

International Laws in the Constitutional Council of Cambodia: A Brief Understanding and Analysis of the Decisions

By *Taing Ratana**

Abstract: Many scholars have discussed how international laws are applied in ordinary courts. However, very few documents and legal scholars in Cambodia have discussed how international laws are approached by the Constitutional Council. The Council is entrusted with the power to guarantee the respect for the Constitution. The decisions of the Constitutional Council shall be final without recourse and have the authority over all instituted powers as stated in the Constitution. However, as the 1993 Cambodian Constitution was established based on Annex 5 of the Paris Peace Agreement, in which “modern” values, including human rights and democracy, are incorporated, one should pay higher attention to the way the Constitutional Council treats or uses international laws and principles to understand whether or not Cambodia, legally speaking, abides by its international obligations. One of the reasons why the Council should be paid higher attention when it comes to guarantee the respects for the Constitution and international obligations is because the Council is entrusted with the power to interpret and make final decisions without recourse. For this reason, this article aims to delve into how the Constitutional Council approaches international laws and principles in its decision-making. This article is divided into five sections: A. Introduction, B. Background and Context, C. Cambodia’s International Obligations, D. International Laws in the Constitutional Council of Cambodia, and E. Conclusion.

Keywords: Constitution; Decision; International Law

* Taing Ratana is currently the Secretary General of the Constitutional Council of Cambodia. He has been working for this institution since September 2005. He is a holder of various degrees: Executive Master of Advanced Studies in Development Studies from the Graduate Institute of International and Development Studies (IHEID), Geneva, Switzerland; LL.B and LL.M from Royal University of Law and Economics, Phnom Penh, Cambodia. Today, Ratana is studying his LL.D (Comparative Law) Program in Law and Political Sciences, Transnational Doctoral Programs for Leading Professionals in Asian Countries, for the academic year 2020-2023, at Nagoya University, JAPAN. He was an invited CALE Foreign Visiting Research Fellow, Nagoya University, from January to February 2020. Ratana is an author of various articles concerning the constitutional law in both English and Cambodian language, and he is also a panelist, speaker and moderator of numerous international conferences and international symposia.

A. Introduction

The relationship between international laws and domestic ones, including the Constitution, and the application of the former in domestic courts have been one of the central topics being discussed by many legal scholars in Cambodia. However, little attention has been paid to how international laws are approached by the Constitutional Council to render final-without-recourse decisions. It is widely known that the Council is given competence to interpret the Constitution and laws adopted by the National Assembly and definitively reviewed by the Senate. Delving in-depth into how international laws are used to make the decisions may be helpful to understand Cambodia's commitment to international obligations, since some international laws are cited in the decisions of the Council. Whether or not the international laws mentioned in the decisions carry any significant weight will also be considerably discussed in this article. As it is difficult to find helpful documents on the issue because it is a novel topic to cover, this article will acquire sources through the existing available documents, including the Council's decisions achieved at the Secretariat General of the Constitutional Council, books or articles written by various scholars. This article will approach selected decisions in which international laws are mentioned and conducts a thematic analysis of how the Council uses these international laws. In other words, this article aims to explore how the Constitutional Council of Cambodia approaches international laws to make decisions. This article engages with the question of how international laws and principles are applied in the decisions of the Constitutional Council. The article is structured into five sections: A. Introduction, B. Background and Context, highlighting the background of the 1993 Constitution and the Constitutional Council of Cambodia and the status of international laws in domestic legal system, C. Cambodia's International Obligations, in which will look at the number of international instruments that bind Cambodia, especially the human rights-related instruments, D. International Laws in the Constitutional Council of Cambodia, pointing out Discourse Analysis, Writing Structure and Thematic Analysis, and E. Conclusion.

B. Background and Context

I. The 1993 Constitution and Constitutional Council of Cambodia

After the decades-long internal conflict in Cambodia after the collapse of Khmer Rouge in 1979, the four main political factions—the State of Cambodia (SOC), the FUNCINPEC, the Khmer People's National Liberation Front (KPNLF) and the Khmer Rouge¹—started to engage in a lengthy process of negotiation, reaching an “Agreement on a Comprehensive Political Settlement of the Cambodia Conflict” (alias Paris Peace Agreement) in Paris of France on 23 October 1991. With the high expectation of having a modern and advanced

¹ The FUNCINPEC, the KPNLF and the Khmer Rouge formed a coalition government in exile to fight against the SOC.

constitution that values democracy, human rights, and the rule of law, as expressed by the interventions of the members of Constituent Assembly, the Annex 5² of this Peace Agreement served as the main guideline for establishing the 1993 Cambodian constitution—the sixth constitution of this country.³

Upon the general election held in 1993⁴, under the auspices of the United Nations Transitional Authority in Cambodia (UNTAC), a Constituent Assembly was successfully formed and entered into function on 14 June 1993. The Assembly consisted of 51 seats held by the Cambodian People's Party (CPP), 58 seats by the FUNCINPEC Party, ten seats by the Buddhist Liberal Democratic Party (BLDP)—the successor of the KPNLF—and one seat by the MOULINAKA Party.⁵ A permanent constitution-drafting commission, led by the president of the Constituent Assembly or by the vice president in the absence of the president, was then established. The Commission was tasked to draft a constitution, supported by the United Nations' legal experts, to guarantee that the Constitution conformed with the principles stipulated in the Paris Peace Agreement.

For about three months of drafting the Constitution and following the six-day debate, from 15 to 21 September 1993, the Constituent Assembly casted secret ballots on 21 September 1993 to adopt the Constitution with 113 votes in favor, five against, and two abstentions. This successful adoption was considered as a crucial step for the Cambodian society towards conflict resolution. Three days later, on 24 November 1993, in *Maha*

2 The five principles are: 1) The constitution will be the supreme law of the land. It may be amended only by a designated process involving legislative approval, popular referendum, or both, 2) Cambodia's tragic recent history requires special measures to assure protection of human rights. Therefore, the constitution will contain a declaration of fundamental rights, including the rights to life, personal liberty, security, freedom of movement, freedom of religion, assembly and association including political parties and trade unions, due process and equality before the law, protection from arbitrary deprivation of property or deprivation of private property without just compensation, and freedom from racial, ethnic, religious or sexual discrimination. It will prohibit the retroactive application of criminal law. The declaration will be consistent with the provisions of the Universal Declaration of Human Rights and other relevant international instruments. Aggrieved individuals will be entitled to have the courts adjudicate and enforce these rights, 3) The constitution will declare Cambodia's status as a sovereign, independent and neutral State, and the national unity of the Cambodia people, 4) The constitution will state that Cambodia will follow a system of liberal democracy, on the basis of pluralism. It will provide for periodic and genuine elections. It will provide for the right to vote and to be elected by universal and equal suffrage. It will provide for voting by secret ballot, with a requirement that electoral procedures provide a full and fair opportunity to organize and participate in the electoral process, 5) An independent judiciary will be established, empowered to enforce the rights provided under the constitution and 6) The constitution will be adopted by a two-thirds majority of the members of the constituent assembly.

3 United Nations, Framework for a Comprehensive Political Settlement of the Cambodia Conflict, 23 October 1991, <https://peacemaker.un.org/en/node/9235> (last accessed on 15 June 2025).

4 According to the marit of the Paris Peace Agreement, the United Nations Transitional Authority in Cambodia (UNTAC) organized the 1993 election from 23-28 May 1993. Among the 4,764,439 registered voters, 4,276,192 (89.56 percent of voters) casted their ballots.

5 Maurice Guillaud, Cambodian Constitutional Law, Phnom Penh 2004 (Khmer version), p. 9.

Phasat Devavinchhay of the Royal Palace of Phnom Penh capital city, Samdach Preah NORODOM Sihanouk signed the Royal Kram promulgating this constitution as urgent in accordance with Articles 135 and 136 of Chapter XIV on the Transitional Provision of this constitution. Then the Constituent Assembly became the National Assembly.

With the Annex 5 of the Paris Peace Agreement and the involvement of the UNTAC legal experts in the Constitution-drafting process, the current 1993 Constitution seems to incorporate some universal values, binding Cambodia to democracy and human rights, while at the same time Khmer values are also protected under the Constitution. This is evidenced by a keynote address made by His Excellency IM Chhun Lim—the former President of the Constitutional Council of Cambodia (2016-2025)—who explicitly remarked that the principles in the Annex 5 are modern and fundamental core values in the Cambodian 1993 Constitution.⁶ The key principles of the 1993 Constitution are: (i) the constitutional monarchy: Cambodia is a Kingdom where the King shall fulfill His functions according to the Constitution and the principles of liberal multi-party democracy and the king shall reign but does not govern and shall be the head of state for life.⁷ (ii) Fundamental rights: The Kingdom of Cambodia recognizes and respects human rights as enshrined in the United Nations charter, the universal declaration of human rights and all the treaties and conventions related to human rights, women's rights and children's rights.⁸ (iii) The liberal multi-party democracy: The Kingdom of Cambodia adopts a policy of liberal multi-party democracy⁹ (iv) The separation of power: the powers shall be separated between the legislative power, the executive power and the judicial power¹⁰ and (v) the *conditio sine quanon*: the amendment of the Constitution shall not be done if (a) affecting the liberal multi-party democracy system, and (b) affecting the constitutional monarchy regime, and (c) Cambodia was declared to be in state of emergency.¹¹ Most of the principles are universal values which are the foundation of the 1993 Constitution.

To ensure the respects for the Constitution, a constitutional review body—named the Constitutional Council of Cambodia—was established in 1993. It was created in approximately four years after the making of the 1993 Constitution. The Constitutional Council of Cambodia has been entrusted with the power to interpret the Constitution and laws adopted by the National Assembly and definitively reviewed by the Senate, to examine the constitutionality of law, to rule on the electoral litigations, and to notify His Majesty the King on the proposal to amend the Constitution. As provided by law, the decisions of the Council shall be final without recourse and have the authority over all instituted

6 H.E. IM Chhun Lim, Keynote Address in Constitution's Day on 23 September 2020, Cambodia's Constitutional Values: Various Concepts in the Conference of 27th Constitutional Day (2020).

7 Article 1(1) of the Constitution of the Kingdom of Cambodia (1993).

8 Article 31(1) of the Constitution of the Kingdom of Cambodia (1993).

9 Article 51 (New)(1) of the Constitution of the Kingdom of Cambodia (1993).

10 Article 51 (New)(4) of the Constitution of the Kingdom of Cambodia (1993).

11 Chapter XVI (New-two) of the Constitution of the Kingdom of Cambodia (1993).

powers stipulated in the Constitution. With this being said, it seems that the Council is given jurisdiction by the Constitution to interpret all kinds of laws, including any treaties or conventions to which Cambodia is a party. This possibly means that the Council can review the constitutionality of international instruments.

It is also known that the decisions of the Council are made through majority vote among the Council's nine members. According to the Constitution, three members are elected by the National Assembly, three members are elected by the Supreme Council of the Magistracy and the remaining three members are appointed by His Majesty the King.¹²

Interestingly, despite the power authorized by the Constitution for adjudicating electoral litigations and interpreting the Constitution and laws, the Council is not considered as a judicial court, hence the members of the Council are not regarded as judges. The Council is not a part of the three branches, which distinguishes the Constitutional Council of Cambodia from the remaining governmental institutions. Although the Council is not a judicial court, the power vested in the Council make it resemble a judicial institution, as its decisions are final without recourse.

II. Status of International Laws in Cambodia's Legal System

There are a lot of debates centered around monism and dualism in Cambodia. In practice, Cambodia seems to be a dualist legal system, while there is also some monist features found in this system.¹³ Conceptually, monism—a legal doctrine—in its purest form refers to the rules of international law being a part of domestic law. Unlike dualism, a monist state does not require domestic procedure for an international treaty to enter into force; and, in this sense, it is often deemed as “self-executing”. However, in a dualist system, no special status is granted to international treaties and no rights and obligations deriving from treaties have any effects in national laws unless the treaties are “incorporated” into domestic law through a process of ratification. The international treaty that has already been “incorporated” into domestic law is also considered domestic law, and any amendments have to be made through later legislation.

In the case of Cambodia, the discussion on Cambodia's monism and dualism is often classified into two parts—human rights related and non-human rights related. Considering the human rights part, Dr. Say Bory, a prominent legal scholar and a former member of the Constitutional Council, stated that Cambodia is a monist country, but he still questioned whether national or international law holds primacy. As enshrined in Article 31(1) of the

12 *Teilee Koung*, Constitutional Council of Cambodia at the Age of Majority: A History of Weathering the Rule of Law Storms in Peacetime, in: Albert H. Y. Chen / Andrew Harding (eds.), *Constitutional Courts in Asia: A Comparative Perspective*, Cambridge 2018, p. 241 ff.

13 *Taing Ratana*, The Influence of Constitutional Law on Administrative Law: The Influence of the Constitutional Council's Decisions on the Administration in Cambodia, in: Kai Hauerstein / Jörg Menzel (eds.), *The Development of Cambodian Administrative Law*, Phnom Penh 2014, pp. 124 ff.

constitution, the United Nations (UN) Charter, Universal Declaration of Human Rights (UDHR) and other human rights treaties and conventions codifying women's and children's rights are ranked higher than other domestic laws since they are a part of the 1993 Cambodian constitution.¹⁴ However, Dr. Meas Bora, another well-known legal scholar in Cambodia, argued that Cambodia is, in practice, a dualist state.¹⁵ He pointed out that the term "respect" and "recognize" as stated in Article 31 of the 1993 Cambodian constitution¹⁶ are considered "soft words" which do not suggest binding obligations.¹⁷ Furthermore, the 1993 Cambodian constitution is the supreme law of the land under Article 152 new¹⁸, which could be deemed higher than international instruments. In 2007, there was a landmark decision made by the Constitutional Council concerning the examination of the constitutionality of Article 8 of the "Law on the Aggravating Circumstances of Felonies", and the Council ruled that judges have to refer to both domestic and international laws recognized by Cambodia, particularly the Convention on the Rights of the Child, to issue a decision.¹⁹ This decision simply states that international laws recognized by Cambodia, notably the Convention on the Rights of the Child (CRC), are directly enforceable in Cambodian courts without barriers.²⁰ With this being said, it seems obvious that ordinary courts have to take into account international laws before making decisions based on the aforesaid decision.

In terms of the non-human rights section, the Constitutional Council can renounce international treaties and conventions in case of inconsistency with Cambodia's independence, sovereignty, territorial integrity, neutrality, national and political unity, and administrative management in accordance with Articles 55 and 92.²¹ Therefore, it can be assumed that non-human rights international treaties and conventions are considered lower than the 1993 Cambodian constitution; however, it remains uncertain if it is lower or equal to other ordinary laws.²² According to Article 26 new and 93 new of the Constitution, international laws that are ratified by the National Assembly and the Senate are made in the form of Royal Decree.²³ Therefore, Dr. Say Bory assumes that human rights laws are ranked equal to the 1993 Cambodian constitution, but that non-human rights laws rank lower than the

14 Say Bory (សាយ បូរី), General Administrative Laws (នគរបាលប្រចាំឆ្នាំ), Blossom Lotus 2012, p. 54.

15 Meas Bora, The 1993 Cambodian Constitution and International Law: A Normative Perspective, in: Hor Peng / Kong Phallack / Jörg Menzel (eds.), Cambodian Constitutional Law, Phnom Penh 2016, p. 79.

16 Art. 31 of the Constitution of Cambodia.

17 Bora, note 13, p. 78.

18 Art. 150 of the Constitution of Cambodia.

19 Decision N° 092/003/2007 CC.D of July 10, 2007

20 Daniel Heilmann, Fundamental Rights Protection: A Comparative and International Law Perspective, in: Hor Peng / Kong Phallack / Jörg Menzel (eds.), Cambodian Constitutional Law, Phnom Penh 2016, p. 354.

21 Bory (សាយ បូរី, note 12, p. 50.

22 Bory (សាយ បូរី, note 12, p. 54.

23 Ibid.

Constitution although he left a doubt if the non-human rights ones are lower or higher than other Cambodian domestic laws.²⁴ With this being said, the 2007 decision did not mention whether or not non-human rights international treaties and conventions should be applicable in ordinary courts. How the Council treats the non-human rights laws remains uncertain either. Regardless of the arguments raised earlier, the Constitution does not mention a hierarchy of international laws. In practice, international laws must go through domestic procedures to become part of Cambodia's laws. It remains uncertain whether or not there is any difference how Cambodia treats international laws that have already been ratified and the ones that have not been ratified yet. This has never raised a legal issue so far. Therefore, this article only seeks to explore how international laws are applied in the decisions of the Constitutional Council of Cambodia. Table 1 below outlines the constitutional provisions related to international law that are relevant to this article.

Table 1: Constitutional Provisions Related to International Laws

Article	Provision
Article 8 Paragraph 2	The King shall be the guarantor of the national independence, the sovereignty and the territorial integrity of the Kingdom of Cambodia, and the guarantor for the respect of citizens' rights and freedom, and of international treaties.
Article 26 new	The King signs and ratifies international treaties and conventions after their approval by the National Assembly and the Senate.
Article 31	The Kingdom of Cambodia recognizes and respects human rights as enshrined in the United Nations Charter, the Universal Declaration of Human rights and all the treaties and conventions related to human rights, women's rights and children's rights. Khmer citizens are equal before the law, enjoying the same rights, liberties and duties regardless of race, color, sex, language, beliefs, religions, political tendencies, birth origin, social status, wealth or other situations. The exercise of personal rights and liberties by any individual shall not adversely affect the rights and freedom of others. The exercise of such rights and liberties shall be in accordance with the law.
Article 55	Any treaty and agreement incompatible with the independence, sovereignty, territorial integrity, neutrality and national unity of the Kingdom of Cambodia shall be abrogated.
Article 90 new (two) paragraph 5	The National Assembly votes the approval or the abrogation of international treaties or conventions.
Article 92	Any adoption by the National Assembly contrary to the principles of safeguarding the independence, the sovereignty, the territorial integrity of the Kingdom of Cambodia, and affecting the political unity or the administrative management of the nation, must be considered null and void. The Constitutional Council is the sole organ competent to pronounce this nullity.

24 Ibid., p. 55.

Article 93 new	The law signed and promulgated by the King shall be published in the Royal Gazette and shall be circulated on the whole territory of the country in the time limit as set above.
Article 128 new (former Article 109)	The Judicial power is the guarantor of impartiality and the protector of the citizens' rights and liberties.
Article 152 new-two (former Article 150 new)	The present Constitution is the supreme law of the Kingdom of Cambodia. All the laws and decisions of all state institutions must be in absolute conformity with the Constitution.
Article 160 new-two (former Article 158 new)	Laws and normative acts in Cambodia that guarantee the protection of the State properties, the rights, the liberties and the legal properties of private persons and that are in conformity with the national interests, shall remain in force until the new texts are made to amend or to abrogate them, except the provisions contrary to the spirit of the present Constitution.

C. Cambodia's International Obligations

Before understanding how international laws are applied in the decisions of the Constitutional Council, one must first know what kinds of international obligations Cambodia is bound by. As a member of the international community with firm commitments in fulfilling its international obligations, Cambodia has thus far signed, acceded to and/or ratified 141 international instruments which are divided into 23 categories, one of which is human rights-related. Cambodia is party to 18 human rights international instruments (see Table 2). According to Article 31 of the Constitution, regardless of whether or not the laws have been through domestic ratification procedures, the Constitutional Council should at least take the international instruments listed below into account when making its decisions. However, this matter remains subject to the official interpretation by the Constitutional Council.

Among the 18 human rights-related instruments, there are six conventions and covenants mentioned in the Constitutional Council's Decisions, namely the Convention on the Prevention and Punishment of the Crime of Genocide (CPPCG)²⁵, the International Covenant on Civil and Political Rights (ICCPR)²⁶, Convention on the Rights of the Child (CRC)²⁷, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD)²⁸ and International Humanitarian and Human Rights Law²⁹ and the 1961

25 Decision N° 13 CC.D Of August 25, 1999.

26 Decision N° 065/007/2004 CC.D of October 22, 2004 & Decision N° 196/004/2018 CC.D of August 15, 2018.

27 Decision N° 092/003/2007 CC.D of July 10, 2007.

28 Decision N° 086/013/2006 CC.D of November 25, 2006.

29 Decision N° 065/007/2004 CC.D of October 22, 2004.

Vienna Convention on Diplomatic Relations³⁰. Five of the laws mentioned above are human rights-related, while the remaining one international law is non-human rights-related.

Table 2: List of International Conventions and Covenants Ratified by Cambodia

No.	Date	International Instruments
1	14/10/1950 (Accession)	Convention on the Prevention and Punishment of the Crime of Genocide ³¹
2	28/11/1983 (Ratification)	International Convention on the Elimination of All Forms of Racial Discrimination
3	26/05/1992 (Accession)	International Covenant on Economic Social and Cultural Rights
4	26/05/1992 (Accession)	International Covenant on Civil and Political Rights
5	27/09/2004 (Signature)	Optional Protocol to the International Covenant on Civil and Political Rights
6	28/07/1981 (Accession)	International Convention on the Suppression and Punishment of the Crime of Apartheid
7	15/10/1992 (Accession)	Convention on the Elimination of All Forms of Discrimination against Women
8	13/10/2010 (Ratification)	Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women
9	15/10/1992 (Accession)	Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
10	30/03/2007 (Ratification)	Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
11	15/10/1992 (Accession)	Convention on the Rights of the Child
12	12/08/1997 (Acceptance)	Amendment to Article 43(2) of the Convention on the Rights of the Child
13	16/07/2004 (Ratification)	Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in armed conflict
14	30/05/2002 (Ratification)	Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography

30 Decision N° 156/004/2015 CC.D of August 12, 2015.

31 The Ministry of Foreign Affairs and International Cooperation, Cambodia's Signature on Multilateral Treaties and Party to Treaties, 1-9 (2023) (unpublished manuscript) (on file with the Department of Legal Affairs and Treaty of General Department of Legal, Consular and Border Affairs).

15	27/09/2004 (Signature)	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
16	20/12/2012 (Ratification)	Convention on the Rights of Persons with Disabilities
17	01/10/2007 (Signature)	Optional Protocol to the Convention on the Rights of Persons with Disabilities
18	27/06/2013 (Accession)	International Convention for the Protection of All Persons from Enforced Disappearance

Aside from the aforementioned international treaties and conventions, there are some international principles found in Article 38 paragraph 6 and 7 of the 1993 Cambodian constitution.³² They are: (1) “The doubt shall benefit the accused” and (2) “[a]ny accused is presumed innocent up to the final verdict of the court”. Moreover, some principles, including the principle of non-retroactivity³³, *in dubio pro reo*³⁴ and *non bis in idem*³⁵ are also found in some decisions of the Constitutional Council. However, it is unclear where these international principles derive from in the first place; these principles are still internationally recognized and adopted, which to a certain extent should also be covered in this article. A question arises: are these principles referred to by the Council the same way it refers to the international treaties and conventions in its decisions?

D. International Laws in Constitutional Council of Cambodia

I. Selected Decisions

Of the 339 decisions the Constitutional Council has issued as in 2023, there are eleven decisions in which international laws and principles are cited, while there are three decisions concerning the examination of the constitutionality of extradition treaties and one Notification on the denial of the request for the constitutional review of the “Law on the Approval of Additional Treaty” between Cambodia and Vietnam. The decisions and notifications concerning extradition treaties are not included in the analysis of this article, since it does not contain substantive international laws as discussed earlier. Only decisions concerning ratified international treaties, conventions and covenants will be selected for the following discussion. As shown in Table 2, there are seven international laws mentioned in six decisions. In this case, the following analysis will mostly discuss human rights-related instruments because there are more human rights-related instruments mentioned in

32 Art. 38 (6) and (7) of the Constitution of the Kingdom of Cambodia.

33 Decision N° 038/001/2001 CC.D of February 12, 2001 & Decision N° 224/006/2023 CC.D of July 31, 2023.

34 Decision N° 099/004/2008 CC.D of July 24, 2008.

35 Decision N° 123/004/2012 CC.D of November 16, 2012.

these decisions based on the thematic analysis. On top of that, decisions that mention international principles will also be covered.

II. Writing Structure of Decisions

The decision writing style of the Constitutional Council of Cambodia has been heavily influenced by the French court's style system. For this reason, the decisions of the Council are organized in three parts, namely “Visas”, “Motif” and “Dispositif”.³⁶ As observed in decisions, the “Visas” contain references to the Constitution and relevant laws, including, but not limited to previous cases. The order of the cited laws in the “visas” is based on the hierarchy of laws and regulations. However, the “Motif” starts with “whereas” in English³⁷ or “considérants” in French. Usually, the “Motif” part varies in length from one decision to another based on each particular case. However, the function of the “Motif” is to provide facts, explanations, arguments, and evidence, the meanings of which are expanded and interpreted by the Council. The “Motif” also mentions counter-arguments and the legal qualification of judicial facts; including, but not limited to, the recognition of a complaint.³⁸ On top of that, the decisions of the Constitutional Council are deemed as a non-rhetorical monologue decision in which no dissident point of views among the members of the Constitutional Council is provided.³⁹ Since 2017, there are some adjustments to improve the decisions of the Constitutional Council, and it clearly cited constitutional principles with reference to Articles of the Constitution although the outcome of the analyses and interpretation of constitutional principles are not included in the decision.⁴⁰ In essence, the Constitutional Council also cites the principles of international law in addition to the national ones.⁴¹ In a nutshell, the “Motif” contains a legal explanation, which serves as a foundation for the final decision written in the “Dispositif” which is the last part of the decision, followed by the “Motif” as the Constitutional Council makes decisions. Usually, this part contains only two Articles. Through observation, all of the international laws and principles are found written in the second part, the “Motif”, although there is no critical explanation and interpretation on the international laws.

36 H.E. IM Chhun Lim (ឯកទែន អ៊ិច លីម), *Methods of Drafting Decisions: Experiences of Constitutional Council of Cambodia of the Kingdom of Cambodia* (វិធានក្រុងការរៀបចំសេចក្តីសារមិនបានបង្ហាញជាប្រចាំឆ្នាំ ឬជាលោកស្រី សំង្គមក្នុងសារិយក្រុងក្រុងក្រសួង), p. 2, (unpublished manuscript) (on file with the Constitutional Council of Cambodia).

37 This is according to unofficial translation of the decisions.

38 Ibid., p. 2.

39 Ibid., p. 4.

40 Ibid.

41 Ibid.

III. Thematic Analysis of the Constitutional Council's Decisions

Decisions are likely to be driven by the consequences and beliefs in constitutional values of the Constitution and the interpretation involves vital human values enshrined in international treaties, such as human rights treaties, in the Constitution so that the latter is in line with international obligations.⁴² In the case of Cambodia, the Constitutional Council is, with comprehensive review and analysis, based on legal grounds, laws, jurisprudence and relevant treaties, particularly the Constitution which has to be respected by the Constitutional Council in constitutional review and the interpretation of law.⁴³ However, there are seemingly very few documents on the approaches the Council uses to make decisions. Some decisions made by the Council may involve political, economic and socio-cultural considerations. But, it is still up to the Council as to what makes up a decision at the end of the day.

1. Theme 1: Reinforcement

The Constitutional Council of Cambodia usually mentions an international instrument that Cambodia has ratified or acceded to or international principles to reinforce or give weights to domestic laws that are under constitutional review for the purpose of ensuring Cambodia's compliance with its international obligations. There are some decisions that fall under this theme. In Decision No 086/013/2006 CC.D of November 25, 2006, the Constitutional Council heard the complaint made by Mr. TOUCH Rithy who demanded to "strike off" 5,413 Vietnamese names. The "Motif" of the decision contains arguments raised by Mr. TOUCH Rithy and legal arguments raised by representatives from the National Election Committee (NEC). The latter put forward some issues, including the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). In this case, the representatives of the NEC use the CERD to refute the arguments from Mr. TOUCH Rithy in a NEC's hearing.

Secondly, Decision No 099/004/2008 CC.D of July 24, 2008, concerns the electoral dispute during an election campaign. Mr. HUL Thol, representing Mrs. THAI Nary, filed a complaint against decision of the NEC to the Constitutional Council. Mr. HUL Thol accused Mr. SOM Sophat for tearing off poster of the wall of an Islamic Mosque, while the latter denied the accusation. When asked for witnesses, Mr. HUL Thol could not provide any, which led the Council to rule this case based on the principle of "in dubio pro reo" (n doubt, for the accused). In this case, the Council referred to this principle to reinforce the domestic laws. Thirdly, Decision No 123/004/2012 CC.D of November 16, 2012, concerns Mr. LY Sophorn's request to turn down on four NEC's decisions. The Council ruled the

42 *Chang-fa Lo*, Treaty Interpretation Under the Vienna Convention on the Law of Treaties: A New Round of Codification, Singapore 2017, p. 26.

43 The Secretariat of the Constitutional Council of Cambodia, Questions and Answers on Constitution (ក្រសួងកសាងព័ត៌មានយុទ្ធសាស្ត្រ) (2011), pp. 44, 50.

case based on the principle of “non bis in idem”(no the same cases are tried twice) as the complaints had been already dealt with in Decision N° 084/011/2006 CC.D. of November 24, 2006 and Decision N° 094/005/2007 CC.D of November 21, 2007.

Thirdly, in 2018, after a major opposition party was dissolved due to an illegal act committed by the party leaders, Mr. SAM Rainsy, one of the party leaders who is living in-exile, called on the citizens to boycott the 2018 election, by calling it a “clean finger” campaign. The Constitutional Council received a complaint from attorney at law SAM Sokung, representing Mr. CHEA Chiv, THORNG Savourn and KRUY Kemsang, who posted pictures of their fingers on social media with some captions that seemed to dissuade people from voting. In a quite lengthy “Motif”, the Constitutional Council mentioned the International Covenant on Civil and Political Rights (ICCPR), following Mr. SAM Sokung’s argument that posting photos of fingers on social media with captions is covered by the right to freedom of expression in accordance with Article 19(2) of the ICCPR. According to the Council this argument is not justified as the rights stipulated under ICCPR often come along with other obligations, which in this case are the respect for other people’s rights public order, good customs, national security, including, but not limited to democracy. In Decision No 196/004/2018 CC.D of August 15, 2018, the Council interpreted the ICCPR by weighing the rights and obligations provided by the Covenant. The Constitutional Council did not deny the application of Article 19 of the ICCPR, but this application shall be in the frame of the democracy, national security, public orders, and good customs of the nation, which shall not be mistreated by any Cambodian citizen. The decision of the Council gave additional weight to the application of Cambodia’s domestic laws, which are completely consistent with the international obligations under the ICCPR.

Fourthly, there was the Decision N° 223/005/2023 CC.D of July 31, 2023, concerned a request from Mr. YAN Sokhoeurn to contest the decision of National Election Committee (NEC), who claimed that he did not realize that sharing a video was considered as an incitement and illegal. Thus, the Constitutional Council decided this case based on the principle “ignorance of law excuses no one”, meaning that the accused is liable for his acts. Fifthly, the Decision N° 224/006/2023 CC.D of July 31, 2023, concerned Mr. SAM Sokung, a lawyer representing Mr. LY Menghorng, who contested the decision of the NEC involved the principle of non-retroactivity. Mr. SAM Sokung argued that Mr. LY Menghorng, posted inciting contents on social media on the 1st of July 2023 before the “Law on the Amendments of Election Law” that was used to punish Mr. LY Menghorng, entered into force on 5th of July 2023. However, the Constitutional Council rejected that the principle did not apply in this context owing to the posted contents remained on social media until the 14th of July, which means the principle of non-retroactivity did not work in this case. In these two cases, the principles of criminal law were used to resolve the cases so that domestic laws could be applicable.

2. Theme 2: Symbolism

The Constitutional Council of Cambodia could plainly mention international laws without reviewing or interpreting the provisions of the laws. The first Decision N° 13 CC.D of August 25, 1999 concerns a request to examine the constitutionality of the “Law on the Period of Temporary Detention” whether or not it is inconsistent with Article 38(7) which stipulates that “[...] the doubt shall benefit the accused”. In the second paragraph of the “Motif”, the date of signature and accession of the Convention on the Prevention and Punishment of the Crime of Genocide (CPPCG) are cited without further reviewing the provisions of the Convention. The reference to the convention is followed by citing Decree N° 01 ,dated 15 July 1979, on the establishment of People’s Revolutionary Court to try Pol Pot and Ieng Sary for committing genocide. Article 2(1) of the Decree also determined the crime of genocide. In the last paragraph of the “Motif”, the Council explains that “temporary detention”, regardless of its period, does not make the accused a criminal. Therefore, it is not inconsistent with Article 38(7) of the Constitution. From the way the decision is written and organized, it was believed that the Council was using the Convention on the Prevention and Punishment of the Crime of Genocide (CPPCG), followed by the Decree in the previous administration to back up the 1993 Constitution, and ruled that the “Law on the Period of Temporary Detention” is in line with the Constitution. For this reason, the Council may symbolically use the Convention to justify that it also takes into account the instrument Cambodia has acceded to.

The second decision is Decision N° 065/007/2004 CC.D of October 22, 2004, concerning a request to reviewing the constitutionality of the Law on the Amendment of Articles 2, 3, 9, 10, 11, 14, 17, 18, 20, 21, 22, 23, 24, 27, 29, 31, 33, 34, 35, 36, 37, 39, 40, 42, 43, 44, 45, 46 and 47 of the “Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia”. Point 4 of the third paragraph of the “Motif” states that, “[...]he modification of the rights of the accused and the immunity of judicial officials and lawyers based on the 1966 International Covenant on Civil and Political Rights (The Article 42)”. In Point 7 of paragraph 3 of the “Motif”, the judges are qualified to be appointed shall have “experiences in International Humanitarian Law and Human Rights Law”. The Constitutional Council listed down the amended parts and mentioned two international laws: (1) the 1966 International Covenant on Civil and Political Rights and (2) International Humanitarian Law and Human Rights Law. The Council did not further provide any explanation for the citation of the international laws.

The third Decision N° 086/013/2006 CC.D of November 25, 2006, concerns the complaint from Mr. TOUCH Rithy—a member of the election committee of the Sam Rainsy Party—who requested to omit the names of 5,413 Vietnamese people from the electoral lists, and whose request had been turned down by the National Election Committee (NEC). In the “Motif” of the decision, arguments from both Mr. TOUCH Rithy and His Excellency MEAN Satik and His Excellency MAO Sophearith, the NEC representatives are briefly mentioned. Mr. TOUCH Rithy requested the Constitutional Council to revoke the decision

of the NEC, arguing that the people did not possess Khmer names, spoke Khmer with Vietnamese accent and that it was uncertain if they hold Cambodian identification cards. In response to the arguments raised by Mr. TOUCH Rithy, His Excellency MEAN Satik and His Excellency MAO Sopheaparith clarified the matters in accordance with the “Law on the Naturalization”, ethnic minority and the International Convention on the Elimination of All Forms of Racial Discrimination. However, no further explanation of the significance of the convention is made in the decision, which is believed that the convention carries symbolic ground in the decision.

Fourth, the Constitutional Council of Cambodia cited the 1961 Vienna Convention on Diplomatic Relations without giving an in-depth explanation. In Decision No 156/004/2015 CC.D of August 12, 2015, concerning the request to review the constitutionality of the “Law on Associations and Non-Governmental Organizations” (NGOs), the Constitutional Council went through each chapter of the law in the “Motif”. Chapter 5 on the Rights, Benefits and Obligations of the law, comprising six Articles, mentions taxation and incentives, including exemptions in accordance with the law. Article 23 of the law states that foreign staffs are not entitled to the immunities and privileges, like diplomats, as mentioned in the 1961 Vienna Convention on Diplomatic Relations (VCDR). The decision of the Council only quoted the Article 23 in which the convention is mentioned, and it does not carry any significant weights in the decision.

3. Theme 3: Harmonization

The Constitutional Council of Cambodia somehow utilizes this approach to interpret laws to ensure consistency between the Constitution and international laws or principles. The first instance is a five-page-long Decision No 040/002/2001 CC.D of February 12, 2001, concerning a request to review the constitutionality of the Law on the Establishment of Extraordinary Chamber in the Court of Cambodia before this law was submitted to be signed by His Majesty the King. Article 3(1) of the law referred to 10 Articles of the 1956 Criminal Code, including Articles 209, 500, 506 and 507. The provisions above stated that “the third level of penalty”, which is death penalty under Article 21 of the 1956 Criminal Code. For this reason, the Council decided that “both literature and meaning of the sentence is opposite to the article 32 Paragraph 2 of the Constitution, which states that: the “[d]eath penalty shall not exist in any way.” However, there was another catché. Article 3(2) of the law extended an additional 20-year sentence to the 10-year limitation for criminal offenses. This seems to violate the principle of non-retroactivity, since the offence was committed in 1975, while the stated law had been enacted in 1956. Interestingly, the Constitutional Council provided that “all principles have two elements: rules and exceptions, both of which have the same value.” This principle was also stipulated in Article 6(2) of the Criminal Code, which states that the offenses could be abolished or the punishment for any offenses could be reduced by a new provision, except in cases where the offenses have already been punished. In this case, the new provisions, which are Articles 38 and 39 of the

“Law on the Establishment of Extraordinary Chamber in the Court of Cambodia”, reduce the punishment from death sentence and labor servitude to life sentence and imprisonment. Hence, the law was declared constitutional, except the third level of penalty. With this being said, the Council mentioned the principle of non-retroactivity and its exception to ensure harmonious consistency between the “Law on the Establishment of Extraordinary Chamber in the Court of Cambodia”, the Constitution and the international principle of non-retroactivity.

4. Theme 4: Avoidance

It is still unclear if the Constitutional Council of Cambodia applied a constitutional avoidance approach—a method of avoiding a constitutional question rather than resolving it on legal grounds, thereby refraining from declaring the unconstitutionality of a law. In 2007, His Majesty the King asked the Constitutional Council to review the constitutionality of Article 8 of the “Law on the Aggravating Circumstances of Felonies”.⁴⁴ In the “Motif” of Decision № 092/003/2007 CC.D of July 10, 2007, the Council mentioned Article 8 of the law, followed by a further expansion of the Council’s explanation, which argued that judges have to take into account “laws” that refer to domestic laws and international laws, especially the Convention on the Rights of the Child. However, this decision does not seem to follow the approach of constitutional avoidance, but as Teilee Kuong pointed out, the Council seems to suggest a more liberal approach in favor of international obligations.⁴⁵ Moreover, the Council assumed that ordinary courts take into account international laws when interpreting national laws, hence the review of the constitutionality of the national laws may not be necessary.⁴⁶ Although the decision did not seem to follow the constitutional avoidance doctrine, it seems to give rise to the doctrine when similar cases are raised to the Council in the future. Table 3 below outlines all decisions discussed in this section to provide a clearer overview of the thematic analysis.

44 Article 8 of the “Law on the Aggravating Circumstances of Felonies” states that: “For the felonies, and felonies with forced labour, the judge must not at all consider the attenuating circumstances for punishment, or reduce it to below the minimum or suspend it. For misdemeanours which do not seriously affect public orders, the punishment may be suspended entirely or partly. In this case, the perpetrator shall not serve out the whole of his/her sentence, unless he/she commits any other offense as provided for in the previous Articles, within the period of 5 years after being sentenced”.

45 *Kuong*, note 12, p. 266.

46 *Ibid.*, pp. 265-266.

Table 3: Thematic Analysis

Nº	Thematic Analysis	Decisions
1	Reinforcement	<ul style="list-style-type: none"> ● Decision No 086/013/2006 CC.D of November 25, 2006 ● Decision No 099/004/2008 CC.D of July 24, 2008 ● Decision No 196/004/2018 CC.D of August 15, 2018 ● Decision No 223/005/2023 CC.D of July 31, 2023 ● Decision No 224/006/2023 CC.D of July 31, 2023
2	Symbolism	<ul style="list-style-type: none"> ● Decision No 13 CC.D of August 25, 1999 ● Decision No 065/007/2004 CC.D of October 22, 2004 ● Decision No 086/013/2006 CC.D of November 25, 2006 ● Decision No 156/004/2015 CC.D of August 12, 2015
3	Harmonization	<ul style="list-style-type: none"> ● Decision No 038/001/2001 CC.D of February 12, 2001
4	Avoidance	<ul style="list-style-type: none"> ● Decision No 092/003/2007 CC.D of July 10, 2007

E. Conclusion

In principle, as a party to an international instrument, a state party is bound by the obligations (i) to promote (ii) to respect (iii) to protect and (iv) to fulfill, in accordance with the spirit and purpose of that international instrument. In total, Cambodia has signed, acceded, and/or ratified 141 international treaties/convention/covenants. Thus far, Cambodia has been determined to comply with them. Although there have been few cases involving international laws and principles in the Constitutional Council of Cambodia, the eleven decisions have reflected the Constitutional Council's tendency to use international laws and principles for making its decision. Based on the thematic analysis of eleven decisions, it becomes obvious that the Constitutional Council of Cambodia upholds all international instruments that Cambodia has ratified and acceded to without discrimination.

There are five decisions made by the Constitutional Council that fall under the reinforcement theme. The international laws or principles mentioned in those decisions seem to be used as a significant legal ground to counter the arguments raised by plaintiffs or the accused or to settle the cases. Most of these decisions involve electoral disputes. In terms of the symbolism theme, there are only four decisions that fall under the latter. The international laws and principles mentioned in the decisions did not carry any significant weight for the ruling, and no in-depth explanations were given. It is difficult to know the reason why the international laws and principles are mentioned without further analysis or explanation. Furthermore, only one decision falls under the harmonization theme. In this decision the Constitutional Council interprets a law to harmonize international laws or principles. The Council explained that the "Law on the Establishment of Extraordinary Chamber in the Court of Cambodia" which extends the additional 20-year sentence is not unconstitutional because of the principle of "rules and exceptions" of the principle of non-retroactivity. At first glance, it seems unconstitutional, but the Council used the

principle to make the law in line with the principle of non-retroactivity. In terms of the avoidance theme, the decision falling under this theme may not be entirely considered an application of the constitutional avoidance doctrine, but a mere expansion of explanation regarding the consideration of international instruments before ruling on a case.



© Taing Ratana