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Report of the Special Rapporteur on the situation of human rights in Cambodia*

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Summary

Cambodia has made some noteworthy progress in protecting and promoting human rights, including enacting some major new laws to this effect. The Government of Cambodia is more engaged with the United Nations human rights institutions and accepted all of the recommendations made during the universal periodic review of the country in December 2009, which include strengthening the independence and capacity of the judiciary. In the opinion of the Special Rapporteur, Cambodia remains a complex country in terms of the protection and promotion of human rights, as democratization has not yet fully taken root. Human rights violations are still taking place in a number of areas. The major areas of concern are those relating to access to land and housing rights, freedom of expression, and the numerous challenges faced by the judiciary. These issues continue to dominate the legal and political landscape. The Special Rapporteur is also concerned about the narrowing of political space. The Government has to become more tolerant towards the internal stakeholders and the international community in moving the country forward. The Special Rapporteur welcomes the endeavours and willingness of the Government to further improve the human rights situation and strengthen the independence and capacity of the judiciary. He was encouraged by the openness of his government interlocutors to engage in substantive discussions, provided that issues were raised in an objective and non-partisan manner, with the intention of looking for solutions. It is in this spirit that the Special Rapporteur has made a series of recommendations in this report and encourages the Government to take the recommendations into consideration and put in place a programme of action with a clear timetable to implement them.

* Late submission.

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I. Introduction

1. The present report is submitted in accordance with decision 12/25 of 12 October 2009 of the Human Rights Council. The Special Rapporteur undertook two missions to Cambodia in 2010, from 17 to 30 January and from 8 to 18 June. He is grateful to the Government for extending its cooperation during his mission and demonstrating its willingness to work with him in a constructive manner.

2. After his first mission, the Special Rapporteur proposed that he look into the workings and effectiveness of State institutions responsible for promoting and protecting human rights, and the Government agreed. The Special Rapporteur first began to examine the judiciary and its ability to deliver justice and command the respect, trust and confidence of the people. It is against this backdrop that this report focuses on the judiciary and makes recommendations to enhance its stature, capacity and independence.

3. The Special Rapporteur would like to state at the outset that the political leaders of Cambodia have provided the political stability needed in the country and led impressive economic growth over many years. Cambodia has also made some progress in improving the system of justice and enhancing both the independence and capacity of the judiciary. The Special Rapporteur is aware of the unique challenges faced by the judiciary in reconstructing itself after the country's tragic past in which much was destroyed. He welcomes the adoption, since he began his work in the country, of important laws – among others, the Penal Code, the law on demonstrations and the anti-corruption law – designed to strengthen the system of justice.

4. The Special Rapporteur was made aware of the reform programme of the legal and judicial sector and noted with satisfaction some of the progress made in this regard. He appreciates the increase in funding by the Government for the judiciary. The Special Rapporteur takes satisfaction in the fact that the Government is receptive to ideas and is willing to work with people and institutions which engage in a constructive manner. The Government has been receptive to some of the Special Rapporteur's suggestions, including strengthening the regulatory framework pertaining to eviction and resettlement, making the law-making process more transparent by sharing draft legislation which has an impact on human rights issues with the wider community, and exploring avenues for a Government and civil society mechanism to foster an environment of cooperation to strengthen democracy and human rights. The Special Rapporteur is hopeful that this spirit of constructive cooperation and dialogue with the Government will continue.

5. During his first mission in January 2010, the Special Rapporteur had the privilege of meeting with the Prime Minister, Hun Sen, and reached an understanding on the areas of focus for the Special Rapporteur's future work. The Special Rapporteur was unable to meet the Prime Minister during his mission in June 2010 due to the latter's illness at the time and wrote to him to wish him well.

6. The Special Rapporteur was privileged to have been granted an audience by King Norodom Sihamoni during his third mission. During both of his missions in 2010, the Special Rapporteur had the opportunity to meet with senior members of the Government, members of the National Assembly and the judiciary, civil society representatives, as well as the United Nations country team, diplomats based in the country and private citizens.

7. During his missions the Special Rapporteur identified a number of shortcomings in the functioning of the judiciary and has made recommendations to address them in the concluding section of this report. In his opinion, the poor, weak and marginalized, including those involved in land disputes, seem to have difficulty in obtaining justice from the judiciary and seem to be knocking on every other possible door, including that of the Prime

Minister. Many of them seem to be desperate for justice and even approached the Special Rapporteur during his visits.

8. The situation of human rights in Cambodia has been the subject of extensive analysis by successive country mandate holders since 1993, particularly in the area of the judiciary. This report seeks to build on their work. Although Cambodia is a forward-looking society which has made great strides in strengthening human rights in recent years, it faces a number of challenges such as those relating to capacity, financial constraints, political will and the effectiveness of State institutions in improving the situation of human rights. This is especially true of the judiciary, whose independence is critical in the enjoyment of human rights by the people. It is an area where a great deal still remains to be done.

II. Working methodology and approach

9. The Special Rapporteur and the Government agreed to look at the workings and effectiveness of State institutions responsible for promoting and protecting the rule of law and addressing human rights issues, including the Parliament, the judiciary, the Constitutional Council, the Supreme Council of Magistracy, the electoral commission, the law-enforcement agencies, and the governmental Cambodian Human Rights Committee. The purpose of this assessment is to identify the ways and means of strengthening their capacity to protect and promote human rights. Accordingly, during his mission in June 2010, the Special Rapporteur focused his work on the judiciary.

10. During his visit, the Special Rapporteur met with the President and other members of the Constitutional Council, the President of the Supreme Court, the President of the Court of Appeal, the Prosecutor General of the Court of Appeal, the President and other members of the Cambodian Bar Association, other high-level government officials and members of the judiciary. He also met with victims of human rights violations, including indigenous groups and communities affected by land evictions in the recent past and interacted with representatives of civil society working in legal and judicial reforms. The Special Rapporteur had the great honour to be received by King Norodom Sihamoni.

11. The Special Rapporteur visited the Kandal Provincial Court and observed the court proceedings. He also visited the Court of Appeal in Phnom Penh and the Battambang Provincial Court during his mission in January 2010 and interacted with the President and Prosecutor General of the courts. During his mission in June 2010, he visited the Extraordinary Chambers in the Courts of Cambodia (ECCC) and interacted with a trial judge, co-investigating judges, co-prosecutors and other senior court officials. He also visited the detention centre where the five individuals indicted by the ECCC were held.

III. Recent developments in human rights and rule of law

12. The Special Rapporteur is pleased to report notable advances made in the area of human rights and rule of law in Cambodia since his first visit in January 2009, which include the strengthening of the legal framework to manage the issue of urban evictions and relocations; the completion of the first case at the Extraordinary Chambers in the Courts of Cambodia and its verdict on 26 July 2010, as well as good progress on the investigations of the subsequent cases; continued effort to reform the prison system; and a clearer regime for public demonstrations.

13. The Government accelerated the legislative process in a number of areas designed to strengthen the system of justice in the country. Four new major laws with direct impact on human rights were enacted by the National Assembly of Cambodia during the period of

review: the Penal Code in October 2009; the Law on Peaceful Demonstrations in October 2009; the Law on Expropriation in February 2010; and the Anticorruption Law in March 2010.

14. The Government also issued a Circular on resolution of temporary settlements in illegally occupied land in city and urban areas in May 2010 which addresses some of the thorny issues associated with urban land evictions. Together with the Law on Expropriation, this Circular could be regarded as constituting the beginning of a process to implement the recommendation of various United Nations human rights bodies to adopt national guidelines on eviction and resettlement.

15. These laws are welcome developments. However, the Special Rapporteur noted some concern amongst the civil society organizations and other stakeholders at not being provided with an adequate opportunity to comment on the content of some of the draft laws listed above prior to their adoption by the National Assembly. There were also concerns expressed to the Special Rapporteur about insufficient opportunity for the parliamentarians, especially those belonging to the opposition parties, to effectively debate and possibly amend the bills before they were passed by the National Assembly.

16. Cambodia underwent the universal periodic review (UPR) by the Human Rights Council in 2009 (A/HRC/13/4). The willingness of the Government to further improve the human rights situation and strengthen the independence of the judiciary was expressed in its acceptance of all the 91 recommendations of the UPR. This was a welcome development. In the opinion of the Special Rapporteur, this acceptance demonstrated the public commitment of the Government to pursue its efforts to build a functioning system of the rule of law guided by international human rights norms, which is an important factor in the development of the country. The Special Rapporteur issued a press statement on 30 March 2010 welcoming the decision of the Government and encouraging it to engage major stakeholders, including civil society organizations, in implementing the recommendations.

17. During his missions, the Special Rapporteur observed that there remains a lack of meaningful and regular dialogue between the Government and civil society organizations for the promotion and protection of human rights. The Special Rapporteur pointed out the benefits of working with civil society in his meeting of January 2010 with the Prime Minister, who was receptive to the idea. Deliberations began amongst civil society organizations on how best to approach the issue. The Special Rapporteur was impressed that civil society leaders representing over 300 organizations participated in the discussions in a spirit of cooperation and enthusiasm. He would like to thank them for their collective endeavour to come up with a joint concrete proposal, which the Special Rapporteur received and intends to forward to the Prime Minister as a working document for the latter's consideration.

18. During his missions the Special Rapporteur was urged by the Government to interact with a wider community of civil society organizations and not only with those critical of the Government. The Special Rapporteur stated that he would welcome an opportunity to interact with as many civil society organizations as possible representing different walks of life and different aspects of human activity. He wrote to the President of the Cambodian Human Rights Committee (CHRC), Om Yentieng, on 18 January 2010 to ask for advice on civil society organizations or groups that the Government had in mind. The Special Rapporteur also expressed his willingness, alternatively, to participate in a meeting organized by the CHRC with these organizations if it was possible. The Special Rapporteur was pleased by the proposal of the President of the Committee to organize a seminar for judges and prosecutors during his next mission to the country on issues pertaining to the judiciary. The Special Rapporteur welcomed such an opportunity.

IV. Independence and competence of the judicial system in Cambodia

A. The current court system

19. The court system consists of the Supreme Court, an appellate Court, 19 provincial courts, 2 municipal courts, and a military court. Three provinces have no courts; cases from these provinces are heard by the neighbouring provincial courts. The twelve-judge Appeal Court, located in Phnom Penh, hears all cases appealed from the courts of first instance. Three-judge panels conduct complete re-trials on questions of fact and law and may conduct additional investigations. The Supreme Court is composed of a President, a Vice-President and several judges. A five-judge panel hears questions of law for cases appealed for the first time from the Appeal Court and a nine-judge panel hears questions of fact and law in the case of a second appeal, where the Appeals Court did not follow the cassation judgment of the Supreme Court. The Court also hears general revision complaints against final and binding verdicts, on the basis that new evidence has emerged which establishes the innocence of the convicted person and was not available at the time of the trial. Judicial appointments are made by the Supreme Council of Magistracy, which is also responsible for discipline within the profession. Training of court professionals is undertaken by a new Royal Academy for the Legal Profession, which contains a School for Judges (including prosecutors¹) and a School for Clerks. There is a professional Cambodian Bar Association but no association of judges.

B. Legal framework for an independent judiciary

The Constitution

20. The 1993 Constitution of the Kingdom of Cambodia states in article 128 that the judiciary shall be an independent power that shall guarantee and uphold impartiality and protect the rights and freedoms of the citizens. Article 129 states that justice is exercised in the name of the citizens of Cambodia in accordance with the procedures and laws in force. Only judges have the right to adjudicate and shall exercise their duties wholeheartedly and conscientiously with due respect for the law. Article 130 states that judicial power shall not be granted to the executive or legislative branches and article 131 that criminal prosecutions are the sole preserve of the Department of Public Prosecutions. Article 132 of the Constitution gives the King the role of guarantor of the independence of the judiciary and mandates the Supreme Council of Magistracy to assist him in this task.

Other legislation

21. The Constitution requires that the statuses of judges and prosecutors be defined in separate laws. This legislation has still not been adopted. The draft law is currently stalled for a number of reasons. One of them seems to be the disagreement between the Supreme Council of Magistracy and the Ministry of Justice about the Ministry's role in controlling prosecutors: the Ministry proposes that it should control the Department of Public Prosecutions in line with practice in France; the Supreme Council claims that since prosecutors are judges and judges are independent under the Constitution, they should come

¹ In line with the French civil law system, prosecutors have the status of judges (*magistrats debouts*) alongside presiding judges (*magistrats assis*). The School trains both prosecutors and judges for both civil and criminal jurisdictions.

under the control of the Supreme Council. One consequence of the failure to adopt this law is that the three members of the Supreme Council who should be elected by judges from amongst their peers have been appointed by the Ministry of Justice since the Supreme Council was created. The Constitution states that elections cannot take place until the Law on the Status of Judges has been promulgated.

22. It is perhaps indicative of the challenges facing Cambodia that, seventeen years after the Constitution was promulgated, the organic law organizing the court system is still not in place. It should be noted here that the law has been also been delayed in part over disagreements on how to establish a commercial court or commercial chambers required under the terms of Cambodia's entry into the World Trade Organization.

C. Supreme Council of Magistracy

23. The Supreme Council of Magistracy (SCM) was established by law in accordance with article 132 of the Constitution in 1994. The Council is formally chaired by the King and includes eight other members, of whom five hold ex officio positions: Minister of Justice; President of the Supreme Court; General Prosecutor to the Supreme Court; President of the Appeal Court; and General Prosecutor to the Appeal Court. The remaining three members should be three judges elected by the Bench from amongst their own number.

24. Questions have been raised as to the independence of the Supreme Council due to the inclusion of a member of the executive branch, the Minister of Justice, as an ex officio member. Furthermore, article 21 of the Supreme Council Law states that the elections for the members cannot take place until a law on the status of judges is promulgated. This law is still pending as part of the Government's legal and judicial reform programme and consequently, since 1994, these three members have been appointed by the Minister of Justice.

25. Despite the perception that the Supreme Council is under the influence of the Government, the Council is currently in disagreement with the Ministry of Justice over the question of oversight of prosecutors. Under Cambodian law, prosecutors have the status of judges (*juge debout*) and therefore come under the control of the Supreme Council. The Ministry of Justice is seeking to bring prosecutors under its direct control in accordance with the practice in some other countries with civil law systems. Furthermore, a pending amendment to the Supreme Council Law seeks to make permanent the current arrangement whereby the Ministry of Justice functions as the secretariat of the SCM.

26. The present composition consists of active judges and prosecutors, resulting in a potential conflict of interest in cases where junior judges are working under the supervision of Council members. Council members hold other positions with onerous responsibilities and are therefore unable to devote sufficient time and attention to the duties of an SCM member. The Council consequently meets infrequently. It was partly for this reason that the former SCM Secretariat was considered unable to carry out its inspection responsibilities and the responsibilities were transferred to a team within the Ministry of Justice. A solution to this problem could be that membership of the Council be restricted to retired judges/prosecutors or membership might be on a full-time remunerated basis for the duration of the appointment, meaning that judges would have to relinquish their judicial activities while sitting on the Council.

27. In September 2009, a sub-decree created a new "assistance team" to assist the Disciplinary Council of the SCM in fulfilling its investigatory responsibilities. This team consists of ten active judges and one under-secretary of state at the Ministry of Justice. It is essentially a duplicate SCM within the SCM, with the same weaknesses of conflicts of

interest and of time outlined above. The inclusion of a member of the executive branch may also be questioned. The body was created to increase the capacity of the SCM to cope with its responsibilities. Its creation therefore indicates that reform of the SCM needs to ensure that the Council has increased capacity. If this is provided, the Assistance Team should be disbanded.

28. Currently the SCM has no specific powers to promote the appointment of women within the judiciary. Currently approximately 10 per cent of the judiciary are women, with about 35 women judges, including prosecutors, out of a total of around 350 judges. There is one female member of the SCM: the Prosecutor-General of the Supreme Court, Chea Leang, a member since 2009.

29. In January 2006, the Committee on the Elimination of Discrimination against Women (CEDAW), following its review of Cambodia's report under the Convention, recommended in its concluding comments (CEDAW/C/KHM/CO/3) that the Government adopt "measures that will result in an increased number of women in elected and appointed office, including the judiciary". Such measures should include special measures to actively promote women, training and awareness-raising. The reformed SCM could be given a specific mandate to promote women within the judicial professions in line with this recommendation.

V. Problems in legal proceedings

30. In spite of the constitutional guarantees and the existence of various institutions to enhance and safeguard its independence, the Special Rapporteur is of the view that the judiciary has not been working as effectively, independently and impartially as possible. Therefore, he proposes to highlight the shortcomings in the judicial proceedings with the help of case studies in two important human rights areas facing Cambodia today: housing and land-related rights and freedom of expression. These examples illustrate wider problems that exist in the country.

A. Housing and land-related rights

31. The issues associated with land rights disputes and evictions continue to dominate the headlines in the media in Cambodia today. The manner in which land is managed and used by the Government for various purposes continues to be a major problem. Land-grabbing by people in positions of power seems to be a common occurrence. Economic land concessions leased to companies and other land transactions have severe consequences for the rural and urban poor as well as for indigenous people.² In 2009 alone at least 26 evictions displaced approximately 27,000 people in Cambodia. The 2001 Land Law does provide a legal framework to deal with issues of land ownership, but there have been problems in implementing this law properly. It is against this background that Resolution 12/25 of the Human Rights Council urged the Government to enhance its efforts to resolve equitably and expeditiously land ownership issues in a fair and open manner, in accordance with the 2001 Land Law, by strengthening the implementation of the law through the development of national guidelines to clarify relevant procedures. The new Law on Expropriation enacted in February 2010 and the Government Circular issued in December 2009 are positive developments in this direction. The Law on Expropriation provides some

² As of May 2010, according to the Ministry of Agriculture's public information, economic land concessions had been granted to 85 companies covering a total land area of 956,690 ha. NGOs' estimates are higher. See <http://www.elc.maff.gov.kh/index.html>

good protection for property owners. The Ministry of Land Management made the process of adopting the Circular participatory, allowing civil society organizations and development partners to make their input.

32. The Special Rapporteur was pleased with the proposal made by the President of the Human Rights Committee of Cambodia during their meeting in June 2010 to constitute an ad hoc, informal group to look at outstanding land disputes with a view to screening them and proposing recommendations for resolving them in a legal and fair manner. This group would comprise a representative from his office, a representative of the Office in Cambodia of the United Nations High Commissioner for Human Rights (OHCHR-Cambodia) and several representatives from civil society organizations working on land issues. Given the inability of existing institutional bodies to resolve some of these disputes, and the lack of redress for individuals, the Special Rapporteur welcomed the proposal as constructive, provided that this new informal mechanism did not replace or undermine existing mechanisms such as Cadastral Commissions, the Courts, or the National Authority for Land Dispute Resolution. The Special Rapporteur encourages cooperative discussions among stakeholders about the possible role that such a mechanism could play in contributing to the resolution of difficult land disputes or eviction cases. The objective should be a transparent cooperative dialogue between the Government, OHCHR-Cambodia and civil society (including voices from communities) to make this a worthwhile exercise. The Special Rapporteur hopes that such a working group can be established in the near future.

B. Freedom of expression

33. Freedom of expression is the lifeblood of democracy but it continues to be one of the main areas of concern in Cambodia. There does not seem to be a proper interpretation of the UNTAC criminal provision on defamation allowing for a proper balance between safeguarding private reputation and making public information concerning matters of public interest. The law regarding defamation and disinformation has been used selectively and in a biased manner against journalists, human rights activists and political leaders, and the courts do not seem to interpret the law and the restrictions on freedom of expression according to domestic laws, much less international standards binding Cambodia. The parliamentary immunity of three members of parliament – Sam Rainsy, Mu Sochua, and Ho Vann – all three belonging to the main opposition party - was lifted in 2009 to allow for criminal charges against them for defamation and/or disinformation

34. In none of these proceedings were the members of parliament given an opportunity to put their case before the National Assembly or rebut the charges levelled against them. This practice went against the basic principle of natural justice which requires that those accused of wrongdoing or committing a crime must be given an opportunity to present their case before action is taken against them. However, the courts did not look into such matters when finding them guilty of defamation. Similarly, the prosecution and imprisonment of journalists such as Hang Chakra, editor of the opposition newspaper *Khmer Machas Srok*, and another journalist, Ros Sokhet, should not take place in a normal functioning democracy as their actions have not undermined law and order or posed any threat to Cambodia's national security interests.

35. Mr. Hang Chakra's case is particularly illustrative of the practice of the judiciary in Cambodia. In May 2009, he faced a disinformation lawsuit filed by a lawyer acting on behalf of Sok An, a Deputy Prime Minister and Minister of the Council of Ministers, after his newspaper published an article on 5-7 April 2009 entitled, "Hun Sen has cracked down on bad and corrupt officials who are working around Sok An". The article stated that Mr. Sok An was not enjoying the same degree of trust from the Prime Minister as in the past. On 21 May 2009, he published another article entitled "Officials Loyal to Sok An face

Dismissals”. These two articles were used by the Phnom Penh Municipal Court and by the Appeal Court as evidence to find him guilty of disinformation and give him a one-year prison sentence even though his articles posed no threat to law and order or national security of the country.

36. What is also intriguing is that while handling the case both of the Courts failed to apply the Press Law, which would require the affected party from the publication to seek a retraction by Mr. Hang Chakra, or a right to response. Immediately after being convicted by the Phnom Penh Municipal Court, Mr. Hang Chakra was arrested in Battambang province from which he was sent to Correctional Centre 1 (CC1). He appealed the judgment to the Appeal Court, but the latter upheld the court ruling. Mr. Hang Chakra did not appeal the verdict of the Appeal Court to the Supreme Court, believing that it would be futile. During his mission in January 2010 the Special Rapporteur visited him in prison. He was eventually granted a royal pardon by the King in April 2010 and released.

37. The verdict of the Courts focused on how the article was written in bad faith and the information was incorrect. The courts did not give any legal reasoning as to why or how the article published by Mr. Hang Chakra could disturb public peace, a necessary element of the offence of disinformation under article 62 of the UNTAC Criminal Provisions. It was intriguing that the prosecutors did not investigate the case but sent the matter directly to trial judges. Nor did the investigating judge get involved in the investigation of the case. The articles were published in April and May 2009 and Mr. Hang Chakra was convicted in June, a very speedy conviction by any standards. This gave rise to suspicion that the judiciary was intent on convicting and punishing Mr. Hang Chakra.

38. The trial was very swift and Mr. Hang Chakra’s lawyer did not have time to prepare the case. He asked the judge to delay the trial, but his request was rejected. Neither Mr. Hang Chakra nor his lawyer had the opportunity to submit arguments in defense. The trial took about one hour and Mr. Hang Chakra was found guilty in absentia. After his arrest, his lawyer appealed to the Appeal Court. The lawyer had a strong argument to make, that this was not a criminal but a civil matter since Mr. Hang Chakra’s articles had not caused any unrest or posed any threat to national security, but the judges of the Court of Appeal did not allow him to submit his arguments. The judges focused their attention on making Mr. Hang Chakra admit the charges rather than enter into the merits of the case.

39. The Special Rapporteur is aware that there have been some positive developments in some cases in the recent past with regard to the interpretation of the law on disinformation. One such example is the verdict of the Takeo Provincial Court to acquit two human rights defenders, Cheab Chiev and Khoem Sarum, a Radio Free Asia journalist, Sok Serey and Cham Community representatives Ny San and Seb Sein on charges of disinformation. Charges had been brought against these five individuals following an interview on Radio Free Asia broadcast in December 2008 during which they alleged corruption on the part of the local officials in Kampong Youl village in Takeo Province. They were charged in September 2009 with, inter alia, disinformation under the UNTAC criminal provisions. The crime requires both an element of malicious intent and evidence that the information that has been publicized would be “disturbing or likely to disturb the public peace”. In deciding to drop the disinformation charges, the Takeo Provincial Court specifically stated that there had been a lack of malicious intent on the part of the accused. This was a welcome development and the Special Rapporteur hopes that other courts will follow suit in future defamation and disinformation cases by entering into the merits of the case and provide legal reasoning for their judgment. However, the Special Rapporteur also hopes that the subsequent appeal by the Prosecutor in this case will not lead to the reversal of the verdict.

VI. The main challenges for the judiciary

40. In any democracy the courts should enable justice to triumph over arbitrary politics. It is primarily the duty of judges to protect their independence and integrity against outside interference, political or financial. The judiciary has an obligation to dispense justice in accordance with the Constitution and law, quite apart from the universally accepted norms and standards of justice, fairness and due process of law; but it lacks the physical and legal structure needed to enable it to function as an independent judiciary. By the Government's own admission, "the judiciary has not yet gained full confidence from the public."³ By strengthening the independence of the judiciary and demonstrating its commitment to genuine rule of law and stronger democracy, the political leadership would be sending a very positive message to the people, the Government and judiciary itself, and to the international community. The Special Rapporteur is of the view that an independent judiciary is not only important in building a fairer and more democratic society but also in enhancing the image of the country internationally. For instance, in order to maintain the momentum and accelerate economic development Cambodia will need to attract more foreign investment in appropriate sectors of the economy. Some of the most important factors that the majority of prospective foreign investors take into account before deciding to invest large amounts of money in any country are an independent judiciary and a robust system of justice.

41. Although the Constitution of Cambodia provides for the separation of powers between the three main organs of the State, in practice the distinction between these organs is blurred and the executive branch dominates the judiciary whether by providing resources to the judiciary or in making appointments to various judicial positions. This remains a key challenge for the country in implementing the rule of law and in promoting and protecting people's rights. The Special Rapporteur is aware of the impact of the tragic past on the judiciary and notes that the efforts made in reconstructing it have been commendable. However, the judiciary still has a long way to go to assert and establish its independence, and the executive and the legislative branches have to adopt a number of measures to enable it to do so. On a number of occasions and especially in high-profile political cases, the judiciary seems to have allowed itself to be used or manipulated for political or purely private purposes.

42. The courts are not trusted by the people to provide impartial justice. As a consequence, citizens seek alternative methods of remedy which tend to undermine further the rule of law. In land disputes, communities tend to bypass the court system, petitioning top leaders to intervene on their behalf, reinforcing the already overwhelming executive authority. Prior to the war, Norodom Sihanouk was the focus of these petitions. Nowadays, groups of villagers are almost permanently encamped outside the gates of the Prime Minister's residences in Kandal province and in Phnom Penh. Interventions by the Prime Minister are frequent in response to direct petitions by private citizens.

43. The quality of legal argumentation in the courtroom is disappointing and often non-existent. Until recent reforms made it a requirement for reasoned arguments to be included in judgments, judges rarely supported their verdicts with a sound analysis of the law. The line of logic running through some legal arguments is often difficult to follow. Even in high-profile cases such as those concerning Ms. Mu Sochua, a member of parliament and leading member of the main opposition party, the courts at all levels failed to provide convincing legal reasoning for their judgments. Rather than entering into the merits of the

³ National report submitted by Cambodia to the Human Rights Council: (A/HRC/WG.6/6/KHM/1, para 101).

case, courts tend to give their judgments on technical grounds. In another example, the land dispute in Koh Pich, an island in the Tonle Basac River, the Municipality of Phnom Penh had brought a case to the municipal court against the families residing on the island. This move was against the law as the land was unregistered and thus was under the jurisdiction of the Cadastral Commissions under article 47 of the 2001 Land Law. The Community Legal Education Centre (CLEC – a Cambodian legal aid NGO), the lawyers who were representing the families, requested that the case be transferred to the Cadastral Commission (CC). Yet the municipal court proceeded with the case and decided that families had to leave and would receive compensation at a much lower rate than the prevailing market rate. The lawyers brought a request for an injunction order until the main case (transfer to the CC) was decided upon. The Municipality countered the request and the municipal court ruled in favour of the Municipality. Allegedly, the judge was reported to have said that he did not want to hear the evidence stating that the “City Hall gave me the case” even when lawyers came with evidence of possession rights. No legal analysis on the merits of the case was made. Two families decided to appeal. The Appeal Court upheld the decision of the municipal court. These are numerous similar cases.

44. In the absence of the law on the status of judges and prosecutors guaranteeing their security of tenure and independence, the judges seem to be operating to a greater or lesser extent in a climate of fear in which they are careful not to take steps which might attract criticism from people in power and in prominent positions. The ways in which they respond to this climate is clear from their behaviour in politically sensitive cases progressing through the courts. At present, judges are governed by general civil service laws and those above the age of 60 can be retired at the discretion of the executive or retained for political loyalty beyond this age and often beyond the age of 65. Prosecutors tend to accept criminal complaints from prominent political figures without question—this is particularly the case with charges of criminal defamation and disinformation—and such cases invariably result in convictions, even when culpatory evidence is lacking and exculpatory evidence is abundant. Judges in lower courts tend to be more fearful of taking independent action than those in the higher courts. As a consequence there is a high rate of appeals all the way to the Supreme Court.

45. A recent illustration was the decision of the Supreme Court in December 2008 to release the men convicted of the murder of a trade union leader, Chea Vichea, and to request the Appeal Court to re-examine the case. The case against the two men had become a cause célèbre because there was almost no evidence against them but an abundance of exculpatory evidence. The original trial had failed to meet basic procedural standards and the Appeal Court had attracted international criticism in failing to correct these errors. Yet in reality the case was of such political significance that it is inconceivable that a lower court could have acquitted the men, despite the lack of evidence against them, without a clear indication from the Government that such a decision was acceptable. The original investigating judge courageously dismissed the case. Within weeks he was reassigned to a remote provincial court and the case was forced back to trial.

46. Another example relates to the case against the lawyers working for the CLEC. In June 2007, they were subjected to a legal action on charges of “incitement” if they continued to represent a community of indigenous people from Kong Yu and Kong Thom villages in Ratanakiri province in the legal action they had brought against a powerful and well-connected businesswoman for misappropriation of their lands. The case was the first attempt by an indigenous community to use the courts to obtain redress. In June 2007, the businesswoman filed a criminal complaint against 12 village representatives, their lawyers from CLEC and Legal Aid Cambodia and two representatives of Ratanakiri-based NGOs. She requested the Ratanakiri provincial prosecutor to investigate the case and pursue charges of fraud, defamation, incitement leading to the commission of a crime, incitement not leading to the commission of a crime and complicity in an offence. Although the

investigating judge of the Ratanakiri Provincial Court dropped the case in March 2009, it is far from clear how charges of incitement could have been justified in the first place: incitement to claim one's human rights through the courts is not and should never be a crime under any law. Furthermore, the same businesswoman had also lodged a complaint with the Bar Association of Cambodia against the seven lawyers from CLEC and three lawyers from Legal Aid Cambodia. She alleged that the lawyers incited the villagers to file complaints against her, encouraged them to defame her, and gave false information to the media. Reportedly, the Bar Association had initiated inquiries concerning the 10 lawyers, but decided eventually to drop the case when the Bar Association came under criticism from both national and international human rights organizations. While the land dispute remains unresolved, her company has undertaken its agricultural development activities on the land.

47. The reasons why the judiciary does not enjoy the reputation it should are manifold. Some of this is attributable to the historical legacy of the Khmer Rouge period.⁴ A variety of other factors contribute to this:

48. First, the absence of the law on the status of judges and prosecutors which would provide them with the protection, security of tenure and independence that they need to discharge their responsibilities in an effective and independent manner.

49. Second, the absence of the Law on the Organization and Functioning of the Courts seems to have had a detrimental impact on the effectiveness and independence of the judiciary in providing speedy and impartial justice. This law is needed to achieve a degree of unity, cohesion and certainty within the system of justice. The legal and judicial reform programme, which is part of the Government's "Rectangular Strategy" provided for the enactment of this law, but this has not yet materialized.

50. Third, many judges and lawyers, particularly of the older generation, do not seem to have a proper grounding in the fundamental principles of the rule of law and international law standards expected of a judge. There are relatively few eminent senior jurists in the country. Inadequate legal education and training of judges and prosecutors about the fundamental principles of natural justice, the rule of law and international standards of fair trial have contributed to making the judiciary a weak institution in the structure of governance.

51. Fourth, people seem to be generally fearful of courts partly due to corruption and partly due to the manner in which the court system operates. There are not enough defence lawyers in criminal cases and the conviction rate is very high. In a very high proportion of cases the accused are convicted by courts on the basis of confessions extracted in police custody, often under duress. There are a large number of poor people involved in land disputes, but since such disputes are civil cases there is no provision for legal aid from the State even for the poor. There are not enough women police to investigate crimes against women. There is no provision for proper training in forensic science for the judicial police, prosecutors and investigating judges. There is no clear differentiation between the prosecutors and judges, and Cambodians have difficulty in understanding their respective roles.

52. Fifth, corruption seems to be widespread at all levels in the judiciary. Because the laws needed to protect the judges are not there, the judges are treated as civil servants and seem to rely on patronage and political protection rather than on the laws for the security of

⁴ During the Khmer Rouge period the judiciary was systematically dismantled - most of the judges and lawyers were killed and law books were destroyed.

their jobs. This has resulted in individual judges and prosecutors compromising their independence.

53. Sixth, the judicial proceedings have been used by the rich and powerful in many cases to dispossess, harass and intimidate the poor as well as their lawyers and those working for them in the civil society sector.

54. Seventh, the lack of human, budgetary and physical infrastructure-related resources seems to be seriously hindering the work of the judiciary. The judiciary is chronically underfunded, under-resourced and understaffed in Cambodia. Prosecutors do not have enough funds to order proper scientific investigation of crimes. Hence, the tendency is to rely on confessions extracted from the accused by the judicial police. The judicial police themselves are not properly trained in criminal investigations, and frequently use constraint or force to obtain confessions of guilt.

55. Eighth, the ratio of lawyers and judges per head of the population in Cambodia is very low. This is particularly concerning in a system where, without lawyers, one cannot have access to the court files. What is more, most judgments are treated as confidential. There is only one Court of Appeal in Phnom Penh and the poor cannot afford to travel to the capital city for justice. Even the State machinery does not seem to have adequate budget to transfer inmates to Phnom Penh for their appeal hearing. As a result, many appeal hearings take place without the presence of the accused or even their lawyers.

56. The process of legal and judicial reform is an ongoing process in any country. The Government in Cambodia has significantly improved access to legal and judicial information, and various programmes are under way to improve the system through a variety of means such as the publication of legal texts and court decisions. The functioning of the judiciary has been enhanced through interactive and accelerated training programmes and the implementation of the Model Court Project, the building and renovation of court houses, the deployment of Justice Houses for legal services at district level and the establishment of various mechanisms such as arbitration tribunals for labour disputes.

57. Legal education has undergone a major overhaul in the past 15 years with major investments by the Government of France in the training of law students, the drafting of the new penal code and code of penal procedure, and the establishment of the Royal Academy to train magistrates; by the Government of Japan to draft the civil code and code of civil procedure and to support the establishment of the Lawyers Training Centre; and by the Government of Australia through its Cambodian Criminal Justice Project focusing on crime prevention, community safety, court and correctional reform and police training. In 2005, the Royal Academy for the Judicial Professions incorporated training of court clerks, prosecutors and bailiffs. The establishment of the Royal Academy is a key factor to improve the professional training of judges and prosecutors. Other structural problems will have to be addressed by the three main organs of the State, and the executive needs to make legal and judicial reform a top priority in order to deliver much-needed and long-awaited justice to ordinary Cambodians.

Extraordinary Chambers in the Court of Cambodia

58. The Extraordinary Chambers in the Court of Cambodia (ECCC) is a Cambodian court with the participation of international judges and prosecutors. After a rather slow start, the ECCC made good progress and completed the trial of its first case. The hearings, against Kaing Guek Eav alias “Duch”, who was the commander of the regime’s central S-21 Security Centre, concluded in November 2009. The verdict was delivered on 26 July 2010, convicting him and passing a sentence of 35 years’ imprisonment on him. The hearings demonstrated to the national and international community that the ECCC is

capable of conducting complex criminal trials to international standards and the work of the Extraordinary Chambers is likely to be regarded as a good model for the Cambodian judiciary. There has been a great deal of interest in the work of the Chambers in Cambodia. More than 31,000 people visited the Chambers to witness the hearing from all over Cambodia. It is expected that the trial of the second case will commence in the fall. There is a possibility that further cases will proceed as the International Co-Prosecutor has forwarded his introductory submissions against five additional individuals.

59. Besides non-governmental organizations such as the Asian International Justice Initiative and the Open Society Justice Initiative, there is no United Nations or other formal international mechanism to monitor the activities of the ECCC, protect its independence and integrity and inform the national and international community about its accomplishments and the challenges it is facing. There is much expectation that the ECCC will function as a model court in Cambodia, so that good practices can be shared with the wider judiciary and gradually help uplift its practice. The place of the ECCC within the Cambodian judicial system potentially enables the Cambodian judges, prosecutors and other court officials at the ECCC to transfer knowledge to their colleagues in the judiciary. Such a project is being initiated by OHCHR-Cambodia and in close cooperation with the Cambodian judges and prosecutors.

60. The scheme of victim participation as a civil society party developed within the ECCC seems to have made a positive contribution to the society in reconciling itself with its tragic past and in healing the wounds. The programme of organized visits to the ECCC for the ordinary people of Cambodia seems to have served as an educational tool in the country in promoting the idea of a fair trial and the rule of law. All in all, this new experiment in international criminal justice seems to have worked reasonably well thus far.

61. The Special Rapporteur welcomes the verdict delivered on 26 July 2010 by the ECCC in the trial of Kaing Guek Eav. Although his prosecution for crimes against humanity and war crimes has come more than three decades after the crimes were committed, the verdict signifies a commitment by the Government of Cambodia to account for the crimes of the Khmer rouge period according to internationally accepted standards of fair trial, a process that is unprecedented in Cambodia.

62. The Special Rapporteur hopes that this trial will have a positive impact on the strengthening of the independence of the judiciary. He welcomes the conclusion of this first case and encourages all parties to work together towards the remaining three cases. He urges the judges of the Extraordinary Chambers in the Courts for Cambodia to defend their independence and integrity and uphold the highest standards of justice, and to continue to demonstrate by example to the judiciary and the people. The Special Rapporteur hopes that this landmark conviction will serve as a catalyst for the Government to address impunity and accelerate its legal and judicial reforms.

63. The international community should continue providing the support the ECCC needs in conducting investigations and trials in accordance with international standards and in ensuring that the judiciary as a whole benefits from the work of the Extraordinary Chambers.

VII. Conclusions

64. **Cambodia has made great strides in strengthening human rights in recent years in an environment of political stability, economic growth and continued generous international assistance and support. The challenge for the Government is first of all to effectively implement its own laws. In this process, not only does it need to transform its international human rights obligations into national law but put these**

laws into practice, in order to foster a culture of pluralism and tolerance and move towards more inclusive, participatory and transparent decision-making processes on issues which have a direct impact on people's human rights. It is in these areas that meaningful and constructive dialogue and cooperation would be needed among the Government, the civil society, and the international community. State-society dialogue is important in any country, at all stages of development, and in particular in a country such as Cambodia which is recovering from the war and is still in a phase of transition. The Government has made good progress in promoting and protecting human rights in the country, but still has a long way to go to meet the international benchmark in this regard.

65. The Special Rapporteur was pleased to note that the Government seems to have the desire and the political will to reform the legal and judicial sector. It has been a pleasure and a privilege for the Special Rapporteur to work with the Prime Minister and other senior members of the State and civil society and he looks forward to working with them to bring about tangible reform to the judicial system. Therefore, the Special Rapporteur is encouraging the Government to push ahead with its legal and judicial reform agenda by building on the accomplishments already made in promoting and protecting human rights in the country.

VIII. Recommendations

Steps to enhance the independence of the judiciary

66. Cambodia should adopt and enact the Law on the Status of Judges and Prosecutors and the Law on the Organization and Functioning of the Courts without any delay. These laws should be designed to ensure the independence both of institutions and of individuals in the judiciary as well as to take disciplinary action against judicial malpractices, and corrupt and incompetent judges. The Constitution requires the enactment of these laws which have not been in place for nearly 17 years. These laws will contribute to safeguarding the tenure of judges and protecting the terms and conditions of their service, based on a code of conduct for judges and prosecutors.

67. The new laws should ban active party political members from holding judicial positions and ban judges and prosecutors from acting as advisers to party political leaders or ministers. The judges and prosecutors may be members of a political party prior to their appointment. However, when they are appointed to judicial positions they should cease to be an active member of any political party or play any role in party political activities.

68. Judges and prosecutors should be adequately remunerated, required to work full time and be banned from holding jobs outside the judiciary. Judges and prosecutors should receive their salary and other allowances from a single source, i.e. the Ministry of Justice. At present, judges are paid their basic salary from the Ministry of Justice and a separate performance allowance from the Council of Ministers. This practice is not conducive to judicial independence from the executive.

69. The Supreme Court, and not the Ministry of Justice, should have overall responsibility for supervising the lower courts.

70. Prosecutors should not come under the control of the Ministry of Justice, but under that of the SCM.

71. There should be a separate and independent office of the Prosecutor General with powers to supervise prosecutors at all levels and all prosecutors should belong to an independent office rather than be simply attached to the courts concerned.

Reform of the composition of the Supreme Council of Magistracy

72. The Law on the Organization and Functioning of the Supreme Council of Magistracy (SCM) should be amended to make it a truly independent body. The existing law already accepts the principle that members of the SCM can be judges and prosecutors elected by their peers from among their number. This principle should be extended to allow all members (with the exception of the King) to be elected from among the highest ranks in the judiciary, from retired senior judges or from among distinguished professors of law. This would reinforce the independence of the judiciary by removing the current elements of executive control and would introduce a democratic and transparent procedure for selecting and appointing members. Three out of nine members of the SCM are supposed to be elected by the judges; however the election has not taken place and the executive has been making such appointments instead, so there are reasons to question the current composition of the SCM. Furthermore, the current composition, especially the presence of six ex-officio members out of nine, is not conducive to effective and independent functioning of the Council. Nor is the provision of appointing the president of the Court of Appeal or the General Prosecutor of the Court of Appeal. This is because these middle-level judicial officials may have to take decisions relating to the appointment of the judges of a higher level court, i.e. the Supreme Court, or take disciplinary action against the members of the judiciary who are senior to them. This state of affairs puts the President of the Court of Appeal and the General Prosecutor of the Court of Appeal in an uncomfortable position and their effectiveness and independence may be compromised.

73. Members of the SCM should cease to be active judges whilst they are in office and should not be members of any political party. There are three reasons why this proposal makes sense. Firstly, it lessens the potential conflict of interest between the duties of an SCM member and the activities of a judge active in a court. Secondly, it allows the member to concentrate full-time on the responsibilities of the SCM without the distraction of his or her normal court work. SCM members should be given tenure for a specific term, perhaps renewable once, and for the duration of this tenure in the SCM, the member should stand outside the routine court system. Thirdly, they would be able to discharge their responsibilities fairly and independently and in a non-partisan manner.

74. A number of positions on the Council should be reserved for women. This proposal is in line with Cambodia's responsibilities under the CEDAW. In addition, the Law on the SCM should contain an explicit duty for the Council to promote the appointment and promotion of competent and qualified women judges and prosecutors.

Reform of the Secretariat of the Supreme Council of Magistracy

75. The Supreme Council of Magistracy should have its own secretariat headed by a senior judge appointed by the King or by the Council itself and not by the Minister of Justice. The reformed SCM should include a professional secretariat under the direct supervision of the members of the SCM. A strengthened secretariat, coupled

with full-time members, would allow for increased capacity, allowing the Assistance Team created in 2009 to be disbanded.

Other legal and judicial reform

76. The capacity of the Court of Appeals should be seriously enhanced to enable it to resolve its enormous backlog and manage new cases in a proper, timely and orderly manner. Additional courts of appeals covering one or more provinces should also be considered. The Court of Appeals in Phnom Penh should have more courtrooms and more resources to support its activities.

77. The Government should respect the independence of lawyers. The law on the Bar should be amended accordingly.

78. The Bar Association itself should not interfere in the work of lawyers. The lawyers should be free to decide for whom to provide their legal services. Only the manner in which the legal services are provided should be the matter for regulation by the Bar Association in order to maintain standards of professional ethics. The code of conduct for lawyers should be amended accordingly.

79. The Bar Association should support and protect public interest lawyers, whose role is crucial in promoting justice in the country.

80. The international development partners of Cambodia should increase their financial support to legal and judicial reform and assist the Bar Association to provide legal aid to the needy.

81. There should be a substantial increase in the budget devoted to justice. The Government should fund legal education for more people, especially from poorer and disadvantaged backgrounds.

82. The process of admission to the training school to become judges and prosecutors should be more transparent and competitive (perhaps through entrance examinations) and be supervised by an independent external body consisting of representatives from the judiciary, the Bar Association, and the faculties of Law in Cambodia. There should be a provision for scholarships for people from disadvantaged groups on merit to enable them to enter the legal profession.

83. The Government should accelerate the process of drafting the administrative code and administrative procedure code.

84. There should be provision for legal education and training for the judicial police who have an important role to play in the conduct of criminal investigations.

85. The Government should ensure that those who are arrested and detained have proper legal representation and immediate access to a lawyer. The Criminal Procedure Code should be amended to ensure that a person accused of committing a crime should have a legal representative present during police questioning.

86. The country should provide for special protection for people belonging to special groups, such as a separate juvenile justice system and should have provision for a family court.

87. The Government should have a more coherent policy and a consolidated mechanism in place to assist the judiciary. Such a policy should be designed to avoid a dual role for government departments in this regard. For this, the role of the Ministry of Justice should be strengthened and it should be provided with more resources in its

task of assisting the judiciary. Government departments or Ministers should not have any role in controlling and influencing the work of the judiciary.

88. The clerks and other court officials should be under the direct control of the relevant courts rather than under the control of the Ministry of Justice.

89. There should be provision for proper training in forensic science for the judicial police, prosecutors and investigating judges.

90. There should be provision for legal aid from the State for the poorest of the poor and other people belonging to vulnerable and marginalized groups.

91. The concept of model courts should be expanded and they should be provided with more resources to enable them to function as real model courts.

92. Every court should have its own registrar and have a proper system of record/file keeping. The judges themselves should not keep the case files with them nor move to other courts with such case files when transferred to another court.

93. The courts should pursue a more transparent policy in releasing copies of judgments and other court papers to the relevant parties.

94. The Government and other State institutions should recognize the importance of complying with the division of tasks between Cadastral Commissions and courts, in accordance with the provision in Article 47 of the Land Law 2001.

Judiciary and the freedom of expression

95. The Government should review the new Penal Code with a view to ensuring its compliance with the permissible limitations to freedom of expression as stated in the 1966 International Covenant on Civil and Political Rights (ICCPR).

96. The judiciary should apply the Press Law in relation to journalists and allow for retractions, corrections and right of reply before resorting to legal proceedings against journalists for publishing information that is deemed incorrect or harming reputations of individuals or even threatening national security or public order. Legal proceedings in these cases should be civil lawsuits and not criminal ones.

97. Public figures should be prepared to tolerate more criticism and avoid using the courts to silence critics as part of a healthy democracy. Untruth is better fought by truth, rather than intimidation through court action. Government departments could employ spokespersons to rebut any criticisms of governmental policy or react to any media story uncomfortable to people in public positions rather than resort to criminal proceedings.

98. Defamation and disinformation should be decriminalized altogether. Statements deemed threatening to national security must be interpreted in line with Cambodia's ICCPR obligations.

99. The concept of "threat to public order" should be defined in the narrowest terms possible by the laws and the judiciary with the aim of allowing for freedom of expression. In their decisions, judges should demonstrate in actual terms how a particular statement or expression has or will threaten public order. Any such claims made in the abstract should not be entertained by courts.

100. Judges and prosecutors should receive adequate training in human rights law and on interpreting domestic laws in compliance with international human rights standards under the international human rights treaties to which Cambodia is a party.

101. There should be a freedom of information law in the country to enable journalists and members of the public to obtain information on matters of public interest. Such a law would also promote responsible journalism, transparency and accountability.

A timetable to implement the recommendations

102. The Special Rapporteur encourages the Government to establish a programme of action with a clear timetable to implement these recommendations.
