23] Ibid., Art. 5(2).
[24] Ibid., Art. 6(1)(a).
[25] EU GDPR, Recital 32.
[26] EU GDPR, Art. 9.
[27] Ibid., Art. 7.
[28] Ibid., Art. 13 and Art. 14.
[29] Ibid., Art. 17.
[30] Ibid., Art. 17(1)(a).
[31] Ibid., Art. 17(1)(b).
[32] Ibid., Art. 17(1)(c).
[33] Ibid., Art. 83(5).

that its data protection practices meet the expectations of a rapidly interconnected world.

As we delve into Cambodia's legal framework governing consent practices for processing personal data, it becomes evident that there are several shortcomings when compared to the comprehensive GDPR framework. These deficiencies not only emphasize areas in Cambodia's legal landscape that require strengthening but also emphasize potential implications for data protection and consent practices.

A significant shortcoming in Cambodia's legal framework is the absence of a dedicated data protection law. While certain laws, such as the Constitution and the Civil Code, make reference to privacy rights, they lack specific provisions addressing consent mechanisms for data processing. This gap raises concerns about the adequacy of legal mechanisms to ensure that individuals' consent is genuinely freely given and informed. The absence of a comprehensive law exposes Cambodia to inadequate protection of privacy rights, potentially resulting in the misuse of personal data, lack of transparency, and confusion among stakeholders.

Transparency and the provision of information to individuals constitute another significant gap in Cambodia's legal framework. Unlike the GDPR, which emphasizes transparency and mandates clear, concise information regarding data processing activities, Cambodia's existing legal provisions do not comprehensively address transparency requirements. While the Law on Electronic Commerce touches on data security and unauthorized access, it falls short in mandating organizations to provide clear and detailed information to individuals about data collection and processing purposes. This opacity may weaken individuals' trust, leaving them unaware of how their data is used. This lack of clarity can impede informed decision-making and hinder the establishment of a trustworthy digital ecosystem.

A further area of concern lies in the limited individual rights regarding data protection within Cambodia's legal framework. Unlike the GDPR, which grants individuals comprehensive rights such as access, rectification, erasure, and objection to processing, Cambodia's legal framework, although acknowledging privacy rights, lacks explicit individual rights. This impedes individuals' ability to exert control over their personal data, limiting their capacity to effectively manage their personal information, including correcting inaccuracies or requesting the removal of unnecessary data.

Enforcement mechanisms and accountability represent critical aspects of data protection, and here, Cambodia's legal framework encounters challenges. Unlike the GDPR, which enforces robust mechanisms, including substantial fines for non-compliance, Cambodia's legal framework lacks the robust enforcement mechanisms needed to ensure compliance with any existing data protection provisions. Moreover, without clear consequences for non-compliance, organizations might be less incentivized to prioritize data protection practices. The absence of strong enforcement measures weakens the effectiveness of data protection laws, potentially resulting in careless or negligent handling of personal data. This could lead to data breaches, unauthorized sharing, and misuse of individuals' data.

In essence, an analysis of Cambodia's data protection framework reveals notable shortcomings, each carrying potential implications for each individual's privacy rights, data transparency, enforcement efficacy, and global integration. Addressing these gaps through comprehensive legislation, enhanced transparency, robust enforcement mechanisms, and strengthened individual rights is essential to ensure responsible digital growth, foster international partnerships, and uphold individuals' privacy rights in a rapidly evolving digital landscape.

V. CONCLUSION

In conclusion, the comparison of Cambodia's legal framework for governing consent practices in processing personal data and the GDPR highlights significant disparities and opportunities for improvement. Embracing the GDPR's principles offers a strategic pathway for enhancing data protection practices, fostering trust, and ensuring responsible data management in Cambodia's evolving digital landscape.

This analysis underscores inherent shortcomings in Cambodia's legal framework, particularly in addressing consent mechanisms and data protection for marketing and advertising. While existing laws touch on privacy and electronic transactions, they lack specific requirements for consent, transparency, and individual rights. Cambodia's growing prominence in the global digital ecosystem makes addressing these gaps imperative for both domestic progress and international collaborations.

The journey towards comprehensive data protection in Cambodia requires legislative action that aligns with international standards. The findings of this research underscore the urgency of enacting a dedicated data protection law that explicitly addresses consent practices in order to provide guidelines for data processing in marketing and advertising. Considering Cambodia's unique position as a non-EU member state when evaluating the feasibility of strict GDPR adherence is crucial. Rather than directly adopting the GDPR, Cambodia can benefit from selectively integrating certain best practices and principles from the regulation to fortify

[22] Ibid., Art. 5(1)(f).
[23] Ibid., Art. 5(2).
[24] Ibid., Art. 6(1)(a).
[25] EU GDPR, Recital 32.
[26] EU GDPR, Art. 9.
[27] Ibid., Art. 7.
[28] Ibid., Art. 13 and Art. 14.
[29] Ibid., Art. 17.
[30] Ibid., Art. 17(1)(a).
[31] Ibid., Art. 17(1)(b).
[32] Ibid., Art. 17(1)(c).
[33] Ibid., Art. 83(5).

data protection. By drawing inspiration from the GDPR's stringent requirements, Cambodia's legislators have a unique opportunity to craft a forward-looking legal framework that safeguards individuals' privacy rights while facilitating innovation and economic growth.

However, legislation alone is insufficient. Cultivating a culture of data protection is equally vital. Initiatives like public awareness campaigns, educational programs, and industry partnerships can spark this transformation, embedding data protection within societal values.

Informed by these insights, Cambodia's legislators are well-positioned to create a data protection law that propels the country toward digital responsibility. By aligning with international standards and recognizing data protection's importance for growth and collaborations, Cambodia can foster a secure and prosperous digital future with enhanced data practices.

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THE LEGAL IMPLICATIONS OF NATIONAL INTERNET GATEWAY (NIG) ON THE RIGHT TO PRIVACY AND FREEDOM IN CAMBODIA

MEAN Sopordaliss

I.INTRODUCTION TO THE LEGAL ISSUE

In 2021, Cambodia issued a sub-decree that requires all internet operations in the country to be routed through the National Internet Gateway. This sub-decree aims to facilitate and manage Internet connections in order to strengthen the effectiveness and efficiency of the national revenue collection, protection of national security, and preservation of social order, culture, and national tradition.[1] According to the sub-decree, as the precise technical and operational infrastructure still remains vague, there are deep concerns over the government's authorization of the internet space including their censorship capabilities that could harm individuals' internet freedom and privacy. [2] Does the National Internet Gateway bring a set of setbacks to Cambodia's freedom of expression? What are the legal implications of the National Internet Gateway on the right to privacy and freedom of Cambodia?

This paper aims to study the consequences of the law on the main stakeholders in Cambodia and analyze the loopholes of this law with a primary scope on the rights of freedom of expression and right to privacy.

II. BODY

1. OVERVIEW

A gateway is a telecommunications network mode that joins two networks using various transmission methods. A gateway acts as a network's entry and exit point since all data must travel through it or connect with it before being forwarded.[3] The National Internet Gateway (NIG) sub-decree paves the way for the establishment of a digital gateway to manage all internet traffic into and out of Cambodia. It consists of a Domestic Internet Exchange (DIX) and an International Internet Gateway (IIG) – Local and International Internet traffic shall be managed by one National Internet gateway.[2] The NIG shall be

[1] Royal Government, Sub-Decree on Establishment of National Internet Gateway, Article 1
[2] Spicer, Sarah. 2022. "CPJ Joins Call for Cambodia Government to Revoke Plans to Establish an Internet Gateway." Committee to Protect Journalists. May 19, 2022.
[3] Lewis, Sarah, and John Burke. 2019. "Gateway." IoT Agenda, June.
[4] Internet Society. 2022. "Internet Impact Brief: Cambodia National Internet Gateway - Internet Society." July 11, 2022.
[3] Royal Government, Sub-Decree on Establishment of National Internet Gateway, Article 2
[6] 2022b. "XGS-PON Enabled High-Speed Broadband Set for Kingdom." Phnom Penh Post. August 3, 2022.
[7] Royal Government, Sub-Decree on Establishment of National Internet Gateway, Article 6
[8] Internet Society. 2022. "Internet Impact Brief: Cambodia National Internet Gateway - Internet Society." July 11, 2022.
[9] Royal Government, Sub-Decree on Establishment of National Internet Gateway, Article 1
[10] Gordon, J. (2004). Illegal Internet Networks in the Developing World (Research Publication). Harvard Law School.
[11] Ibid
[12] Royal Government, Sub-Decree on Establishment of National Internet Gateway, Article 12

applicable for all infrastructure, network operations and internet service operations in Cambodia. [4] Currently, there are 44 internet service providers in Cambodia as of 2022.[6] As stated in the sub-decree NIG operators have the obligations to maintain and keep up technical records, the IP address allocation table, and the route tracking of traffic passing via NIG; Compile and keep up-to-date records and reports on connections and all Internet traffic; supply additional information as requested by the MPTC and TRC.[7] Because networks in Cambodia's NIG must now connect to the DIX or IIG, more technical and financial procedures will stand in the way of operating the internet infrastructure in Cambodia. This NIG law will essentially act as a permission protocol to join the internet operation services in Cambodia.[8]

2. LEGAL FRAMEWORK

The NIG is established for the purpose of facilitating and managing internet connections in order to improve the effectiveness and efficiency of national revenue collection and defend national security.[9] Unlicensed international telecommunications networks pose great difficulties as they can undermine state unds allegedly set aside for supporting old traditional telecommunications infrastructure in developing nations.[10] There are security concerns over the traffic of internet gateways that make monitoring difficult, the need to preserve state revenues, and the safeguarding of licensing rights.[11] The mentioned sub-decree indeed stipulates the obligation of NIG operators to cooperate with the authorities in order to assure national revenue collection, public order, and dignity and to crack down on crimes.[12]

Having an NIG provides centralized control over all incoming and outgoing domestic and international internet traffic via a single infrastructure. This also implies that networks from outside the nation cannot readily link to networks from within it. It limits network operator engagement with its operation and governance.[13] If a government has an NIG, it does not necessarily mean that they have access to all the data that passes through it. However, it is possible for a government to use an NIG to intercept and monitor internet traffic, including personal data such as emails, messages, and online activities.[14] The extent of government access to data through an NIG will depend on the specific laws, regulations, and policies in place, as well as the technical capabilities of the system. As stated in the sub-decree, there are various statements mentioned in the articles, “To be mentioned by the Prakas of MPTC”.[15]

3. LEGAL IMPLICATIONS

a. Right to Freedom of Expression

In law, access to the Internet is a rapidly developing area. It is already well-established that access to the means of communication is important to the exercise of the right to freedom of expression.[16] Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers. [17] Explicitly, the Cambodian Constitution enshrined and guaranteed this right. [18] Despite traditional means of expression, the internet is a platform with means of opportunities for people to express themselves[19] and indeed empowers the right to freedom of expression with easier access to let themselves be exposed to the public sphere according to individual’s own discretion.

In cyberspace, the control of Internet access and the protection of freedom of expression to a large degree are in the hands of commercial parties, specifically Internet Service Providers. [20] It is because Internet Service providers have access to various amounts of information which underlines their significant role and position vis-à-vis the rights and freedoms of users.[21] However, the provisions in the sub-decree only mention the regulation of the flow of internet traffic in Cambodia and do not provide any stipulations with regard to content regulation or the flow of information. However there are provisions for the cooperation of Internet Service Providers with authorities to block all network connections that adversely affect social order, dignity, and customs. [22] This is problematic, especially as the Internet Service Provider’s actions will have a significant effect on both the right of others to informational access as well as the freedom of expression of individuals to whom they choose to deny access.[23] In practice, Internet Service Providers are more and more willing to abide by requests that they take down websites or ban access for their users to a certain website or group of websites. Examples can be found in cases from countries such as certain sites blocked in Switzerland, China (Great Firewall), and India (where the Government-owned service provider controls all international Internet gateways).[24] However, if we shift focus from the negative obligation of governments not to interfere, to the positive obligation to protect, we might argue that states increasingly need to ensure that freedom of expression is protected in cyberspace. Thus, providing the same level of protection for the Internet is provided for the physical public sphere.
a.Right to Privacy

The Kingdom of Cambodia recognizes and respects human rights as stipulated in the Universal Declaration of Human rights, the covenants and

[13] Mok, 2022. “Internet Impact Brief Cambodia’s National Internet Gateway.” Press release. Stanford University. February 18, 2022.
[14] Ibid.
[15] Royal Government, Sub-Decree on Establishment of National Internet Gateway, Article 5, 9, 10, 11
[16] “Background Paper on Freedom of Expression and Internet Regulation for the International Seminar on Promoting Freedom of Expression With the Three Specialised International Mandates.” 19-20 November 2001 London, United Kingdom of Great Britain and Northern Ireland.
[17] ICCPR Commentary Article 19
[18] Constitution of the Kingdom of Cambodia, Article 41
[19] “Freedom of Expression Online in 2023 | DW Observatory.” n.d. Digital Watch Observatory.
[20] Jørgensen, Rikke Frank. 1998. “Internet and Freedom of Expression.” MA thesis, RAOUL WALLENBERG INSTITUTE. Page 31
[21] “Human Rights Guidelines for Internet Service Providers Developed by the Council of Europe in Co-Operation with the European Internet Services Providers Association (EuroISPA).” 2008. Press release. 2008. Page 7
[22] Royal Government, Sub-Decree on Establishment of National Internet Gateway, Article 6
[23] “Background Paper on Freedom of Expression and Internet Regulation for the International Seminar on Promoting Freedom of Expression With the Three Specialised International Mandates.” 19-20 November 2001 London, United Kingdom of Great Britain and Northern Ireland.
[24] Ibid.

conventions related to human rights. [25] Article 17 of ICCPR[26] stipulates the right to personal data protection as this also includes preventing states from mandating the extensive storage of personal data by any sort of entities and preventing access to personal data unless under certain, regulated situations as well as ensuring that that information concerning individual's privacy should not be used in purposes incompatible with the covenant.[27]

There are currently no regulations or provisions in place in Cambodia that expressly specify the various responsibilities of data controllers and data processors or the distinctions between them, nor has the country passed any comprehensive legislation on data protection or data privacy.[28] However the constitution stipulates the rights to privacy and secrecy of correspondence by mail, telegram, fax, telex and telephone shall be guaranteed. [29] Privacy on the Internet is the ability of individuals and groups to understand what information about them is being collected and how, and to control how this is used and shared.[30] Article 12 of the decree requires all telecommunications operators connected to the NIG to ask their users for clear identification of their identities, whereas Article 14 of the regulation mandates NIG operators to retain technical records and send routine status updates to the authorities. [31] The sub-decree does not provide a precise list of types of information or data that can be obtained or shared and the provision only stipulates "other information as required". The sub-decree does not mention any provision related to surveillance, however, it stipulates the requirement of Internet service providers to provide IP address reports and other information to the MPTC.[32]

This allows the MPTC to have the authority to determine at any time to issue orders to obtain information about individuals or entities according to the government's order. To illustrate the legal aspect, in some cases, governments may be required to obtain a warrant or court order to access specific data, while in other cases, they may have broader authority to monitor and collect data. For instance, in Cambodia's criminal procedure code, unless an investigative judge issues an order to authorize and intercept and record all telecommunications including messages through the internet.[33] The authorities are responsible for performing the orders of the court, and namely for the data collection on the internet are the duties of the Anti-cybercrime department of the National Police. [34] In this case, it may be possible that the NIG may be used as a medium to collect individuals' personal privacy to a greater extent.

While legislating data retention without also guaranteeing that service providers have the capability to effectively meet the consequent increase in data security demands, this risk becomes greater by centralizing internet traffic and data under an NIG. [35]

It is worth noting that private companies, such as internet service providers have the ability to track, collect and retain data on their users.[36] However, this can only be accessed by government agencies under certain circumstances subject to legal or regulatory limits. Moreover, the government had issued a statement of clarification on the purpose of the National Internet gateway stating that the provisions set forth in the sub-decree has no intention to authorize the collection of consumers' data or restrict the freedom of expression. The NIG is created to serve as a tool to contribute to thwarting cyber-crimes including cross-border network connections, online gambling, and scams. [37]

III. CONCLUSION

In conclusion, The National Internet Gateway Sub-decree raises questions about the future of the Internet typically in Cambodia. In order to correspond to the development of digitalization, considering the regulation of internet traffic, the prospective purposes of the sub-decree have been enshrined in the articles however it imposes few concerns over the legality of freedom of expression and privacy as well as potential harms to the Internet and individuals resulting from setting up the NIG and defend the Internet space. Although the implementation of this sub-decree has been delayed due to infrastructural or other challenges, it is vital to consider the fact that the sub-decree stipulation is vague and may pose a few threats as analyzed above. Hence, a full internet impact assessment should be reviewed, revised, and clarify the details of the law and re-consider the implementation of this law.

[25] Constitutional Law Cambodia, Article 31
[26] International Covenant on Civil and Political Rights, 16 December 1966, Article 17
[27] UN Human Rights Committee (HRC), CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, 8 April 1988.
[28] "Cambodia - Data Protection Overview." 2022. DataGuidance. December 19, 2022.
[29] Constitutional Law Cambodia, Article 40
[30] Internet Society. 2022. "Internet Impact Brief: Cambodia National Internet Gateway - Internet Society." July 11, 2022.
[31] Royal Government, Sub-Decree on Establishment of National Internet Gateway, Article 12, 14
[32] Royal Government, Sub-Decree on Establishment of National Internet Gateway, Article 14
[33] Cambodia Criminal Procedure Code 2008, Article 172.
[34] Pich, Ratana. 2015. | Open Development Cambodia (ODC)." Open Development Cambodia (ODC). September 8, 2015.
[35] "Discard the Sub-Decree on the Establishment of the National Internet Gateway, Set to Detrimentally Impact Human Rights Online in Cambodia." 2021.
[36] O'Driscoll, Aimee, and Aimee O'Driscoll. 2023. "How to Stop Your ISP Tracking Your Browser History." Comparitech, June.
[37] Sochan, Ry. 2022. "Ministry Clarifies Purpose of National Internet Gateway." Phnom Penh Post. February 15, 2022.

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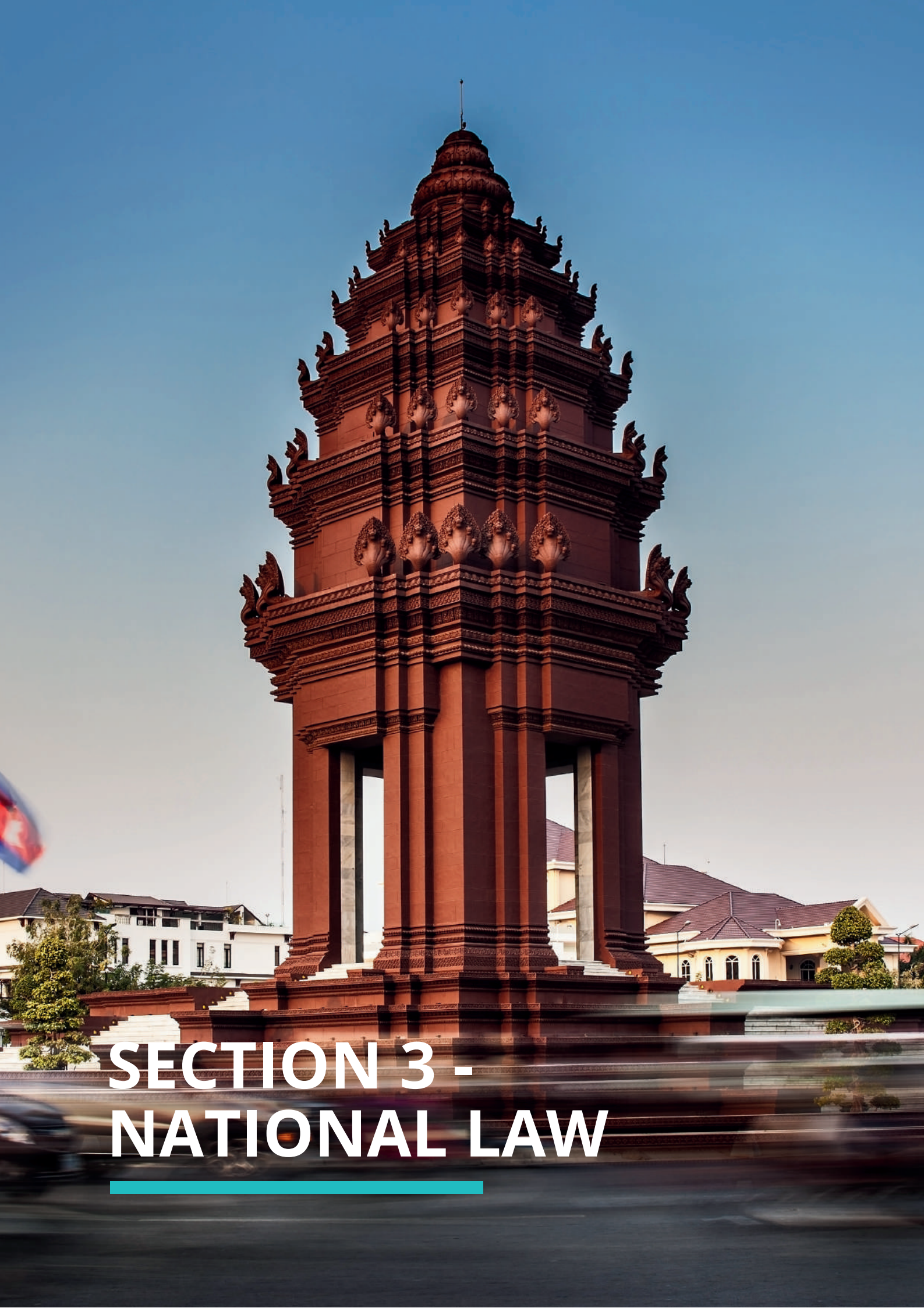

SECTION 3 - NATIONAL LAW

Demolish of monastery buildings at Wat Ounalom in the capital's Daun Penh district
Photo: Heng Chivoan, 2022

THE LOOPHOLE ON CONSTRUCTION AND DEMOLITION WASTE (CDW) MANAGEMENT IN CAMBODIA

CHIV Madalen

I.INTRODUCTION TO THE LEGAL ISSUE

In accordance with the rapid economic growth and urban development, waste collection and management has always been a major issue for Cambodia during the process. However, over the last few years, the Construction and Demolition (C&D) waste management has started to cause a greater concern for the country, mainly in Phnom Penh and Sihanoukville where the construction boom happens.[1] This is set off by the influx of Chinese investment in real estate which in turn has been causing the number of high-rise buildings to skyrocket.[2]

Although there is no official national data or investigation on the exact amount of C&D waste generation,[3] the United Nations Environmental Programme (UNEP) has suggested that the estimated data be collected at the landfills or at C&D sites because C&D waste is often considered as part of with other Municipal Solid Waste (MSW) and is usually disposed of at landfills altogether due to the lack of legislation to properly govern the C&D waste.[4]

A study conducted at the C&D sites in Phnom Penh, roughly estimated the waste composition of about 60% broken brick, rock, left-over cement and soil, 20% wood, 10% metal, 5% plastic, 5% paper, and other waste.[5] According to the study, the C&D waste is bulky, heavy, and mostly unsuitable for disposal by incineration or composting, therefore definitely unfit to combine them with the MSW at the same landfill, and if combined it may lead to danger.[6]

Currently, there is no legislation specifically targeting C&D waste, regarding the responsibility of C&D waste generators and effective transportation. Therefore, this paper aims to address the legal issue resulting from the lack of legislation to properly regulate C&D waste and propose suitable solutions influenced by the countries that have faced similar situations and have handled them successfully.

[1] Casper Bruun Jensen, Phnom Penh Kaleidoscope: Construction Boom, Material Itineraries and Changing Scales in Urban Cambodia, p. 211.
[2] Ibid, pp. 211-232.
[3] IGES Centre & UNEP, State of Waste Management in Phnom Penh, Cambodia, p. 22.
[4] United Nations Environmental Programme (UNEP), Developing Integrated Solid Waste Management Plan: Training Manual, p. 22.
[5] IGES Centre & UNEP, State of Waste Management in Phnom Penh, Cambodia, p. 22.
[6] Asian Institute of Technology, Construction and Demolition Waste Management: Current practices in Asia (Vilas Nitivattananon), p. 98.
[7] AECOM Asia Company Limited (AECOM), People's Republic of China: Construction and Demolition Waste Management and Recycling, p. 17.
[8] Ibid.
[9] Adane Sewhunegn Molla, Patrick Tang, Willy Sher, Dawit Nega Bekele, Chemicals of concern in construction and demolition waste fine residues: A systematic literature review, Abstract.
[10] K.L. Hentz, Toxicology Testing and Evaluation, pp. 14-23.
11] Adane Sewhunegn Molla, Patrick Tang, Willy Sher, Dawit Nega Bekele, Chemicals of concern in construction and demolition waste fine residues: A systematic literature review, Abstract; Lesley Rushton, Health hazards and waste management, p. 188.

II. IMPACT OF CONSTRUCTION AND DEMOLITION WASTE

The C&D waste can cause serious environmental impacts which lead to critical health impacts on humans.[7] The toxic chemicals such as calcium silicate hydrate, calcium hydroxide, sulfate, sulfate ions, lignin, and tannin from C&D waste lead to pollution which subsequently causes fatal health issues.[8] The chemicals of concern (COC) discovered in C&D waste include polycyclic aromatic hydrocarbons, polychlorinated biphenyls, and brominated flame retardants have been detected in the landfills in the Netherlands, Sweden, Japan, and Canada.[9] A study conducted at the site claimed that these COC have caused health complications such as carcinogenicity (a substance that causes cancer)[10], liver and kidney damage, cumulative damage, neurological disorders, prenatal damages, and birth defects were reported as associated health implications of exposure to COC from C&D waste.[11]

In the case of Sihanoukville, the owner of a high-rise construction site in Preah Sihanouk province, commune 2, identified to be a Chinese national, was found to be "secretly burning huge amounts of plastic and construction waste day and night".[12] The people who are living in the area complained that the smoke had caused headaches, nausea, and sore throats, especially for the children and elderly.[13] Unfortunately, the authorities interpreted the mixture of household and construction waste altogether as "the rubbish" and did not impose separate fines for the illegal burning of rubbish on both household and construction waste.[14] The World Health Organization estimates that 3.7 million people die each year as a result of air pollution, with open burning being responsible for at least one-fifth of those deaths.[15]

III. LEGAL FRAMEWORK ON CONSTRUCTION AND DEMOLITION WASTE MANAGEMENT

The critical impacts mentioned above are due to the lack of legislation specifically designed to regulate C&D waste. For the time being, there are two sub-decrees that slightly clarify the responsibility of C&D waste generators on appropriate storage, collection, and companies, while stipulating financial penalties for non-compliance regarding the construction and demolition waste management. Unfortunately, the sub-decrees are not enough because there are still loopholes regarding the matter.

1. SUB-DECREE 113 ON MANAGEMENT OF GARBAGE AND SOLID WASTE OF DOWNTOWNS

The sub-decree 113 on Management of Garbage and Solid Waste of Downtowns was implemented in 2015 with the goal to enhance the management of garbage and solid waste of downtowns with effectiveness, ensure aesthetics, public health, and environmental protection.[16] It mainly covers the management of garbage and solid waste of downtown areas and sets out the penalties for improper storage of the owners.
Article 23 of the sub-decree 113 instructs the owners or contractors that demolishing, repairing or constructing houses or buildings shall be responsible for garbage and solid waste from their constructing sites such as storing, cleaning, collecting and transporting their garbage and solid waste by their own to local landfills.[17] However, the C&D waste is a mixture of all sorts of hazardous wastes and solid wastes including heavy furniture and harmful substances such as solvents and asbestos.[18] This is impractical for the C&D waste generators to manage it all by themselves without the guidance from the ministry.

Additionally, Article 46 of the sub-decree has addressed the penalty for the owners of construction sites who improperly store their garbage and solid waste from constructing work or materials as stipulated in Article 23 where they will fine 400,000 riels for construction sites of housing and 800,000 riels for big construction sites of buildings.[19]

The C&D waste is referred to as "garbage and solid waste" which means that the C&D waste is also counted as part of garbage and solid waste which later will be transported to the same landfill as the MSW, which can be dangerous.[20] While our current legislation fails to distinguish the different types of waste, the Australia National Waste stream policy has classified solid waste into three categories which are MSW, C&D waste and Commercial and Industrial (C&I) waste which makes it easier to handle, depending on the type of wastes.[21]

2. SUB-DECREE 36 ON SOLID WASTE MANAGEMENT

The sub-decree 36 on Solid Waste Management was established to oversee the solid waste management namely household waste and hazardous wastes with proper technical manner and safe way which applies to all activities related to disposal, storage, collection, transport, recycling, dumping of garbage and hazardous waste.[22]

Despite covering a wider range on the management and collection of hazardous waste, the C&D waste was not included as one of the hazardous wastes to be regulated by the sub-decree 36 as stated in the Annex.[23] The sub-decree 36 is still lacking as it has missed out on specific details in many aspects as stipulated in Article 11 that the Ministry of Environment "must establish guidelines on the management of hazardous waste to ensure the safe management".

[12] Savi Khorn, Sihanoukville building site accused of burning waste, The Phnom Penh Post.
[13] Ibid.
[14] Ibid.
[15] Ibid.
[16] Sub-Decree No. 113 ANKr.BK on Management of Garbage and Solid Waste of Downtowns, 27 August 2015, Art. 1.
[17] Ibid, Art. 23.
[18] European Commission, Construction and demolition waste.
[19] Sub-Decree No. 113 ANKr.BK on Management of Garbage and Solid Waste of Downtowns, 27 August 2015, Art. 46.
[1] Ibid, Arts. 23 & 46.
[2] Australian Government Department of Climate Change, Energy, the Environment and Water, National waste stream profile
[22] Sub-Decree No. 36 ANKr.BK on Solid Waste Management, 27 April 1999, Arts. 1-2.
[23] Ibid, Annex.

However, it did not clearly list the requirements needed in the management plan.[24] In contrast to this, the Article 8 of the Japanese Construction Waste Recycling Promotion Act has specifically laid out the details that the Ministry of Environment must include the basic objectives, research, and development to ensure the proper disposal, production, and use of construction waste; measures for the utilization, management of information on the production, and facilitation of recycling of construction waste.[25]

IV. LEGAL SOLUTIONS

The main concern for the management of C&D waste is due to the lack of a practical legal framework. The possible solutions for the legal problem to effectively regulate C&D waste are to first establish a sub-decree on C&D waste management as the sub-decree consumes less time to implement than the law. Second is proper enforcement, and lastly establishing education programs for the citizens as well as the civil servants in order to have a better understanding relating to the issue.

1. THE ESTABLISHMENT OF A SUB-DECREE ON CONSTRUCTION AND DEMOLITION WASTE MANAGEMENT

The new sub-decree may assign the government and ministries involved, including the Ministry of Environment and Ministry of Land Management, Urban Planning, and Construction, to establish regulations, policies, or principles relating to the issue. The methods and principles can be based on the Japanese Construction Waste Recycling Promotion Act and the Environmental Management System (EMS).[26]

1.1 Japanese Construction Waste Recycling Promotion Act

There are two things to be drawn from the Japanese Construction Waste Recycling Promotion Act, first is using technology to control the C&D waste management, which is stated in Articles 9 and 10, and second is to sustainably dispose of the C&D waste under Article 12.[27]
As stipulated in Articles 9 and 10, the ministers are instructed to establish and oversee a technological research and development team to facilitate the environmentally friendly disposal and recycling of C&D waste.[28] According to Article 12 of the Act, The Minister of Environment shall divide the C&D waste into combustible and incombustible wastes and subdivide construction wastes by kind, in accordance with the classification system.[29] This separates the C&D wastes from being mixed with the MSW, due to the physical and chemical properties of the C&D wastes that contain a variety of different substances. Improper handling can lead to pollution and health hazards. Thus, by taking this step, the regulation is already making a positive impact in managing the C&D wastes.

2. ENVIRONMENTAL MANAGEMENT SYSTEM EMS – ISO 14000 PRINCIPLES

Environmental management studies on the combination of environmental engineering and project management, with a greater emphasis on the roles and duties for each project phase.[30] An Environmental management plan proposed by a study is to apply the Life Cycle Assessment (LCA) method following the standard verified procedures, the International Organization for Standardization (ISO) 14000 principles and has classified the phases into four.[31] The 'initiation phase' is to estimate environmental impact; the 'construction phase' is to study and consider the resources used on sites; and the third is the 'operation and maintenance phase' which covers the waste generation, pollution release as well and dangerous chemical agents; and lastly, the 'end of life phase' is to keep track of the waste disposal, incineration, recycling, and processing.[32]
The standard has been adopted in Singapore by international and local construction industries on the structured approach to improving the environmental performance of their constructions.[33] While in Hong Kong, the local industries have been promoting measures in compliance with the ISO 14000 such as establishing waste management plans, reduction and recycling of C&D waste, private training, and legal measures on environmental management and protection.[34]

V. CONCLUSION

Overall, the legal issue involving C&D waste management in Cambodia is an ongoing and urgent concern, and the longer we wait to settle it, the more individuals are exposed to long-term and severe health issues as a result of the legal loopholes in Cambodian legislation. This problem needs immediate attention from the lawmakers alongside the help from the government by taking the initiative to swiftly establish a separate law on C&D waste management on time because without appropriate laws or certain regulations to act as a pillar against this issue, the result will be temporary. As earlier suggested, the most effective and efficient way is to establish a sub-decree to address the uncertainty in the present legislation while also incorporating ideas supplied by other nations who have encountered the same situation and are better able to manage it. It will be a huge breakthrough in the Cambodian legal system to be able to address the C&D waste management as a whole which can greatly impact and shape how people will view the Cambodian waste management systems in the future.

[24] Ibid, Art. 11.
[25] Japanese Construction Waste Recycling Promotion Act, Act No. 11879, 12 June 2013, Art. 8(2).
[26] Japanese Construction Waste Recycling Promotion Act, Act No. 11879, 12 June 2013; Walaa S.E. Ismaeel, Nada Kassim, An environmental management plan for construction waste management, pp. 3-4.
[27] Japanese Construction Waste Recycling Promotion Act, Act No. 11879, 12 June 2013, Arts. 9-10.
[28] Ibid, Arts. 9-10.
[29] Ibid, Art. 12.
[30] Walaa S.E. Ismaeel, Nada Kassim, An environmental management plan for construction waste management, p. 3.
[31] Ibid.
[32] Ibid, pp. 3-4.
[33] Asian Institute of Technology, Construction and Demolition Waste Management: Current practices in Asia (Vilas Nitivattananon), 2016, pp. 99-100.
[34] Ibid, p. 100.

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A COMPARATIVE STUDY ON THE RECOGNITION AND ENFORCEMENT OF ARBITRATION AWARDS IN CAMBODIA

POENG Somalika

I.INTRODUCTION TO THE LEGAL ISSUE

Arbitration is a widely recognized and preferred method for resolving international disputes outside of the national courts. Its flexibility, confidentiality, and enforceability make it a desirable substitute for normal litigation.[1]

Any arbitration system must include the recognition and enforcement of arbitral awards. No matter where the award is made or where enforcement is demanded, they guarantee that the parties to an arbitration receive a binding and enforceable ruling. [2] Recognizing and enforcing arbitral awards is necessary for maintaining confidence in the arbitration process by doing so increases the predictability and finality of the result.[3]
State problems

This paper aims to provide a comprehensive overview of the Recognition and enforcement of arbitral awards by delving into the legal frameworks, practical challenges, and international conventions, we can gain insights that will enhance our understanding of the recognition of enforcement processes, ultimately contributing to a more reliable international arbitration system.

II.LEGAL FRAMEWORK FOR RECOGNITION AND ENFORCEMENT OF ARBITRATION AWARDS IN CAMBODIA

The legal framework for arbitration in Cambodia is primarily governed by the Law on Commercial Arbitration ("LCA"), which was enacted in 2006.[4] The law on Commercial Arbitration sets out the procedures and requirements for the recognition and enforcement of arbitration awards in Cambodia.[5] It establishes the Cambodian Arbitration Council as the competent authority for the recognition and enforcement of awards.[6] The Law on Commercial Arbitration recognizes that arbitral awards are final and binding, and provides a comprehensive set of rules for the recognition and enforcement of such awards.

[1] 1 J. Ralston, "International Arbitration from Athens to Locarno, P. 153, 1929
[2] Report of the Secretary-General: Possible Features of a Model Law on International Commercial Arbitration, A/CN.9/207.
[3] Ratha L Panh, "Enforcing foreign judgments in Cambodia ´ Enforcing foreign judgments in Cambodia | Phnom Penh Post, Post Media Co Ltd The Elements Condominium, Level 7 Hun Sen Boulevard Phum Tuol Roka III Sangkat Chak Angre Krom, Khan Meanchey 12353 Phnom Penh Cambodia, 07 September 1996.
[4] HBS Law's Expertise in International Arbitration Recognized by Chambers and Partners. (2021).
[5] Ibid.
[6] International Labour Organization. "Labour Code of Cambodia." Updated February 2011.

Under the law, parties seeking recognition and enforcement of an arbitral award must apply to the competent court within three months of the award being rendered. The court, in turn, has 30 days to make a decision on the application. [7] Under the LCA, arbitration can be conducted for both domestic and international disputes, it applies to disputes arising from business dealings, such as contracts, transactions, and other commercial business deals. [8] However, arbitration is not permitted to resolve some issues, including those involving consumers, labor, and a variety of maritime disputes. Under the law, an arbitration award made in Cambodia or in a foreign jurisdiction can be recognized and enforced in the country if it meets certain criteria. [9] The LCA contains comprehensive provisions on numerous arbitral-related topics, including the arbitration agreement, the selection of arbitrators, how the arbitration will be conducted, the recognition and enforcement of awards, and how they might be challenged or overturned. [10]

Foreign arbitral awards issued in jurisdictions that are signatories to the New York Convention are thus often accepted and upheld in Cambodia.[11] The parties must submit an application to the Cambodian courts in order to have a foreign arbitral ruling enforced there. [12] If specific reasons, such as the invalidity of the arbitration agreement or a violation of due process, are shown, the court will evaluate the application and may reject recognition and enforcement. [13]

Cambodia has additionally signed Bilateral Investment Treaties ("BITs") with a number of jurisdictions in addition to the New York Convention. [14] The protection and execution of arbitral decisions relating to investments are frequently covered by these BITs. [15] With regard to the restrictions stated in the applicable BITs, such awards may be enforced in Cambodia. [16]

III. COMPARATIVE ANALYSIS OF RECOGNITION AND ENFORCEMENT OF ARBITRATION AWARDS IN CAMBODIA AND OTHER JURISDICTION

Recognition and Enforcement of arbitration awards play an important role in ensuring the viability and effectiveness of international arbitration.[17] In this comparative analysis, we will be focusing on the Recognition and Enforcement of Arbitration Awards in Cambodia and Singapore.

3.1 LEGAL FRAMEWORK

In Cambodia, the legal framework for the Recognition and Enforcement of Arbitration Awards is primarily governed by the Civil Procedure Code and the Law on Commercial Arbitration. [18] The Civil Procedure Code sets out the general provisions for the recognition and enforcement of foreign awards, while the LCA specifically governs the recognition and enforcement of commercial arbitration awards.[19] This law provides for the recognition and enforcement of domestic and international arbitration awards.[20] It adopts the provisions of the United Nations Commission on International Trade Law ("UNCITRAL") Model Law, which ensures uniformity with international arbitration practices. [21]

Meanwhile, Singapore has been recognized as a leading arbitration-friendly jurisdiction. The key legislation governing arbitration in Singapore is the International Arbitration Act ("IAA"), which governs both domestic and international arbitration, Singapore is a party to the New York Convention and actively promotes arbitration through its pro-arbitration legal framework and Singapore has also incorporated the provisions of the UNCITRAL Model Law into their domestic legislation, ensuring harmonization with international standards. [22]

3.2 INTERNATIONAL AGREEMENT

Cambodia is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). [23] By being a party to this international agreement, Cambodia is obligated to recognize and enforce arbitration awards from other member states, subject to certain limited grounds for refusal. [24]

Similarly, Singapore is also a signatory to the New York Convention. As a result, Singaporean courts must recognize and enforce foreign arbitration awards from other member states, with only limited grounds for refusal. [25]

3.3 COURT COMPETENCY

In Cambodia, the competent court for the recognition and enforcement of arbitration awards is the Court of Appeal. [26] The party seeking recognition and enforcement must file an application with this court, along with supporting documents, such as the arbitration award and the arbitration agreement.[27]

In Singapore, the High Court has jurisdiction over recognition and enforcement proceedings.[28] The party seeking enforcement must file an originating summons with the High Court, along with the necessary supporting documents.[29]

3.4 GROUND FOR REFUSAL

Both Cambodia and Singapore have limited grounds for refusing the recognition and enforcement of arbitration awards. Under the Law on Commercial Arbitration in Cambodia, recognition and enforcement may be refused if the arbitral award is contrary to public policy, the subject matter of the dispute is incapable of settlement by arbitration, or if proper notice or representation was not provided during the arbitration proceedings.[30]

[7] Article 36 of LCA
[8] "Law on Marks, Trade Names and Acts of Unfair Competition." Cambodia Intellectual Property. Ministry of Commerce, 2016.
[9] Ibid
[10] Ibid
[11] United States Department of State. "2023 Investment Climate Statements: Cambodia." Bureau of Economic and Business Affairs, Office of Investment Affairs.
[12] Ibid
[13] Ibid
[14] Ibid
[15] United States Department of State. "2023 Investment Climate Statements: Cambodia." Bureau of Economic and Business Affairs, Office of Investment Affairs.
[16] Ibid
[17] Thomas E. Carbonneau. "The Recognition and Enforcement of International Arbitral Awards in French Law." The International Lawyer, vol. 11, no. 4, 1977, pp. 603-617.
[18] World Bank Group: "The International Comparative Legal Guide to: International Arbitration 2019 - Singapore"
[19] Ibid

Similarly, the IAA in Singapore allows for refusal of recognition and enforcement on grounds such as public policy, lack of due process, and invalidity of the arbitration agreement.[31]

3.5 PROCEDURAL REQUIREMENTS

In Cambodia, the procedural requirements for the recognition and enforcement of arbitration awards include filing an application with the Court of Appeal and providing supporting documents, such as the arbitration award and the arbitration agreement. The party seeking enforcement must also prove that the award is final and binding.[32]

In Singapore, the procedural requirements involve filing an originating summons with the High Court and submitting supporting documents, including the arbitration award and the arbitration agreement. The party seeking enforcement must also demonstrate that the award is in writing and that it is final and binding.[33]

Overall, while both Cambodia and Singapore have established legal frameworks for the recognition and enforcement of arbitration awards, Singapore has a more developed and comprehensive system in place. Cambodia, being a signatory to the New York Convention, provides a framework for recognition and enforcement. However, Singapore's well-established legal system, its adherence to international standards, and its robust courts make it a more attractive jurisdiction for the recognition and enforcement of arbitration awards.[34]

IV. CHALLENGES AND ISSUES IN THE RECOGNITION AND ENFORCEMENT OF ARBITRATION AWARDS IN CAMBODIA

Generally speaking, when talking about the recognition and enforcement of the arbitral award, the New York Convention on the Recognition and Enforcement of the Arbitral Award ("NYC") needs to be considered along with the Law on Commercial Arbitration of the Kingdom of Cambodia. [4] It is true that Article 1 of the NYC allowed the contracting states to recognize and enforce the arbitral award. [5] However, the recognition and enforcement of the arbitral award does not seem easy as stated under the NYC due to several reasons.

4.1 LACK OF LEGAL FRAMEWORK

One of the major challenges in the recognition and enforcement of arbitration awards in Cambodia is the lack of a comprehensive legal framework. [37] While the Law on Commercial Arbitration was enacted in 2006, it lacks detailed provisions on the recognition and enforcement of foreign arbitral awards. This gap in the legal framework creates uncertainties for parties seeking to enforce their awards in Cambodia, as they are unsure of the requirements and procedures involved.[38] Without a clear and detailed legal framework, parties may face legal obstacles and delays in the recognition and enforcement process. This lack of legal clarity can also lead to inconsistent decisions by Cambodian courts, as judges may interpret and apply the law differently. This undermines the predictability and reliability of the recognition and enforcement process and discourages parties from choosing arbitration as a dispute resolution mechanism.[39]

4.2 INCONSISTENCIES IN JUDICIAL PRACTICE

Another challenge in the recognition and enforcement of arbitration awards in Cambodia is the inconsistencies in judicial practice. [40] While the Law on Commercial Arbitration establishes the competence of the Cambodian courts in recognizing and enforcing arbitral awards, the actual application of the law varies among different courts and judges. [41] These inconsistent decisions create uncertainties for parties seeking to enforce their awards, as they cannot rely on consistent and predictable judicial practice.[42] In addition, the lack of specialized judges and expertise in arbitration matters further contributes to the inconsistent judicial practice. [43] Without judges who are knowledgeable and experienced in arbitration law, parties may face challenges in convincing the court of the validity and enforceability of their awards.[44]

V. SOLUTIONS AND RECOMMENDATIONS FOR IMPROVING RECOGNITION AND ENFORCEMENT OF ARBITRATION AWARDS IN CAMBODIA

Recognition and enforcement of arbitration awards in Cambodia can be improved through various measures.[45] This section discusses two key solutions and recommendations that can contribute to a more effective system.

5.1 COMPREHENSIVE LEGAL FRAMEWORK

One of the primary steps to improve the recognition and enforcement of arbitration awards in Cambodia is to establish a comprehensive legal framework that is in line with international standards.[46] This includes enacting a modern and well-defined arbitration law that incorporates the provisions of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration. [47]

The legal framework should provide clear guidance on the recognition and enforcement process, specify the grounds for refusal, and promote the principle of minimal intervention by the courts.[48]

[20] Ibid
[21] UNCITRAL: "UNCITRAL Model Law on International Commercial Arbitration 2018" (URL:
[22] Nishith Desai Associates: "International Commercial Arbitration in India: A Practical Guide",
[23] Jus Mundi, Singapore International Commercial Court Decision.
[24] New York Convention
Title: National Arbitration Law – Cambodia.
[25] Global Arbitration Review: "Challenging and Enforcing Arbitration Awards: Report - Singapore"
[26] Raja, Darryl, Lee & Lo: "International Arbitration Guide - Cambodia"
[27] Ibid
[28] Global Arbitration Review: "Challenging and Enforcing Arbitration Awards: Report - Singapore"
[29] Ibid
[30] Raja, Darryl, Lee & Lo: "International Arbitration Guide - Cambodia"
[31] Pryles, Michael. "Recent Singapore Decisions on International Arbitration." National Law School of India Review, vol. 24, no. 1, 2012, pp. 35-53. Accessed 18 August 2023

Furthermore, the legal framework should also address the issue of anti-arbitration injunctions. These injunctions, which are issued by Cambodian courts to restrain the arbitration process, undermine the effectiveness of arbitration, and create uncertainties for the parties involved, the legal framework should expressly prohibit such injunctions to ensure consistency and certainty in the enforcement of arbitration awards.[49]

5.2 SPECIALIZED ARBITRATION COURTS

Establishing specialized arbitration courts can significantly contribute to the efficient recognition and enforcement of arbitration awards in Cambodia. [50] These dedicated courts can be staffed with judges who have extensive knowledge and expertise in arbitration. Their specialized knowledge can help expedite the enforcement process and ensure a consistent and accurate application of the law.[51] In addition, these specialized courts can also handle challenges or appeals against arbitral awards, by having a dedicated body that exclusively deals with arbitration-related matters, parties can have greater confidence in the system and be assured of fair and impartial treatment.[52]

VI. CONCLUSION

In conclusion, the recognition and enforcement of arbitration awards play a critical role in ensuring the effectiveness and reliability of international arbitration. In Cambodia, the legal framework for recognition and enforcement is primarily governed by the Law on Commercial Arbitration, which sets out the procedures and requirements for enforcing both domestic and international arbitration awards.[53]

Despite the progress made, there are several challenges and issues that need to be addressed in order to enhance the recognition and enforcement of arbitration awards in Cambodia. [54] These challenges include the lack of a comprehensive legal framework, inconsistencies in judicial practice, limited scope of recognition and enforcement, and inadequate infrastructure and resources. These issues undermine the predictability, efficiency, and attractiveness of arbitration as a dispute resolution mechanism.[55]

The establishment of specialized arbitration courts staffed with knowledgeable and experienced judges can also contribute to more efficient and consistent recognition and enforcement. [56] Cambodia can enhance the credibility and reliability of its arbitration system, providing parties with a more predictable and efficient mechanism for resolving international disputes. This will not only benefit businesses and individuals involved in international transactions but also contribute to the overall economic development of the country.[57]

[32] "Investment Law of the Kingdom of Cambodia (Unofficial Translation),"
[33] "Enforcement of foreign judgments and arbitral awards," Practical Law.
[34] "Cambodia: Arbitration," Lexology,
[35] United Nations Conference on Trade and Development (UNCTAD). "Investment Policy Review of Cambodia,"
[36] Article 1 NYC
[37] "Commercial Arbitration in Cambodia" (February 2017),
[38] International Labour Organization. "Cambodia Arbitration Council,"
[39] Ibid

[40]Enforcement of Arbitral Awards
[41] ibid
[42-44] ibid
[45] ibid
[46] "The Use of Arbitration in International Commercial Disputes: An Analysis of the Benefits and Challenges") Hong-Lin Yu and Laurence Shore, "Independence, Impartiality, and Immunity of Arbitrators: US and English Perspectives", The International and Comparative Law Quarterly, Vol. 52, No. 4 (Oct., 2003)
[48] ibid
[49] Raja, Darryl, Lee & Lo: "International Arbitration Guide – Cambodia

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International Labour Organization. "Cambodia Arbitration Council." Accessed June 27 2023 https://www.ilo.org/static/english/inwork/cb-policy-guide/cambodiaarbitrationcouncil.pdf.

International Labour Organization. "Labour Code of Cambodia." Updated February 2011, Accessed June 27 2023 Retrieved from https://www.ilo.org/dyn/natlex/docs/WEBTEXT/62960/65261/E02KHM01.htm.

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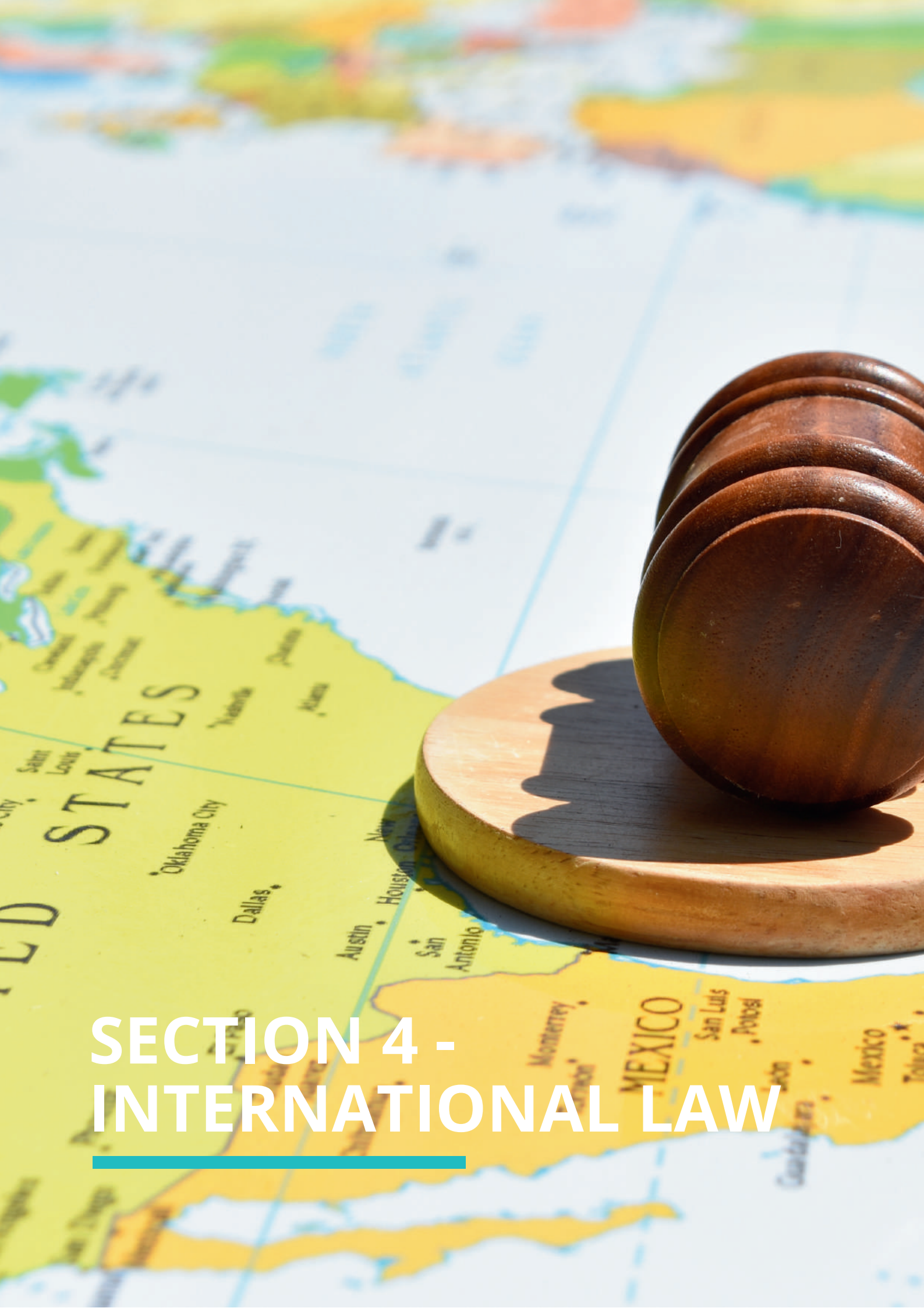
Nishith Desai Associates. "International Commercial Arbitration in India: A Practical Guide." Accessed August 8 2023 https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/International_Commercial_Arbitration.pdf

"Pryles, Michael. "Recent Singapore Decisions on International Arbitration." National Law School of India Review, vol. 24, no. 1, 2012, pp. 35-53. Accessed 18 August 2023.

[49] Ibid
[50] HBS Law, "HBS Law's Expertise in International Arbitration Recognized by Chambers and Partners"
[51-52] Ibid
[53] "Cambodia Arbitration Council: Promoting Fairness and Efficiency in Labor Disputes"
[54] Ibid
[55] Raja, Darryl, Lee & Lo: "International Arbitration Guide – Cambodia
[56] "Principles of Transnational Civil Procedure" by UNIDROIT and the American Law Institute
[57] "Doing Business in Cambodia: A Guide to Arbitration and Mediation"



SECTION 4 - INTERNATIONAL LAW

INCOMPATIBLE RESERVATIONS TO HUMAN RIGHTS TREATIES

BUNTHOEUN Sreykun

I.INTRODUCTION TO THE LEGAL ISSUE

The use of reservations[1] by states has caused concerns among human rights activists and jurists due to the interconnected nature of the rights outlined in these treaties.[2] The reason is that the rights included in these treaties are interconnected and interdependent, meaning that they cannot be separated or isolated from one another.[3] By entering reservations, states may be able to avoid obligations to respect and protect certain rights, leading to fragmentation and weakening of the overall human rights framework.[4] This can result in unequal or inadequate protection of human rights, particularly for vulnerable groups. Additionally, reservations may undermine the universality and integrity of human rights treaties, potentially leading to a lack of consistency in the application and interpretation of these treaties across different countries.[5]

By making reservations to the human rights treaties, states are able to escape some legal obligations, thus limiting the legal protection they offer[6]. However, there are various legal frameworks available to determine if states are not required to comply with a reserved provision entirely, or if there are alternate laws that can govern the issue. Additionally, other methods exist that can hold states accountable to their obligations despite reservations made. The purpose of this paper is to analyze the problem of reservation with a specific focus on how this applies to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). This treaty was chosen to be analyzed because it laid down the most significant principles of the protection of women rights and it is also one the human rights treaties with the highest number of reservations made. Additionally, Bangladesh's reservation to Article 2 of CEDAW provides a compelling example of how the legal framework for reservations can impact a state party's obligations. The reservation raised significant concerns

[1] Article 2 of the Vienna Convention on the Law of Treaties (VCLT) defines reservation as a "unilateral statement... made by a state, when signing, ratifying, accepting, approving or acceding to the treaty where it purports to exclude or modify the legal effect of the treaty's certain provisions."
[2] "Reservations to Human Rights Treaties and Their Validity – A Contemporary Analysis.
[3] Ibid.
[4] Frederick Cowell, "Reservations to human rights treaties in recommendations from the universal periodic review", The international journal of human rights (19 May 2020).
[5] Ibid.
[6] "Reservation on human rights Treaties called into question by European union in third committee", United Nation, 13 Nov 1996.
[7] Nathalie Gunasekera, "Reservations to human rights treaties: are they still a problem?", International Journal of Human Rights, 2018, [accessed on 12 may 2023]
[8] Christine Chinkin, "The Convention on the Elimination of All Forms of Discrimination against Women", Handbook on Gender in world politics, p 147.
[9] United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, Art. 19-20.

among scholars and organizations regarding its compatibility with the object and purpose of CEDAW, demonstrating the complexity of issues surrounding reservation in the human rights context.

The main question here is therefore, to what extent does reservation affect State's human rights obligation under the treaties? To be able to answer this question, there will be two sub-questions. The first sub-question is to which extent can a reservation to a Human Rights treaty provision be legally valid, and which limits should be observed for a reservation not to endanger the legal protection offered in the treaty? The second sub-question is can legitimate reservations made on cultural grounds from state parties be balanced with the integrity of the legal protection offered in the CEDAW? This analysis of the reservation made by Bangladesh to CEDAW and the state's obligation to comply with the provision shows the practical impact of reservations on the legal protection offered by human rights treaties. It must be noted that this paper only focuses on the theoretical aspect and not on the basis of state's practice, and the comparing article was limited to article 3, 4, 5 and not the entire convention of CEDAW.

II. THE EXTENT TO WHICH RESERVATIONS TO A HUMAN RIGHTS TREATY PROVISION ARE LEGALLY VALID

The problem with the doctrine of reservation in human rights treaties is that it allows states to make reservations to core provisions of the treaty.[7]These core provisions are the central elements that ensure the treaty's effectiveness in protecting and promoting human rights.[8] States are allowed to make reservations to core articles of human rights treaties, because reservations are intended to provide flexibility and facilitate the ratification process.[9] While reservations to Human rights treaties are permitted under international law[10], they are subject to limitations such as compatibility with the 'object and purpose' of the treaty, and cannot fundamentally modify the obligations of the state under the treaty.[11] However, the criterion for how a reservation isincompatible with 'the object and purpose' of a treaty has not been comprehensively explained in the treaty nor is there a generally accepted definition yet.[12] Therefore, the committee has to analyze on an ad hoc and case by case basis, with reference to a specific reservation made by states to a specific treaty.[13] In the case of Bangladesh's reservation to Article 2 of CEDAW, it has been argued that the reservation goes against the object and purpose of the treaty, as it limits the legal protection offered to women.[14] By using the case Bangladesh's reservations, we will discuss the conditions under which a reservation to core provisions of the Treaty leads to undermining the integrity of the protection provided, creating uncertainty over the extent to which a state is bound and how it dilutes the force of its provisions. We will also consider potential solutions to limiting the negative impact of reservations.

III. RESERVATION MADE BY BANGLADESH TO ARTICLE 2 OF CEDAW

1. THE LIMITS TO BE OBSERVED FOR A RESERVATION NOT TO ENDANGER THE LEGAL PROTECTION OFFERED IN THE TREATY

As mentioned, a reservation is considered invalid if it excludes or modifies the legal effect of the provision, which undermines the treaty's protection. Reservation on very important articles is impermissible as it excludes the fundamental values provided in the Convention. The CEDAW committee provided that Article 2 of the Convention is one of the core provisions that stipulated the basic principles in implementing the provision.[15] This article required state parties to pursue by all appropriate means and without delay to eliminate discrimination against women by adopting appropriate policy and legislative measures to protect women. [16]

Bangladesh's reservation to Article 2 is limiting itself from taking comprehensive measures to eliminate discrimination against women and may be limiting the scope of its obligations under the convention. This could have negative impacts on the implementation and enforcement of other provisions of CEDAW, which are closely linked to Article 2, such as those related to violence against women, education, employment, and health. Because Article 2 is an important provision, to analyze whether Bangladesh is still fully bound to its human rights obligation, we will have to look at alternative legal frameworks such as the other provisions in the CEDAW Convention and Bangladesh national law itself.

A. A DISCUSSION OF THE POTENTIAL ALTERNATIVES TO ARTICLE 2 OF THE CEDAW AND THEIR DESIRABILITY

While all articles in CEDAW are important for promoting gender equality and eliminating discrimination against women, they have different focuses and cannot fully substitute for each other.[17] Article 2 of CEDAW sets out the core obligations of state parties in promoting and protecting women's rights and eliminating discrimination against women in all areas of life.[18] These obligations include the adoption of laws and policies to eliminate discrimination, promoting social changes and attitudes, and taking affirmative action.[19] In this sense, Article 2 can be seen as a cornerstone of the Convention, providing the basis for the other articles and requiring states parties to take an overarching approach to women's rights.[20] Article 3 of CEDAW requires states parties to take appropriate measures,

[10] Art. 19 of the VCLT provides that reservations are permissible under 3 conditions; if the treaty does not expressly prohibit them or falls within those specified in a treaty, or a reservation is not incompatible with the object and purpose of the treaty.
[11] Ibid.
[12] Ulf Linderfalk, "The Meaning of the object and purpose of a treaty Criterion", Nordic journal of international law (2003), p 431.
[13] Ibid.
[14] Navi Pillay, United Nations High Commissioner for Human Rights.
[15] Ulf Linderfalk, "The Meaning of the object and purpose of a treaty Criterion", Nordic journal of international law (2003), p 456.
[16] Ibid.
[17] Frequently ask question about CEDAW, UN Women, Asia.
[18] CEDAW, Art 2.
[19] Ibid.
[20] Pragna Patel, "Duty of state-Article 2, CEDAW", Women's resources center.
[21]CEDAW, Article 3.

to ensure the full development and advancement of women, including equal access to education, employment, and opportunities in public life.[21]. While Article 3 is closely related to Article 2 in terms of promoting gender equality, it focuses more specifically on the role of education and employment opportunities for women. Article 4 focuses specifically on the measures that should be taken to eliminate stereotypes and prejudices concerning the roles of women and men in society.[22] Article 5 focuses on ensuring women's access to appropriate health services and specific measures to address discrimination against women in rural areas.[23]

The Human Rights Council (HRC) notes in its report on the implementation of CEDAW that "the Convention is an integral whole, with each provision reinforcing the others."[24] However, the report also underscores that "some provisions are particularly relevant to certain areas of life and to certain types of discrimination"[25]. In particular, the UN committee notes that, while Article 2 is the foundational provision of the Convention and sets out the general obligations of states parties, "the other substantive provisions of the Convention... address specific aspects of discrimination against women and promote gender equality and women's empowerment in different settings and sectors".[26]
Similarly, a study on the role of Article 2 in CEDAW notes that while Article 2 is considered the centerpiece of the Convention, it cannot be seen as a panacea for all forms of discrimination against women.[27] The study argues that the different provisions of the Convention are specifically tailored to address different forms of discrimination against women, and that states parties need to implement all provisions of the Convention in a complementary and mutually reinforcing manner.[28]

B. BANGLADESH'S NATIONAL LAW AND ITS EFFECTIVENESS ON THE PROTECTION OF WOMEN

Bangladesh has several national laws and policies that explicitly protect women's rights and aim to eliminate discrimination against women in various areas of life. The Constitution of Bangladesh provides several provisions for the protection of women's rights. For example, Article 28(2) of the Constitution prohibits discrimination against any citizen on grounds of race, religion, caste, sex, or place of birth. [29] Article 27 of the Constitution also recognizes the equality of women in all spheres of life and states that women shall have equal rights with men in all aspects of national life.[30] The Bangladesh Labor Act of 2006 provides several protections for women in the workplace, including prohibiting discrimination in employment and ensuring equal remuneration for work of equal value.[31] The Act also requires employers to ensure a safe working environment for women workers and provides for maternity leave for female employees.[32]

However, these provisions under the labor act have a limited scope, excluding certain groups or situations that only cover harassment that occurs within the workplace and do not apply to other areas. This means that women who experience sexual harassment outside of work, such as on public transportation or in public spaces, are not protected by these laws.[33] Additionally, Bangladesh's legal system has also been criticized for having vague and ambiguous laws related to women's rights, such as laws on sexual harassment and domestic violence. [34] This can result in confusion for those who seek legal remedies, and may also lead to uneven application of the law. Particularly, The Bangladesh Penal Code includes provisions related to sexual harassment, but these provisions have been criticized for being vague and difficult to apply in practice. For example, in a study conducted by the Bangladesh National Women Lawyers Association, many women who had experienced sexual harassment reported that they did not know how to report the incident or what the legal process would entail.[35] What is more, The Domestic Violence Act of 2010 has also been criticized for being vague and not providing adequate protections for women. For example, the law defines domestic violence as "any physical or mental torture," but does not provide specific examples or criteria for what constitutes such torture.[36]

2. WHETHER LEGITIMATE RESERVATIONS MADE ON CULTURAL GROUNDS FROM STATE PARTIES BE BALANCED WITH THE INTEGRITY OF THE LEGAL PROTECTION OFFERED IN THE CEDAW

The cause behind Bangladesh's reservation to Article 2 of CEDAW is not entirely clear. Some scholars and human rights advocates suggest that Bangladesh's reservation is motivated by the conflict with cultural and religious factors.[37] CEDAW's goal of eliminating discrimination against women conflicts with some provisions of Muslim personal law, which have been criticized for perpetuating gender-based discrimination.[38] The apparent conflict between Bangladesh's reservation and Article 2 relates to the role of Muslim personal law in the country also known as Sharia law, which allows for practices such as child marriage, polygamy, and the unequal distribution of inheritance between male and female heirs.[39] By reserving the right to comply with Article 2 to the extent that it does not conflict with Muslim personal law, Bangladesh limits the extent to which the country can address these discriminatory practices and provide full legal protection for women's rights enshrined in CEDAW. The reservation states that Bangladesh will comply with the provisions of Article 2 of CEDAW "to the extent that they are consistent with the provisions of the Constitution of the People's Republic of Bangladesh."[40] As a result, Bangladesh may not be required to take all appropriate measures

[22] Ibid., Article 4.
[23] Ibid., Article 5.
[24] HRC/RES/16/2112 April 2011 and HRC/DEC/17/119 19 July 2011.
[25] Ibid.
[26]UN Committee on the Elimination of Discrimination Against Women (CEDAW Committee), 'General recommendation No. 28 on the core obligations of States parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women' (16 December 2010)
[27] Rikki Holtmaat, "A holistic approach to women equality and freedom", 25 March 2013.
[28] Ibid.
[29] Constitution of People's republic of Bangladesh, Article 28(2)
[30] Ibid., Article 27
[31] The Bangladesh Labor Act 2006.
[32] Ibid.
[33] Kabir, S. (2011). Sexual Harassment Against Working Women in Bangladesh. Journal of International Women's Studies, 12(3), 64-76.
[34] Maliha Khan, "How well are female workers protected by the law?" Feb 2018.
[35] Chowdhury, P. (2013). Sexual Harassment in Bangladesh: A Study of Women's Experiences and Perceptions. Bangladesh National Women Lawyers Association.
[36] Rahman, M. (2013). Domestic Violence against Women in Bangladesh: Journal of International Women's Studies, 14(3), 16-29.

including legislative and policy measures, as required by Article 2. The reservation also raises concerns about the country's commitment to gender equality and the elimination of discrimination against women.[41] The reservation could be seen as a signal that Bangladesh is not fully committed to implementing the provisions of CEDAW or taking the necessary steps to promote gender equality.[42]

Thus, legitimate reservations based on cultural grounds may be permissible in certain circumstances, but they cannot be used to permit discrimination against women or undermine the integrity of the legal protection offered by CEDAW.[43] The case of Bangladesh's reservation to Article 2 highlights the need to strike a balance between cultural diversity and the fundamental human rights principles enshrined in international human rights law.[44]

IV. CONCLUSION

Reservations to human rights treaties, as evidenced by the case of Bangladesh and its reservations to the CEDAW Convention, can have significant implications for the protection and promotion of human rights. While all articles in the CEDAW Convention are interrelated and provide guidance for promoting women's rights and eliminating discrimination against women, they have specific focuses and cannot substitute for each other. While Articles 3, 4, and 5 all relate to the promotion of gender equality and eliminating discrimination against women, Article 2 is the core foundation of the obligations of states parties under the Convention, and it plays a crucial role in guiding states parties towards a comprehensive approach to promoting and protecting women's rights.[45] Even though Bangladesh has several national laws and policies that protect women's rights and aim to eliminate gender discrimination. However, the vagueness and limited scope of laws can result in unclear legal remedies or lack of protection for certain groups of women.[46] There is a need for stronger legal protections and implementation mechanisms for women's rights in Bangladesh.[47]It can be concluded that Bangladesh domestic law is inadequate and leaves room for discrimination against women despite the constitutional provisions.

In conclusion, Reservation can limit the Accountability of states obligation. When states make reservations to core provisions of a treaty, it can weaken the human rights obligations of that state, making it more difficult for individuals to hold the state accountable for violating their rights. It is recommended that restrictions be placed on reservations made to human rights treaties, particularly those related to core provisions.[47] This can help ensure that the spirit and intent of the treaty is fully respected and that states are held accountable for their obligations.[48]

To achieve this, it is essential that clear criteria be established to guide the making of reservations and ensure compatibility with the object and purpose of the convention.[50] Such criteria could, for example, limit the scope of reservations to non-core provisions, or require specific justifications for reservations to core provisions.[51]Additionally, states should be encouraged to consult with the treaty body and other relevant stakeholders to ensure that any reservations made are in accordance with the general principles and purposes of the treaty, and do not undermine its effectiveness.[52] By adopting these measures, states can help promote the full realization of human rights and strengthen the overall effectiveness of human rights treaties.

[37] "Bangladesh's Reservation in CEDAW & Human Right Protection; Causes, Justifications and Prospects", London college of legal studies.
[38] Ibid.
[39] Ibid.
[40] Brandt, Michele, and Jeffrey A. Kaplan. "The Tension between Women's Rights and Religious Rights: Reservations to CEDAW by Egypt, Bangladesh and Tunisia." Journal of Law and Religion 12, no. 1 (1995): 105–42.
[41] Maliha Khan, 'CEDAW at a dead end in Bangladesh?' The Daily Star (Bangladesh, March 08, 2019); Citizens' Initiatives on CEDAW, Bangladesh (CIC-BD) 'Eighth CEDAW Shadow Report to the UN CEDA Committee' (2016).
[42] Ibid.
[43] Amnesty International, Reservations to the Convention on the Elimination of All Forms of Discrimination against Women (London: Amnesty International, 2004).
[44] Ibid.
[45] Convention on the Elimination on all form of Discrimination against women New York 18 December 1989, UN General Assembly.
[46] Maliha Khan, Ibids., [Access on 18 May 2023]
[47] Concluding observations of the Committee on the Elimination of Discrimination against Women, CEDAW/C/BGD/CO/7, 4 April 2011.
[47] Redgwell, Catherine J. "Reservations to Treaties and Human Rights Committee General Comment No.24(52)." The International and Comparative Law Quarterly 46, no. 2 (1997): 390–412.
[48-51] Ibid.
[52] Hill, Daniel W. "Avoiding Obligation: Reservations to Human Rights Treaties." The Journal of Conflict Resolution 60, no. 6 (2016): 1129–58.

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Blackwater mercenaries training far-right militia in Ukraine
Photo: Steve Sweeney, 2023

THE LEGAL AMBIGUITY SURROUNDING PRIVATE MILITARY SECURITY COMPANIES IN ARMED CONFLICT: IN THE CASE OF BLACKWATER

IM Vireakboth

I.INTRODUCTION TO THE LEGAL ISSUE

"Humanity should question itself, one more, about the absurd and always unfair phenomenon of war" (Pope John Paul II). Private Military and Security Companies (PMSCs) have gained public attention and expanded dramatically since the end of the Cold War. These companies gained prominence during the US-led wars in Iraq, where companies like Blackwater became a topic of much controversy. Today, the widespread utilization of PMSCs has raised concerns about the participation of private companies in the conduct of war, in particular the issues of legitimacy, especially when they take a direct part in hostilities ("DPH"). As long as a regulatory gap exists, PMSCs can continue to commit crimes without being held accountable. Several occurrences in Iraq have demonstrated how PMSCs may thrive outside of the existing regulations. As a result, they operate in a legal vacuum since they are typically granted immunity by the state in which they operate, have no legal responsibility to the foreign government that employs them, and are not accountable to the state in which they are enrolled. This opens the doors to a lack of responsibility in the event that PMSCs perform unlawful activities.

A. TERMINOLOGY

PMSCs are not explicitly described in any International Humanitarian Law ("IHL") treaties, but they are usually "refer exclusively to those who specialize in military services and others in security services.[1] In the absence of a legal definition of what a PMSC entails, such companies are distinguished by a financial or material compensation interest rather than idealistic national intentions to protect one's country.[2] Although many attempts have also been made to contribute to a universal definition of PMSCs by emphasizing one of the controversial aspects of PMSCs, namely how such private companies' services replace tasks that would be considered sovereign state affairs.[3] Nonetheless, international treaties still do not provide a straightforward answer defining the status of PMSCs either in peacetime or wartime.

[1] International Committee of the Red Cross, "International humanitarian law and private military/security companies – FAQ", 2013.
[2] Schreier, F., and Caparini, M., "Privatising Security: Law, Practice and Governance of Private Military and Security Companies", Geneva Centre for the Democratic Control of Armed Forces: Occasional Paper, 2005, p. 18.
[3] Hanna B., "Private Military and Security Companies in Armed Conflict", Örebro University, 2021, p.10.

B. CLASSIFICATION

Due to a failure to explicitly regulate PMSCs and their personnel, they are frequently bound by minimum rules and principles in the absence of a specific legal regime. While it is arguable that the PMSCs industry evolved from mercenarism, the initial step on how IHL should regulate PMSCs is to review existing mercenary regulations and determine their core characteristics, as well as what differentiates them from PMSC personnel.

a) PMSCs

The Montreux Document and the International Code of Conduct Association defines such companies as "any company" in its list of definitions, meaning that such companies are any company "whose business activities include the provision of security services [...], irrespective of how such company describes itself."[4] However, their classification should not be based on their profiling, because the status of PMSC personnel should be determined on a case-by-case basis, specifically based on the nature and circumstances of the functions in which they are involved.[5] Therefore, determining the status of a PMSC must be based on the contracted mission and services agreed upon between the company and its client also with the company's actual conduct when carrying out its services.

b) Mercenaries

After the establishment of the United Nations in 1948, it has contributed to a common understanding that mercenarianism is an act of condemnation. Thus, the international community started to explicitly oppose the use of mercenaries by codifying the definition of a mercenary under Article 47 of the API stating that mercenaries are any person who: "is specially recruited locally or abroad in order to fight in an armed conflict"; "does, in fact, take a direct part in the hostilities," etc., and neither of them is entitled to treatment as a prisoner of war ("POW"),[6] which has also been established as a rule of customary international law flowing from state practice.[7]

For this reason, it can be drawn that the core differences between the PMSCs and mercenaries can be highlighted by five distinguishing characteristics as follows: "PMSCs are (1) highly organized business; (2) driven by business profit rather than individual profit; (3) are operating legally on the open global market; (4) offering services within a broad spectrum; and (5) they are often interconnected with other industries which provide them with some degree of legitimacy."[8] Besides, PMSCs differentiate themselves by the fact that their personnel are hired into an organization that acts as a middleman for the professional soldiers they employ on the one hand, and the governments that seek their services on the other.[9]

II. LEGAL FRAMEWORK ON PMSCS: PMSCS OFFER PROFESSIONAL SERVICES TO STATE AND NON-STATE ACTORS

The Differentiation between Private Military Contractors (PMC) and mercenaries can be difficult to identify, especially when PMCs operate within the PMSC industry and perform activities falling under the extensive range of services during deployment in both non-conflict and conflict zones. While some activities are regarded as innocent, such as guarding shopping malls, others are more controversial, and violent in nature and would be considered core military functions. Since this industry relies on contractual law, an activity that is defined as a military service under one contract may be classified as a security service under the contract instead. Meanwhile, another feature of PMSCs is the services they offer to their clients. PMSCs provide a variety of services and are adaptable to their clients' needs, such as (1) offensive combat; (2) military and security expertise; and (3) military support, as well as advice, training, logistical support, monitoring, and demining. [10] As a result, the services they can offer are limitless. They provide these services to a variety of clients, including governments, and non-governmental organizations.

III. LEGAL PROBLEM SURROUNDING PMSCS

A. NO LEGAL TAXONOMY RECOGNIZES WHAT PMSCS DO

The regulatory challenges surrounding the classification of PMSCs are linked to three interconnected factors: first, the conduct of PMSCs is difficult to identify since they engage in such a wide range of activities. Second, approaching the definition of PMSCs is difficult because there is no fixed definition for PMSCs. Third, there is still a lot of confusion between PMSCs and mercenaries, because most laws that regulate PMSCs also regulate mercenaries. The definitions and views of PMSCs are clearly predicated on their relationship to the state. Even if there were legal consensus on what PMSCs are, it is likely that the wide range of operations that companies that could be labeled PMSCs are involved in would entail many classifications.

Aside from the absence of a legal taxonomy, there is a fundamental definitional issue that must be addressed here. That is a distinction that must be made between mercenaries and PMSCs and whether those PMSCs are subject to any regulation and whether the necessity for such regulation exists, because PMSCs are regulated through the ban of mercenary activities rather than through the regulation of PMSC-specific activities. Thus, if we focus on the dangerous gray areas between PMCs and mercenaries, there appears to be a disregard for

[4] International Code of Conduct Association,"International Code of Conduct for Private Security Service Providers", 2021, p. 5.
[5] ICRC, "International humanitarian law and private military/security companies – FAQ", 2013.
[6] Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict, 1125 UNTS 3, 8 June 1977, (entered into force 7 December 1978), Article 47.
[7] Henckaerts., J. M., and Doswald-Beck., J.,"Customary International Humanitarian Law", Cambridge University Press, Volume II, Chapter 33, Section C, Rule 108, 2005, p. 2574.
[8] Singer., P. W., "Corporate Warriors: The rise of the privatized military industry", Cornell University Press, 2003, p. 6.
[9] Legal Assistant, "Are mercenaries Legal?", 2020.
[10] International Committee of the Red Cross, "International humanitarian law and private military/security companies – FAQ", 2013.

the legitimacy of PMSCs as we have known that mercenaries act anonymously, but PMSCs are registered corporations with organizational structures to maintain. In addition, it is worth noting there is also a distinction between their missions as well. PMSCs are not free to choose their own missions. They are contracted to perform a mission from their respective PMSCs. Mercenaries have their own reasons for fighting and from free will.

B. WEAKENING THE PRINCIPLE OF DISTINCTION

The presence and use of PMSCs in armed conflict posed a threat to the international norm. Given that PMCs conduct activities in a gray zone between DPH and the indirect part in hostilities ("IDPH"), undermines the principle of distinction that determines the legitimacy of the use of force. IHL emphasizes a clear distinction between non-combatants and combatants based on the notion that combatants are the primary target of armed conflict. [11] Thus, if PMCs presume to be a civilian (non-combatants) due to the fact that they are not legally incorporated into the regular armed forces [12] means that their use of force within the mandate of their contract may be only considered as IDPH. This is contradicted by the Interpretive Guidance where PMCs remain civilians and lose their protection against direct attack for such time as their direct participation lasts. The application of the Interpretive Guidance, as a customarily undefined notion, means that a large percentage of PMSC's operations would come under the concept of IDPH. This would eventually prevent those PMCs from becoming legitimate targets. In this regard, the extension of civilian protection to PMSC personnel performing controversial military and security activities jeopardizes the basic protection that is granted to civilians.

IV. THE IMPLICATION OF PMSCS: BLACKWATER: THE PMSC COMPANY

When the United States established its embassy in Baghdad in 2004, the Bureau of Diplomatic Security ("DS") took over from the military the job of providing security but DS lacked the manpower to carry out this task while also carrying out its other responsibilities across the world.[13] To make up the difference, DS signed Blackwater, to provide security for the new Baghdad embassy and its personnel.[14] However, Blackwater earned a bad reputation as a result of the aggressive conduct that eventually emerged in Iraq. The gunshots by Blackwater personnel against Iraqi citizens in west Baghdad sparked outrage not only from the Iraqi government but also from the US Congress.[15]

However, Blackwater personnel could not be prosecuted in Iraq due to the nature of their employment and immunity given to PMSCs, consequently raising questions regarding the accountability of PMSCs and the regulation of the privatization of war.[16] This is due to Order 17, which was issued by the Coalition Provisional Authority, a transitional government of Iraq formed by the United States, which allows its contractors to be immune from Iraqi laws in situations relating to their contracts.[17] Thus, the atrocity in Iraq demonstrated how immunity allows PMSCs to bypass responsibility to the foreign government for which they were hired. Since they operate in a legal vacuum even if they engage in hostilities, it appears more likely that PMCs would be prosecuted under criminal statutes that apply extraterritorially to the United States, or by means of the Military Extraterritorial Jurisdiction Act. [18]

V. LEGAL SOLUTION

A. THE CREATION OF A LEGAL TAXONOMY THAT RECOGNIZES WHAT PMSCS DO

PMSCs might be regarded as international entities and governed. Thus, a taxonomy based on the nodal governance approach, for example, would imply that the private military sector is considered a potential node of security governance. One would also recognize that this business is governed by multiple nodes, including nations, other transnational industries, and non-governmental organizations such as relief organizations and local private security. A local governance viewpoint would aim to comprehend the diverse mentalities in the industry as well as the technology, resources, and institutional design. A decentralized study of PMSCs could also aid in the development of a definition. This form of analysis is resolved to reject the boundary between public and private, and it focuses on comprehending a market's interdependence, complexities, and ungovernability. Thus, the optimal legal definition of a PMSC is one that recognizes the numerous sorts of activities that PMSCs may conduct while enabling movement throughout the area of subcategories of acts and services provided by PMSCs.

Nonetheless, the state may consider utilizing an existing mechanism for regulating PMSCs, which differ in terms of scope of application, instrumental effect, and level of implementation. As PMSCs function in a legal vacuum, it is critical to alter present regulatory mechanisms at both the domestic and international levels in order to hold PMSCs and their personnel accountable for their misbehavior and anticipate the erosion of legitimacy over the non-state of force. The mechanism here is focused on two major legal tools to be used or developed by those states where PMSCs are based: (1) the control over

[11] Henckaerts., J. M., and Doswald-Beck., J., "Customary International Humanitarian Law", Cambridge University Press, Volume II, Chapter 2, Section A, Rule 7, 2005, p. 2574.
[12] Nils, M., "Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian law", International Committee of the Red Cross, 2009, p. 39.
[13] Rebecca, A. B., "The State in Disarray: US Oversight of Private Security Contractors", Salve Regina University, 2010, p. 4.
[14] Ibid.
[15] Welch, M., "Fragmented power and state-corporate killings: a critique of Blackwater in Iraq", Crime Law and Social Change, 2009, p. 355.
[16] Walters, J., "Supreme court rejects appeal from Blackwater guards convicted of killing Iraqi civilians", The Guardian, 2018.
[17] Coalition Provisional Authority Order Number 17 Status of The Coalition, Foreign Liaison Missions, Their Personnel and Contractors, Section 3 (I).
[18] Legislative Attorney, "Private Security Contractors in Iraq and Afghanistan: Legal Issues", Congressional Research Service, 2010, p. 2.

the export of military services based on licensing and restricted the extension of extraterritorial jurisdiction over PMSC personnel; (2) there is a need for international regulation, particularly through the establishment of a new international convention on the PMSC industry and the development of supranational bodies capable of monitoring, controlling, and penalizing corporations' misconduct and functioning.

B. ENHANCING RESPECT FOR THE INTERNATIONAL HUMANITARIAN LAW

The use of PMSCs poses a great challenge to the concept of DPH's temporal scope, which refers to the loss and regain of protection against direct attack that runs in parallel to the intervals of one's engagement in DPH.[19]Thus, the Employing State and the PMSCs can form various legal instrument to ensure that the PMSC's operation to the state that they are being deployed to is legally in accordance with the IHL, and those approaches can be seen as follow:

- **Special Agreement:** enable the Employing State and the PMSCs to make an explicit commitment to comply with IHL in their contract because they are based on the mutual consent of the parties and make clear that the parties have the same IHL obligations.

- **Inclusion of IHL in PMSC's Code of Conduct:** By adopting and distributing a code of conduct that is consistent with IHL, the PMSCs can set up a mechanism that enables its personnel to respect this law. Such an indication of a commitment to adhere to the rules of IHL can nonetheless lead to better implementation of IHL norms by PMSCs.

VI. CONCLUSION

PMSCs rose to public prominence in the early 2000s and provided the general public with a greater grasp of the industry's concerns. In many aspects, the PMSCs seem like something out of a novel, yet the PMSCs industry is vivid as a multibillion-dollar industry. Despite the fact that they are not mercenaries, they have inherited certain difficulties that make their deployment equally challenging. However, the lack of appropriate regulations for their ambiguous activities under the IHL often led to many violations of the IHL.

Therefore, the need to fulfil security demands with PMSC solutions is not an inherently bad or impossible choice. However, it certainly has pros and cons that must be regularly examined and addressed by good policy. Consequently, the state must act with precaution and consciousness since the stakes in the armed conflict are significantly higher than in other corporate industries. Thus, they must be doubly certain of their relations with private companies in this most essential public sphere, when national security and people's lives are at risk.

[19] Nils, M., "Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian law", International Committee of the Red Cross, 2009, p. 21.

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The Supreme Court Chamber of the Extraordinary Chambers in the Courts of Cambodia (ECCC)
Photo: ECCC, 2022

FORCED MARRIAGE AS AN "OTHER INHUMANE ACT" OF CRIME AGAINST HUMANITY – SCSL, ECCC, ICC

HEAK Chhuny

I.INTRODUCTION TO THE LEGAL ISSUE

Numerous atrocities were committed during armed conflicts and one of those was forced marriage. The commission of forced marriage tends to increase during armed conflicts due to the insecurity and instability in the country where, unfortunately, most of the time women were victimized. Forced marriages during armed conflicts were reported to take place in Afghanistan, Angola, Cambodia, the Democratic Republic of Congo, East Timor, Guatemala, Kashmir, Liberia, Mozambique, Myanmar, Peru, Rwanda, Sierra Leone, Somalia, Sudan (Darfur), and Uganda.[1] The act itself was explicitly prohibited by various human rights instruments and treaties.[2] However, forced marriage was yet to be prosecuted as an international crime until 2008 when it was first recognized as "other inhumane act" of crime against humanity by the Special Court of Sierra Leone ("SCSL") in the AFRC Case[3] and the RUF Case,[4] later in 2018 in the Case 002/2 of the Extraordinary Chamber in the Courts of Cambodia ("ECCC"),[5] and in 2021 in the Ongwen Case of the International Criminal Court ("ICC").[6]

This paper aims to study the significance of these jurisprudence by laying its core finding and how it contributes to the prevention of such crime in future armed conflicts. It focuses primarily on how forced marriage was decided in each court as an "other inhumane act" of crime against humanity as well as the assessments on the shortcomings and main contributions of each court. The paper concludes with a proposal to include forced marriage as one of the crimes against humanity in the Rome Statute of ICC.

II. FORCED MARRIAGE AS AN "OTHER INHUMANE ACT" OF CRIME AGAINST HUMANITY

1. JURISPRUDENCE OF THE SCSL

Following the nine-year Sierra Leonean conflict, various widespread and systematic sexual violent actions against women and girls were spotted. Forced marriage was one of the widespread practices in Sierra Leone where women were abducted from their homes and forcibly married to the individuals

[1] M. Bastick, K. Grimm & R. Kunz, Sexual Violence in Armed Conflict. Global Overview and Implications for the Security Sector, Geneva Centre for the Democratic Control of Armed Forces 2007.
[2] UDHR, Art. 16; ICCPR, Art. 23; CEDAW, Art. 16; CCM, Art. 1(1).
[3] Prosecutor v. Brima et al., SCSL-2004-16, Appeals judgment 22 February 2008.
[4] Prosecutor v. Sesay et al., SCSL-2004-15, Appeals judgment 26 October 2009.
[5] Prosecutor v. Chea et al., Case 002/19-09-2007-ECCC.
[6] Prosecutor v. Ongwen, ICC-02/04-01/15.

in rebel groups as "bush wives".[7] In addition to experiencing sexual slavery, including rape, torture, and forced labor, the abducted woman had to carry her husband's possessions as they move from place to place, cook for him, wash his clothes, and satisfy him sexually in the name of his "wife".[8] The hybrid tribunal, SCSL, was established upon the end of the civil war in Sierra Leone with the purpose of prosecuting the most responsible persons for serious violations of international humanitarian law. Two cases were brought before the SCSL regarding the crime of forced marriage, the AFRC Case and the RUF Case.

The ARFC Case, with the official case name Prosecutor v. Brima et al., was the first international case ever to recognize forced marriage as a crime against humanity. Under pressure from civil society, the prosecutor included the count of forced marriage as an "other inhumane act" in accordance with Article 2(i) of the Statute. With respect to the majority, the Trial Chamber found that it is not necessary under the law to separate the crime of forced marriage as an "other inhumane act" as it is completely subsumed by the crime of sexual slavery.[9] This finding was later overturned by the Appeal Chambers, providing that in addition to the sexual elements which are in common with the crime of sexual slavery, there are some other non-sexual elements such as being forced into a conjugal relationship and the exclusive nature of the relationship which render it "not predominantly a sexual crime", thereby, finding forced marriage as an "other inhumane act" of crime against humanity. [10]

The RUF Case, also known as Prosecutor v. Sesay et al., was the second case in which the crime of forced marriage was decided in SCSL. Both the Trial Chamber and the Appeal Chamber confirmed and convicted the accused for forced marriage as an "other inhumane act" of crime against humanity following the decision from the AFRC Case.[11]

With these two judgments, the SCSL left significant progress in forced marriage being recognized as a crime against humanity. One of those was its definition of the crime with the emphasis on the conjugal element where the AFRC Appeal Chamber held that: "forced marriage describes a situation in which the perpetrator through his words or conduct, or those of someone for whose actions he is responsible, compels a person by force, threat of force, or coercion to serve as a conjugal partner resulting in severe suffering, or physical, mental or psychological injury to the victim".[12]

However, both trials failed to provide a concrete statement of what exactly constitutes forced marriage as a crime against humanity, specifically its elements like other crimes.

2. JURISPRUDENCE OF THE ECCC

The ECCC was a hybrid tribunal established in cooperation between the Royal Government of Cambodia and the United Nations aimed to prosecute the senior leaders of the Khmer Rouge Regime for the most serious crime committed during 1975-1979.[13] A number of massive atrocities were committed and forced marriage was one lying under the state's political reform to exert control over the civilian population.[14] Both men and women were forced into marriage where their lives were at stake as they would face violence, death, or being sent to the work camps if they did not comply with.[15] Once the trial began, forced marriage was charged as a crime against humanity under the residual clause "other inhumane acts".[16] This claim was challenged by the defense lawyer providing that forced marriage in the context of Cambodia differs in several ways from the cases in Sierra Leone, adding that the commission could be rather referred to as "arranged marriage" which is a tradition in Khmer society.[17] However, with regard to other relevant evidence, the Court rendered the judgment classified forced marriage as a crime against humanity in the category of "other inhumane acts" and emphasized the conjugal relationship in the coercive circumstances, referencing the AFRC and RUF judgment.[18]

The judgment from the ECCC made a substantial finding in recognizing forced marriage as a crime against humanity. The Court managed to clarify the elements of the crime, specifically the actus reus and mens rea, while at the same time, prove satisfaction of chapeau elements of crime against humanity and further found that forced marriage is of sufficient gravity to be prosecuted as a crime against humanity. Interestingly, the Court also shed light on the distinction between forced marriage and sexual slavery which has always been a controversial issue when it comes to the classification of forced marriage as a crime against humanity. The Court also has the opportunity to highlight that forced marriage extends to more than a perpetrator-victim relationship as both parties in the marriage are victims of the perpetrator government.[19]

3. JURISPRUDENCE OF THE ICC

Another armed conflict took place in Uganda between the rebel group known as LRA and the government of Uganda between 2002 and 2005 in which civilians suffered systematic attacks from rebel groups. Several children were kidnapped and forced into marriages with members of the LRA.[20] The situation was referred to the ICC in 2003. At the confirmation of charges stage, forced marriage was charged as a crime against humanity as "other inhumane acts". The Pre-Trial Chamber, relying on the cases at the SCSL, concluded that forced marriage constituted a crime against humanity, providing that the crime differs

[7] Sexual Violence within the Sierra Leone Conflict. (2001, February 26). Human Rights Watch.
[8] Prosecutor v. Brima et al., SCSL-2004-16, Decision on Prosecution Request for Leave to Call an Expert Witness (Prosecution Expert Bangura) 8 August 2005.
[9] Prosecutor v. Brima et al., SCSL-2004-16, Trial judgment 20 June 2007, para. 714.
[10] Prosecutor v. Brima et al., SCSL-2004-16, Appeals judgment 22 February 2008, para. 195.
[11] Prosecutor v. Sesay et al., SCSL-2004-15, Appeals judgment 26 October 2009, para. 735.
[12] Prosecutor v. Brima et al., SCSL-2004-16, Appeals judgment 22 February 2008, para. 196.
[13] Agreement Between The United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, signed June 6 2003, entered into force 29 April 2005, (Draft Agreement annexed to GA Res. 57/228B).
[14] Prosecutor v. Chea et al., Case 002/19-09-2007-ECCC, Co-Investigating Judges, Closing Order, 15 September 2010, paras. 845, 847 and 858.
[15] Ibid. para 849 and 850.
[16] Ibid. para. 1430 and 1442.
[17] Prosecutor v. Chea et al., Case 002/19-09-2007-ECCC, Trial Chamber Judgement, para. 748.
[18] Ibid. para. 742.
[19] Cameron Christensen, Forced Marriage at the Cambodian Crossroads: ECCC Can Develop a New Crime Against Humanity, 2015 BYU L. Rev.1825 (2016), p. 1837-1843.
[20] Prosecutor v. Ongwen, ICC-02/04-01/15, Pre-Trial Chamber, Decision on the Confirmation of Charges, 23 March 2016, para. 3.

from the other crimes charged such as sexual slavery and that the central element is the imposition of "marriage" regardless of the will of the victim.[21]

Following these judgments, which decided forced marriage as a crime against humanity, seven other situations were brought before the ICC where forced marriage took place, yet were left unprosecuted.[22] In the prosecution's submission in the case against Katanga, among other crimes, forced marriage was charged against the two defendants alleging that there is evidence which illustrates that women, during an attack, were raped and later were given as wives to their captors.[23] The ICC Pre-Trial Chamber, in the decision on the confirmation of charges, was in accord with the Trial Chamber of SCSL in the Case of AFRC in holding that forced marriage is not a distinct crime against humanity but a form of sexual slavery conveying that sexual slavery also encompasses a situation where women and girls are forced into marriage.[24] Situations and cases concerning the same crimes were brought before the court, yet cannot be decided. This case demonstrates the weaknesses of these jurisprudences in dealing with the crime of forced marriage.

III. CONCLUSION

As already decided by the international criminal court and the other hybrid tribunals, individuals shall be further prosecuted for forced marriage as a crime against humanity. While these court decisions played a major role in advancing condemnation against forced marriage, they remain insufficient in addressing forced marriage as an international crime since the commission of crime is still going on without further prosecutions.

To enhance the effectiveness of the prosecution of forced marriage in addition to the existing jurisprudence, member states of the ICC which is the only permanent international criminal court shall endorse the inclusion of forced marriage as a distinct or separate crime of crime against humanity in the Rome Statute alongside other enumerated crimes instead of placing it under the category of "other inhumane acts" and set out the conclusive element of the crime. By doing so, forced marriage can properly be recognized universally as a crime against humanity and its prohibition will become a part of customary international law, developing a status as a jus cogens norm, thereby, effectively redeeming the victims and punishing the perpetrators.

[21] Ibid. para. 95.
[22] Haenen, I. (2014). Forced marriages in conflict situations. In Force & Marriage: The criminalization of forced marriage in Dutch, English and international criminal law (pp. 65-116).
[23] Katanga and Ngoudjo Chui Prosecution's submission of public version of document containing the charges, para. 89.
[24] ICC, Katanga and Ngoudjo Chui, Decision on the confirmation of charges, para. 431.

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Taliban fighters hold a flag for the Islamic Emirate of Afghanistan
Photo: Ali Khara, 2022

THE LIMITATIONS OF LAW: WHAT EXACTLY IS "UNLAWFUL COMBATANT" AND ITS LEGAL STATUS?

HOR HENG Serey Roth

I. OVERVIEW

Living in a world where everyone has access to protection and security, the violation of these rights still happen in different parts of the world today, especially in armed conflicts, one of which is an "unlawful combatant". Even if it is not stated in the Geneva Conventions, due to the rise of terrorism across the globe, it is mainly assumed that an "unlawful combatant" refers to everyone who exists between "lawful combatants" and "civilians".[1] In short, unlawful combatants refer to armed forces that are not uniformed or part of the states' armed forces. [2] Because of this ambiguity, more harm than good has been done to those people who deserve to be protected. The significance under this is about the people's lives and their livelihood in situations of armed conflicts. This paper will begin with the problematic status of the "Unlawful Combatant" along with the case studies of Al-Qaeda, the Taliban, and the Guantanamo Bay Detention Camp, and end with possible solutions to solve this particular issue.

II. INTRODUCTION TO THE LEGAL ISSUE

The term "unlawful combatants" has not been included in The Geneva Conventions and their Additional Protocols. It was created by the American government basically to counter-terrorism. According to the International Committee of the Red Cross, the term "unlawful combatant" refers to an individual who is not a "combatant" nor a "civilian", but is a part of the armed group which has not received combatant status.[3] Because the term "terrorism" was not clearly defined according to the International Humanitarian Law as well, it is still unclear what "terrorism" is and who "unlawful combatants", the ones considered to carry out acts of terrorism, are. The International Committee of the Red Cross considers captured individuals as a result of the fight against terrorism to be subjected to International Humanitarian Law. This means that captured terrorists, if yet to achieve the "prisoners of war" status, should be treated under the Fourth Geneva Convention and trialed under domestic courts for

[1] Marco Sassoli, 2004, The Status of Persons Held in Guantanamo under International Humanitarian Law, Journal of International Criminal Justice 2, Oxford University Press.
[2] Mofidi & Eckert, 2003, Unlawful Combatants or Prisoners of War: The Law and Politics of Labels, 69.
[3] International Committee of the Red Cross, Unlawful Combatants.
[4] International Committee of the Red Cross, 01 January 2011, International Humanitarian Law and Terrorism: Questions and Answers.
[5] Knut Dormann, March 2003, The Legal Situation of "Unlawful/unpriviledge Combatants".

criminal acts that they have committed.[4] In reality, unlawful combatants are being subject to physical and mental abuse, unpleasant treatment, and limitations of basic needs.[5] This has raised concerns about the legal status of unlawful combatants and how they should be treated.

III. LEGAL PROBLEM

The Geneva Conventions only explicitly stated that "prisoners of war" should be treated humanely and any actions being done during custody that may lead to injuries or death of the prisoners must be considered as a serious breach of the Convention.[6] "prisoners of war" are people who are allowed to use force during armed conflicts and will be protected by the Third Geneva Convention when in enemies' hands.[7] "Civilians" are the rest of the population who are not authorized to use force and are protected by the Fourth Geneva Convention when in enemies' hands.[8] The issue here is whether or not "unlawful combatants" satisfy the elements to be considered as "prisoners of war" or "civilians", and therefore deserve to be protected under the Geneva Conventions.

3.1 UNLAWFUL COMBATANTS LEGALITY UNDER THE THIRD GENEVA CONVENTION

The Third Geneva Convention clearly defined the status of "prisoners of war", in regard to their capture, labor, financial resources, treatment, judicial proceedings, and that they should be released at the end of hostilities.[9] With the status of "prisoners of war", the person will be exempted from all cruel and inhumane treatment, as well as receive protections from all those kinds of torture.

For a person to gain "prisoners of war" status, then, he or she must be commanded by a commander, have a fixed, distinctive sign that could be recognized from a distance, carry arms openly, and operate in accordance with the laws and customs of war under IHL.[10]

With this, the case study of Al-Qaeda is needed to be analyzed. Even if it may be true that Al-Qaeda may be commanded by one person, Osama Bin Laden, it is still unclear as to who actually is behind all these atrocities.[11] Even after Bin Laden's death, Al-Qaeda was still active in parts of Yemen and Syria.[12] Therefore, it is still unknown as to whether or not the one true commander of Al-Qaeda exists. Secondly, Al-Qaeda had always hide themselves in crowded areas without any distinctive signs that could distinguish them from the civilian population. Thirdly, while they do not distinguish themselves from the civilians, they fail to abide by "carrying arms openly" as well. Lastly, Al-Qaeda did not operate in accordance with the laws and customs of law, because they have always been targeting civilians all across, torturing them, and publicly murder them as well.[13] From this analysis, one could already see why Al-Qaeda, a terrorist group, does not meet the element of "prisoners of war" and therefore, could not be protected under the Third Geneva Conventions.

The Taliban forces could also be used to analyze in this case. Taliban is considered to be a terrorist group based in Afghanistan.[14] The Taliban does have a more organized command structure than that of Al-Qaeda, as it may have a connection with the Afghan government. However, even if this is the case, the other three elements must be met in order for its detainees to be considered as "prisoners of war". The Taliban members showed no intention of distinguishing themselves from the civilians, nor did they actively hold arms.[15] This would look like them hiding among the crowds and taking up arms if needed. The Taliban soldiers also did not abide by the law of war, since they were actively involved in the civilian population throughout the process. For instance, they hid military equipment with the civilian population during their takeover in Kabul.[16] Due to the fact that they did not clearly meet the three other elements of "prisoners of war", the Taliban detainees, then, could also not be given the status of "Prisoners of War". Due to the unclear organization of terrorist groups and their vagueness in abiding by the Geneva Conventions, it could not be said that those terrorist groups meet the elements of "prisoners of war" under the Third Geneva Convention. Therefore, they could not be protected under IHL on the same status as "prisoners of war".

3.2 FOURTH GENEVA CONVENTION AND THE CASE STUDY OF THE GUANTANAMO BAY DETENTION CAMP

The ICRC stated that civilians, who do not fulfill the elements of "prisoners of war" are to be protected by the Fourth Geneva Convention in the name of enemy nationals.[17] They may be detained and tried under the national law for the criminal acts that they have committed.[18] However, they, too, are protected from any ill-treatment as civilians in enemy's territories.[19] Even with this stated, the reality of Guantanamo Bay Detention Camp showed a different view. Located along Guantanamo Bay in Cuba, this detention camp has casted a different story – a story where prisoners are being physically tortured and put into detention without any trial.[20] The detention camp has been constructed since 2002 and has been used to contain suspected terrorists that have been arrested for the 9/11 attack.[21] Some of these detainees were not located in the United States grounds when they were captured. Many of them had been accused of having connections with the Taliban or Al-Qaeda and were captured in Afghanistan, Iraq, etc.[22]

[6] United Nations Human Rights Office of the High Commissioner, Geneva Convention Relative to the Treatment of Prisoners of War, Article 13.
[7] International Committee of the Red Cross, Prisoners of war.
[8] Ibid.
[9] International Committee of the Red Cross, 01 January 2014, The Geneva Conventions of 1949 and their Additional Protocols.
[10] Michael C. Dorf, 23 January 2002, What Is An "Unlawful Combatant" and Why It Matters: The Status of Detained Al Qaeda and Taliban Fighters.
[11] Ibid.
[12] PBS NewsHour, 2 May 2016, How Al-Qaeda Has Changed Since Bin Laden's Death.
[13] Michael C. Dorf, 23 January 2002, What Is An "Unlawful Combatant" and Why It Matters: The Status of Detained Al Qaeda and Taliban Fighters.
[14] Ibid.
[15] Ibid.
[16] Ibid.
[17] International Committee of the Red Cross, 01 January 2011, International Humanitarian Law and Terrorism: Questions and Answers.
[18] International Humanitarian Law Databases, IHL Treaties - Geneva Convention (IV) on Civilians.
[19] Ibid.
[20] American Civil Liberties Union, Guantanamo Bay Detention Camp.
[21] Ibid.
[22] Ibid.

There should be no problem if the people detained in the Guantanamo Bay Detention Camp are being treated as combatants or civilians and protected by the Geneva Conventions. Instead of referring those detainees to either of the two characterizations of "prisoners of war", the United States government refers to them as "Unlawful Combatant".[23] The phrase "Unlawful Combatant" does not exist in the Geneva Conventions, thus, there are no provisions to protect those detainees or list down the rights they have. President George W. Bush and his administration, at that time, denied any obligations to grant any basic rights to the prisoners as they were not detained in American territory.[24] In addition to this, they also denied the requirement for them to abide by the Geneva Conventions, since the convention did not include any clauses of law protecting "unlawful combatants", only "civilians" and "lawful combatants". These have led to some awful allegations from Guantanamo Bay Detention Camp which include torture of the detainees like beating, waterboarding, and psychological torment resulting in mental deterioration; ill-treatment such as sleep deprivation, locking in confined and cold cells, and starvation; and detention without trial.[25] The detainees in Guantanamo Bay Detention Camp have been captured by force without any interrogation process nor trial.[26] This can be seen when detainees were being captured in their houses, schools, malls, or even on the streets and being transferred into detention camps. Out of all the detainees, 26 prisoners are not charged with crimes, but not cleared for release either.[27] This has shown that "unlawful combatants" have not received any protections, even if they were supposed to be protected under the Fourth Geneva Convention as civilians on enemy's territory.

IV. Legal Solutions

In order to solve this loophole in the International Humanitarian Law, there should be amendments in the IHL, either to expressively include terrorism as international armed conflict to clearly determined how "prisoners of war" on terrorism should and should not be treated, or create new laws specifically on terrorism to indicate what should be done and how should prisoners of this war be treated.

Currently, the International Humanitarian Law does not recognize the term "terrorist" as a distinct actor in armed conflict situations.[28] However, acts like violence against civilians, taking hostages, and violence leading from discrimination against other races or ethnicities, which are parts of terrorism, are all prohibited under the International Humanitarian Law.[29] For instance, taking hostages is considered as an offense under the International Convention against the Taking of Hostages 1979 and also in the two additional protocols under the Geneva Conventions.[30] Without clear conventions on terrorism, it allows for the so-called "unlawful combatants", which are referred to as those of terrorist groups, to be in the grey zone of law. So, in order to make way for the acknowledgment of "unlawful combatants" under the International Humanitarian Law, there should be new provisions on "terrorism" or "the war of terror", including the provisions to protect and grant basic human rights to those "unlawful combatants". In addition to new provisions on "the war of terror", the term "unlawful combatant" should also be compared to "lawful combatants" or "civilians" to see whether or not they could be listed in the same category. If it is impossible to merge "unlawful combatant" into either of the above types of "prisoners of war", it should be clearly defined and differentiated. This may include provisions that define who should be considered as "unlawful combatants", who should not be considered as one, and what rights would they receive when captured and detained. If the law allows the high contracting parties to use the term "unlawful combatant", there should be provisions to back it up and clearly distinguish it from other types of "prisoners of war". Once terms are being redefined and characterized properly based on their own definitions, then these "unlawful combatants" would then receive sets of rights and obligations that have to perform or abide by during armed conflicts. These new amendments would take years to get enacted and practiced by all member states of the Convention. However, the solution to the problem now is to end the indefinite detention that is without charge or trial, transfer detainees who have been cleared of wrongdoings, and trial detainees for whom there is evidence of wrongdoings. Because terrorism, as mentioned above, is not included in the International Humanitarian Law, the only way to trial those detainees is to trial those detainees in domestic courts, as stated by the ICRC.[31] This will be followed by transferring detainees who have been cleared of wrongdoings out of the detention camp, and opening a trial for detainees with evidence of wrongdoings as what is required under international law.[32] This looks like giving reparations for detainees who have been tortured, returning detainees home or to other countries, as well as holding those who have really done wrong accountable.[33]

V. CONCLUSION

In conclusion, while laws are created to sustain order in society, laws must also be developed to catch up with the fast-changing society. The loopholes in the law, especially ones like this where terms have not been clearly defined, have led to many stakeholders suffering from the situation as a whole. If "unlawful combatants" were to be acknowledged and clearly stated in the provisions, then they would be added to the protected persons under the International Humanitarian Law. The International Humanitarian Law must be able to protect all actors against the violation of human rights, no matter whether they are good civilians or prisoners of war.

[23] Marco Sassoli, 2004, The Status of Persons Held in Guantanamo under International Humanitarian Law, Journal of International Criminal Justice 2, Oxford University Press.
[24] American Civil Liberties Union, Guantanamo Bay Detention Camp.
[25] Ibid.
[26] American Civil Liberties Union, May 2018, Guantanamo by the Numbers.
[27] Ibid.
[28] United Nations Office on Drugs and Crime, Module 6: Military/Armed Conflict Approaches to Countering Terrorism.
[29] Ibid.
[30] Ibid.
[31] International Committee of the Red Cross, 01 January 2011, International Humanitarian Law and Terrorism: Questions and Answers.
[32] United Nations Human Rights Office of the High Commissioner, 10 January 2022, Guantanamo Bay: "Ugly Chapter of Unrelenting Human Rights Violations" – UN Experts.
[33] International Committee of the Red Cross, 01 January 2011, International Humanitarian Law and Terrorism: Questions and Answers.

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A humanitarian aid convoy for the Gaza Strip is parked in Arish, Egypt
Photo: Gianluca Pacchiani, 2023

THE DEFINITION OF REFUGEE IS NOT COMPREHENSIVE ENOUGH

PEN Karona

I.INTRODUCTION TO THE LEGAL ISSUE

A refugee, as defined by Article 1 of the 1951 Convention and the 1967 Protocol, is someone who, due to a well-founded fear of persecution based on race, religion, nationality, membership in a particular social group, or political opinion, is outside their country and unable or unwilling to avail themselves of its protection.[1]This definition was later expanded by the Convention's 1967 Protocol and regional conventions in Africa and Latin America to include individuals who have fled their home country due to war or other forms of violence.[2] This means the definition of a refugee is rooted in the concept of persecution. When interpreting the word persecution, a lack of clear definitions and universally agreed-upon criteria can create challenges and inconsistencies in determining refugee status.[3] Therefore, some states are starting to realize that not all refugees can be neatly categorized according to the legal definitions established by the 1951 Geneva Convention.[4]

II. THE ABSENCE OF A GENERALLY RECOGNIZED DEFINITION OF A REFUGEE

A. DIFFERENT PERSPECTIVES ON WHAT IS MEANT BY "PERSECUTION"

International human rights law and international criminal law explicitly identify certain acts as violations, such as sexual violence, and recognize them as serious abuses that can amount to persecution.[5] These laws provide a framework that can assist decision-makers in determining whether a specific act qualifies as persecution.[6] Acts like rape, gender-related violence, dowry-related violence, female genital mutilation, domestic violence, and trafficking are recognized as inflicting significant physical and mental pain and suffering.[7] These acts have been used as forms of persecution, regardless of whether they are perpetrated by state or non-state actors.[8]

[1] Convention and Protocol Relating to the Status of Refugees, Article 1(2).
[2] New World Encyclopedia contributors, "Refugee."
[3] Francesco, Maian. "The Concept of "Persecution" in Refugee Law: Indeterminacy, Context-Sensitivity, and the Quest for a Principled Approach." para3.
[4] Howland, Todd. "A Comparative Analysis of the Changing Definition of a Refugee." p.34.
[5] The UN High Commissioner for Refugees (UNHCR). "Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A (2) of the 1951 Convention and its 1967 Protocol Relating to the Status of Refugees." para 9.
[6]Ibid.
[7] Ibid.
[8] Ibid.
[9] Thompson, Barney. "Climate Change and Displacement: Why Environmental Issues Matter to Refugees and UNHCR."
[10] Ibid.
[11] Ibid.

In addition, the UNHCR interpreted that the reasons for forced displacement are multifaceted and interconnected.[9] Climate change and natural disasters can exacerbate existing conflicts, increase poverty and economic instability, and create conditions that lead to persecution.[10] The interplay between these factors makes refugee emergencies more complex and requires comprehensive approaches to address the root causes and provide protection and assistance to affected individuals.[11]

Furthermore, in Latin America, Conclusion III of the 1984 Cartagena Declaration states that the definition of a refugee can be expanded beyond the traditional categories of persecution based on "persons who have fled their country because their lives, safety, or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violations of human rights, or other circumstances which have seriously disturbed public order." [12] Depending on that, those people should also be considered as refugees.[13]

Lastly, Article I (2) of the 1969 OAU Convention in Africa expands the definition of a refugee to encompass individuals who are compelled to leave their usual place of residence due to external aggression, occupation, foreign domination, or events that significantly disrupt public order in their country of origin or nationality.[14] These individuals are forced to seek refuge in another location outside their country of origin or nationality.[15]

B. THE 1951 REFUGEE CONVENTION DOES NOT SPECIFICALLY ADDRESS THE ISSUE OF INTERNAL DISPLACEMENT

Based on Article 1 of the 1951 Refugee Convention, a refugee is defined as an individual who is not in their home country or habitual residence, fears persecution based on their race, religion, nationality, [16] membership in a specific social group, or political opinion, and is unable or unwilling to seek protection from their own country or return there due to the fear of persecution.[17]Furthermore, it does not specifically address the situation of internally displaced persons (IDPs).[18] Unlike refugees, IDPs have fled their homes but remain within their own country's borders and are still subject to the laws of that state.[19] The United Nations High Commissioner for Refugees (UNHCR) provides assistance to millions of IDPs in certain crises, but not all of the estimated 20–25 million IDPs worldwide receive this support.[20] Currently, there is an ongoing international debate on how to better protect and assist this group of uprooted individuals, and who should be responsible for their well-being.[21] Therefore, as the 1951 convention did not explicitly mention internal displacement, individuals who are forced to leave their home country may not be classified as refugees under this convention.

III. THE IMPACT OF THE LACK OF A UNIVERSALLY ACCEPTED DEFINITION OF A REFUGEE

A. PEOPLE WHO NEED PROTECTION MAY NOT BE ABLE TO ACCESS IT

There are approximately 5.2 million individuals who require international protection.[22] Environmental refugees and internally displaced persons have yet to access the protection under the definition of refugee (1951 Convention).
Environmental refugees are not protected by international law.[23] These individuals, who are forced to leave their homes due to environmental factors, face heightened political risks compared to refugees fleeing conflict or political oppression.[24] Unlike traditional refugees, climate refugees may be at risk of being returned to their environmentally devastated homeland or being confined to refugee camps.[25]

Internally displaced persons are not considered refugees due to the distinction between refugees and internally displaced persons (IDPs), which lies in the requirement of crossing an international border.[26] While refugees are individuals who have crossed into another country seeking protection, IDPs are forcibly displaced within their own country and do not have the same legal status or rights under international law.[27] The term "internally displaced person" is purely descriptive and does not confer any specific legal rights on those affected, despite sharing similar circumstances and challenges.[28]

IV. POSSIBLE SOLUTIONS TO THE ISSUES

In gaining refugee status, the most important thing is helping people who are facing persecution. And the definition under the 1951 Convention and its Protocol limited the refugee's definition. So, in order to make sure that people who need protection under this convention can get the protection they need, the United Nations High Commissioner for Refugees or other authorities should first extend the definition of refugee. The existing definition of persecution is rooted in the ideas of political opinion, religion, race, nationality, and membership in a specific social group.[29] And it does not specifically mention environmental factors as a cause of persecution. However, there is a need to modify this definition to include individuals who are forced to leave their homes as a result of environmental factors, such as climate change or natural disasters. This modification would ensure that these individuals are recognized as refugees and afforded the necessary protection and support.

[12] UNHCR,"Refugee Definition-Main Guidance."
[13] Ibid.
[14] Ibid.
[15] Ibid.
[16] UNHCR, "Frequently Asked Questions about the 1951 Refugee Convention-Who Is a Refugee?"
[17] Ibid.
[18] UNHCR, "Frequently Asked Questions about the 1951 Refugee Convention-Does the Convention Cover Internally Displaced Persons?"
[19] Ibid.
[20] Ibid.
[21] Ibid.
[22] UNHCR, "Refugee Data Finder."
[23] National Geographic"Environmental Refugee-Refugee Status."
[24] Ibid.
[25] Ibid.
[26] OHCHR."About Internally Displaced Persons-What Is the Difference Between an Internally Displaced Person and a Refugee?"
[27-28] Ibid.

Secondly, UNHCR should create a Global Agreement on the definition of a refugee. By doing so, all countries can have a common concept or interpretation of the definition of refugee. This wouldsimplify the process for refugees to obtain protection and support, as they would not be required to provide evidence of their refugee status in every country they seek refuge in. Besides, it could help prevent countries from refusing to protect and support refugees based on their narrow interpretation of the definition of refugees. And lastly, it would help raise awareness to support refugees.

Therefore, we know that these two solutions will not be easily resolved just by raising the idea; however, it is a work that all countries and organizations should work together to extend and make a common definition that is universally accepted so that people who need protection can access it.

V. CONCLUSION

In conclusion, the definition of a refugee, as outlined in the 1951 Convention and its protocols, is rooted in persecution based on race, religion, nationality, membership in a particular social group, or political opinion. However, there are challenges and inconsistencies in interpreting the term "persecution," leading to a lack of universally agreed-upon criteria. This has resulted in the expansion of the refugee definition in regional agreements, such as the Cartagena Declaration in Latin America and the OAU Convention in Africa, to include individuals fleeing generalized violence, internal conflicts, and disturbances of public order. Additionally, the absence of a recognized definition for internally displaced persons (IDPs) and the lack of protection for environmental refugees pose further challenges.

To address these issues, there is a need to extend the definition of a refugee to include individuals forced to leave their homes due to environmental factors and to create a global agreement on the definition of a refugee. These measures would ensure that people who require protection are not excluded and that there is a common understanding among countries. It is essential for the United Nations High Commissioner for Refugees (UNHCR) and other relevant authorities to work together to raise awareness and take collective action to protect and support refugees. While these solutions may require extensive efforts, they are crucial steps towards ensuring that individuals in need of protection can access it universally.

[29] UNHCR, "Convention and Protocol Relating to the Status of Refugees."

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