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

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Summary

This year marks the twentieth anniversary of the adoption of the Paris Peace Agreements in 1991, which set in motion the peace process in Cambodia. The mandate of the Special Rapporteur has its origins in these Agreements. It is commendable that Cambodia has achieved significant milestones in a number of areas. However, it still has a long way to go to fulfil its obligations under international human rights treaties ratified by the country. The international community should continue assisting Cambodia in its efforts to establish the rule of law and reconstruct State institutions.

The Special Rapporteur is particularly concerned by the state of various human rights issues, and especially freedom of expression and land and housing rights. He is of the view that the peaceful expression of opinion should not be dealt with under the Penal Code as is currently the case with crimes such as defamation and disinformation. He is also concerned about the narrowing of space for people, including those belonging to different political parties, to express their views peacefully and without fear. He is particularly concerned in this regard by the charges of incitement, defamation and dissemination of information that have been brought against human rights defenders, land rights activists and individuals of communities defending their land and housing rights in the face of eviction.

Cambodia has enacted a number of laws designed to protect human rights, but it is lagging behind in their implementation. Many of the laws passed by Parliament and its own internal rules fall short of the standards required by the principle of the rule of law. What prevails in Cambodia in a number of areas is rule by law rather than rule of law.

The present report focuses on an assessment of the independence and capacity of Parliament as one of the State institutions responsible for upholding people's rights. Parliament in Cambodia has not been able to safeguard the freedom of speech of some of

its own members. Furthermore, the doctrine of the separation of powers is weak and Parliament has been regarded as having limited capacity to act as an effective check on the executive.

Parliament is the soul of democracy and is responsible for adopting laws required to protect human rights. With this in mind, the Special Rapporteur makes a series of recommendations in the present report in a constructive manner and hopes that the Government, Parliament and other stakeholders will implement them.

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I. Introduction

1. This is the third report of the present Special Rapporteur on the situation of human rights in Cambodia, submitted in accordance with resolution 15/20 of the Human Rights Council.
2. What has been achieved in Cambodia in a number of areas since the conclusion of the Agreement on a comprehensive political settlement of the Cambodia conflict (the Paris Peace Agreements) is commendable. The conflict was resolved, the transitional period was managed reasonably well, the new democratic Constitution was adopted in 1993 and periodic elections have taken place since then. There has been steady economic growth and political stability in recent years which has enabled many people to come out of poverty, at least in urban areas.
3. The Paris Peace Agreements established the rule of law, human rights and democracy as major pillars of the new political architecture for the country. Thus, the peace process cannot be regarded as complete until the democratic institutions created under the Constitution are able to work effectively and independently. The international community has a particular stake and a responsibility in this regard. It is in this context that the Government agreed to the proposal of the Special Rapporteur that he carry out a systematic assessment of the State institutions with a view to exploring the ways and means of strengthening their capacity and independence in upholding people's rights. Accordingly, the Special Rapporteur's previous report (A/HRC/15/46) was focused on the judiciary, and the present report is focused on Parliament. The Special Rapporteur centred his two missions to the country in 2011 mainly on examining the capacity of Parliament to uphold people's rights and democratic norms.
4. The Special Rapporteur is pleased to note that the Government has responded positively to accelerate its legislative programme designed to implement, inter alia, the key recommendations of the Special Rapporteur relating to the judiciary. The Government has indicated that the recommendations made by the Special Rapporteur in his previous report are being implemented or in the process of planning for implementation. The Special Rapporteur is, for example, encouraged by indications that the long-delayed organic laws on the judiciary are finally moving forward. It is noteworthy that an inter-ministerial working group has been set up in this regard. However, the Government has not responded to the Special Rapporteur's request to commit itself to a time frame or a concrete plan of action to implement his key recommendations.

II. Working methodology and approach

5. During the reporting period, the Special Rapporteur undertook two missions to Cambodia in 2011, from 15 to 24 February and from 30 May to 4 June. He is grateful to the Government for extending its cooperation during his missions and demonstrating its willingness to work with him in a constructive manner. During his missions, the Special Rapporteur focused his work on Parliament. The Special Rapporteur had the privilege to meet with Prime Minister Hun Sen, the President of the National Assembly, Heng Samrin, Deputy Prime Minister Sok An and other senior members of the Government, as well as members of both the Senate and the National Assembly belonging to various political

parties.¹ He was encouraged by their response to some of the issues that he raised. The Special Rapporteur was made aware of the work carried out by both houses of Parliament in holding the executive to account and to protect and promote human rights in the country. He appreciates some of the new laws enacted by Parliament to this effect. The Special Rapporteur has identified a number of shortcomings in the functioning of Parliament and has made recommendations to address them in the concluding section of this report.

6. Separately, the Special Rapporteur had meetings with the United Nations Country Team and its members, donor organizations, and diplomats, and visited the Extraordinary Chambers in the Courts of Cambodia, where he met with the President and Vice President of the Court's judicial plenary shortly before the close of its seventh session. He also met with victims of human rights violations, including indigenous groups and communities affected by land evictions in the recent past and an individual who had been charged with defamation, and interacted with representatives of trade unions; civil society organizations working in the area of human rights, such as land rights and freedom of expression, and on parliamentary reform; and private citizens. He visited sites in Kampong Chhnang, Boeung Kok Lake and Khan Sen Sok where families are facing the threat of eviction or have been forcibly removed.

III. Recent developments in human rights

7. While the general situation of human rights has progressed in some areas, it has not improved much in others.

A. Land and housing rights

8. Disputes linked to land continue to have an impact on the lives of many people in the country, especially those who are poor, marginalized and left without an effective mechanism to address their grievances. While the Government is developing a number of land management, housing and relocation policies, progress has been slow. Unresolved land disputes, many of them marred by corruption, have led to ongoing clashes among the Government, civil society and communities under threat of forced eviction and have been the cause of several outbreaks of violence in recent months.

9. The judiciary has not been effective in upholding the rights of many people affected by a lack of land title. The existing mechanisms for land disputes currently in place, such as the cadastral commissions and the National Authority for Land Dispute Resolution, are reportedly lacking in resources and not effective in upholding the rights of small landholders, and some communities report that they favour non-judicial mechanisms due to a lack of faith in the courts and the existing land-dispute systems currently in place. During the reporting period, numerous land disputes escalated and a large number of people were evicted from their land or were faced with the threat of forced eviction, after having exhausted legal remedies to peacefully settle the dispute or obtain a fair settlement.

10. At least 3,000 to 4,000 families living in the Boeung Kok Lake area have been evicted or face the threat of forced eviction from their homes since the Government granted a 99-year lease to Shukaku, Inc. for development of the land. Intimidation and threats were used against villagers to coerce them into accepting inadequate compensation or resettlement outside Phnom Penh, despite many villagers having strong claims to formal

¹ The Special Rapporteur has unfortunately not had the opportunity to meet with the Minister of Justice thus far.

land title under articles 30 and 31 of the 2001 Land Law. The security forces have also used intimidation and violence against protesters. Since August 2008, Shukaku began filling the lake with sand and many families have moved from the site, accepting an inadequate package of compensation in the face of the threat of an eventual forced eviction. However, it is estimated that 1,500 families still remain under threat of forced eviction. While some dialogue has taken place between affected communities who remain in the Boeung Kok Lake area and the Municipality of Phnom Penh, much remains to be achieved in terms of compensation and solutions for onsite upgrading.

11. With the help of the international community, the Government has embarked on an ambitious land-titling programme in the country which, however, often lacks transparency regarding economic land concessions. Land grabbing by the rich and powerful has at times overshadowed the progress made in land titling. While some of the economic and social land concessions have been for bona fide public purposes, the same cannot be said of some other such concessions.

12. Furthermore, individuals advocating for the rights of their communities to land have often been subjected to arbitrary arrest or unfounded charges. A lack of dialogue and consultation with potentially affected communities before the granting of economic land concessions is an unfortunate pattern that the Special Rapporteur has observed, as is the failure to conduct an environmental impact assessment. The Special Rapporteur had expressed hope in his report of last year that the Government would create a mechanism in conjunction with non-governmental organizations (NGOs) in an attempt to address the growing number of land disputes (A/HRC/15/46, para. 32), and he was encouraged by the announcement made by the Chair of the Cambodian Human Rights Committee to create such a mechanism in May 2011.

13. The Special Rapporteur has observed a trend characterized by the convergence of the State apparatus with private business interests. In February 2011, the Special Rapporteur visited the Kampong Chhnang province and witnessed for himself the situation of some villagers from Lorpeang village, Taches commune, Kampong Tralach district who had been evicted from their land in early 2008 without compensation, even though a case concerning the situation of those and other villagers was pending in the district cadastral commission, and had been sent to the National Authority for Land Dispute Resolution. Despite the communities' claim to it, their land was taken over by KDC International, a company run by the wife of a Government Minister. Eight villagers, including a village chief and a staff member of an NGO who assisted the affected villagers, were charged with property infringement, incitement, and dissemination of disinformation (more details in para. 21 below).

14. In June 2011, the Special Rapporteur met with three families who were forcibly evicted from their homes in Sangkath Phnom Penh Thmey commune, Russei Keo district (now Sen Sok district), despite the lack of an official decision on the land in question that had been pending since 1992. The families reportedly bought the land from a military officer in 1992 (they have the purchase document, but attempts to secure a land title from the municipality have been unsuccessful). Since September 2003, there had reportedly been multiple attempts to seize the land and evict the families, with little or no compensation, against which the families protested. The case was examined first by the municipal court, and then sent to the municipal cadastral commission in 2004, and had remained pending and unresolved for several years.

15. In June 2011, a violent clash occurred between authorities of Kampong Speu province and villagers of Oudong district over a disputed 65-hectare plot of land currently used for rice production, and the intended destruction of three houses on the land used by five families. Four members of the gendarmerie and at least six villagers reported injuries. The clash was the culmination of a long-standing dispute over the parcel of land, on which

88 families claim to have lived since the early 1980s. The dispute started after military officials allegedly sold the land to the Taiwanese Meng Keth Company (owned by a Taiwanese businessman who had become a naturalized Cambodian citizen), which now claims that it owns the land; the villagers deny the sale. The dispute had been pending in the court system since 2004, and in December 2009, the Supreme Court ruled against the villagers. The clash came after prosecutor Kuth Sopheang led a force of hundreds of armed police and military police in an attempt to enforce the Supreme Court's verdict.

16. These are some of the representative examples of problems relating to land rights in the country. Although the Government and local authorities have on a number of occasions, when acquiring land for public purposes, offered a reasonable package to residents in different sites to relocate elsewhere, there are still far too many cases where the Government has taken a heavy-handed approach towards the residents in disputed land areas.

17. In early 2010, the Council on Land Policy released a draft housing policy, which recognizes the right to adequate housing; the policy, however, is still pending. In May 2010, the Government adopted a circular relating to illegal temporary settlements in urban areas, which offers some solutions with regard to onsite upgrading and relocation. The circular, however, does not provide for a system by which the legality of urban settlements is determined. The Special Rapporteur hopes that a moratorium on eviction for dwellers in informal settlements will be respected until the Government can further develop its land-dispute capacity, as recommended by the Human Rights Council in its resolution 12/25, which 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 Special Rapporteur urges the Government to redouble efforts to use both the existing and emerging domestic legal framework to resolve disputes, rather than allow land conflicts to erupt into violence, which has been escalating during the reporting period.

B. Freedom of expression

18. The state of the right to freedom of expression and opinion in Cambodia remains a matter of concern. There has been a disproportionate use of defamation and disinformation provisions in the law by the Government against journalists, human rights defenders and political leaders, who seem to be resorting to self-censorship because of the fear of such possible charges against them.

19. The Special Rapporteur noted that provisions in many laws in Cambodia, including even the new Penal Code, go beyond international standards in curtailing people's freedoms, as do the courts' application and interpretation of such laws. The courts do not demonstrate sufficient understanding of the evolving international practice and jurisprudence and have a tendency to interpret the law literally rather than in spirit. For instance, in August 2010 Leang Sokchoun, a staff member working for the Cambodian League for the Promotion and Defense of Human Rights (LICADHO), and two others, Tach Vannak and Tach Le, were sentenced to two years in prison and a fine of two million riel, and another defendant, Tach Khong Phoung, was tried in absentia and sentenced to three years' imprisonment. They had been accused of distributing anti-government leaflets in Takeo province on 4 January 2010. The trial on 30 August was marked by a number of deficiencies, indicating that the defendants did not enjoy a fair trial. The evidence presented and the situation around this case suggested that elements for conviction under article 62 of the Penal Code for the crime of disinformation had not been not satisfied, as the alleged

distribution of the leaflets did not disturb the peace and it seems that no public-order issues arose after the leaflets were found.

20. The Special Rapporteur on the situation of human rights in Cambodia, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on the situation of human rights defenders, and the Special Rapporteur on the independence of judges and lawyers jointly sent an urgent appeal to the Government of Cambodia on 14 September 2010 on this case. The Special Rapporteurs expressed concern that the situation of the four nationals might constitute a violation of the right to freedom of expression and the right to a fair trial. They also expressed concern that the conviction of one of the four nationals, who is a human rights defender, on the basis of alleged questionable evidence might have an adverse impact on the working climate of human rights defenders in the country. The Special Rapporteurs sought clarification on the investigation, and judicial and other inquiries related to the cases, the measures that were in place to guarantee fair trial, and how the sanction against the defendants with respect to the alleged distribution of fliers constituted a permissible restriction on the right of freedom of expression. At the time of writing, no response has been received from the Government.

21. Similarly, on 3 February 2011, the Special Rapporteur on the situation of human rights in Cambodia, the Special Rapporteur on the right to freedom of opinion and expression, and the Special Rapporteur on the situation of human rights defenders jointly sent an allegation letter to the Government of Cambodia questioning the legal basis of the case of Sam Chankea and Reach Seima, convicted of disinformation and defamation under article 305 of the new Penal Code, for allegedly pointing out in a radio interview the unresolved legal status of an ongoing land dispute and the unlawful act by the company involved, KDC International, of bringing machinery to work on the land (see background information in para. 13 above). Mr. Chankea is a local coordinator of the human rights organization Adhoc. His comments in the broadcast of Radio Free Asia on 26 December 2009 were that “what the company has done violates the law because the court has yet to rule on the merits of the case. Therefore the company should suspend the activity and await the court decision”. The company claimed that the comments were not true and upon receiving that complaint, the public prosecutor brought a charge of defamation against the Adhoc coordinator. When the case went to the court, the trial had a number of shortcomings which suggested that it did not meet the standards of a fair trial. Mr. Chankea was sentenced to pay 4 million riel in fines and compensation or face three months’ imprisonment. Mr. Seima was sentenced to pay 10 million riel in fines and compensation or face six months in jail. The use of criminal defamation proceedings against human rights workers promoting a fair resolution of a land dispute is a matter of serious concern. At the time of writing, no response has been received from the Government.

22. Another case in point is that of Seng Kunnaka, a staff member of the World Food Programme, who was convicted of incitement to commit a felony by Phnom Penh Municipal Court on 19 December 2010, and was sentenced to six months’ imprisonment and a fine of 1 million riel. On 17 December 2010, Mr. Kunnaka was arrested and taken into custody in Russei Keo district for questioning for 48 hours. On 19 December 2010, he was tried by the Phnom Penh Municipal Court under the new Penal Code and convicted for printing information materials from an Internet website and sharing them with two colleagues in his workplace. The materials appear to include caricatures of political leaders, which were called “traitors”. Observers were not authorized to attend the trial proceedings, which were held in camera. The trial took place two days after his arrest and on a Sunday, when courts are normally closed other than for exceptional cases. It looked as if the prosecutors did not have time to properly investigate the case and the Court was in rush to deliver a verdict without allowing for a proper trial. An urgent appeal was jointly sent by the Special Rapporteur on the situation of human rights in Cambodia, the Special

Rapporteur on the right to freedom of opinion and expression and the Chair-Rapporteur of the Working Group on Arbitrary Detention on 22 March 2011, seeking clarifications on the legal basis of the conviction of Mr. Kunnaka. The Special Rapporteurs expressed concern that article 495 of the new Penal Code may have been interpreted to curtail the constitutional exercise of freedom of opinion, expression and information, rather than to protect the public from the commission of any crime. At the time of writing, no response has been received by the Government.

23. The Special Rapporteur observed that courts implement laws that do not conform to the nature and scope of the rule of law in the first place and thus risk being used by the executive for political purposes. An example of this is the 10-year jail sentence imposed on opposition leader Sam Rainsy in absentia after he had been found guilty of a falsification of public documents and disinformation, a charge that was allegedly politically motivated. The Special Rapporteur had hoped that the Court of Appeal or the Supreme Court would be more objective during the appeal of the opposition leader's case. Regrettably, the Supreme Court upheld in March 2011 the verdict of the Court of Appeal, which had upheld the verdict of the court of first instance. The allegation made by the Government was that Mr. Rainsy had manipulated a map to show that Viet Nam had encroached on the territory of Cambodia. In any properly functioning democracy, such political matters would be debated in the parliament and become a matter of public debate rather than the subject of a criminal case before courts. Scrutinizing the activities of the Government and requiring the Government to respond to any criticisms of its policy decisions is one of the basic functions of the leaders of opposition parties and they should not be subjected to criminal proceedings for discharging their responsibilities in a peaceful manner.

24. On 24 August 2010, the Special Rapporteur wrote to the Prime Minister and provided him with a briefing note outlining the international human rights perspective on the use of defamation proceedings and disinformation charges. The Special Rapporteur highlighted how important it was for the protection of democratic space for public debate that public authorities and politicians, as well as members of the media and the public who participate in these debates, tolerate dissenting views and do not regard them as personal attacks. The Special Rapporteur referred to a worrying trend of restrictions on freedom of expression in the form of criminal defamation, disinformation and incitement suits that had resulted in prison terms for individuals, including journalists, NGO workers and parliamentarians, who had no intention of affecting national security. The Special Rapporteur has regularly noted that, in defamation cases, the complainant appears not to have proven that his or her reputation has been damaged (one of the elements of the crime of defamation). With regard to disinformation cases, the Special Rapporteur has noted that there was often no proof tendered to the court that the information in question endangered national security (an element of the crime of disinformation).

C. Draft law on non-governmental organizations

25. In September 2008, during the fourth legislature (2008-2012), the Government decided to adopt a law regulating the activities of non-governmental organizations and associations. On 15 December 2010, the Ministry of the Interior publicly released the first draft of the law and invited NGOs and other stakeholders to participate in a first public consultation on the draft on 10 January 2011. The role of civil society actors in the political and economic development of Cambodia has been acknowledged by the Prime Minister in his speeches of 24 November 2009 and 6 June 2011, and by other senior members of the Government. Many of the civil society organizations have been playing a complementary role to that of the State in helping or delivering key social services in the areas of education, health, rural development, sanitation, social welfare and the protection of natural resources and the environment.

26. The decision to adopt a law to regulate NGOs and associations is a critical initiative which requires careful attention, given its long-term implications for the development of Cambodian society - and in turn the country - itself. In the past two years, human rights groups and other NGOs working to promote and protect the land and housing rights of the poorest, sustainable development, or the constitutional rights to freedom of expression, assembly and the press have been increasingly subjected to various forms of harassment and intimidation, including restrictions on movement and freedom of assembly, verbal threats, threats of legal action and, in some cases, criminal proceedings. Their efforts to educate and advise local communities about their legal rights and how to exercise them peacefully, through existing institutions, have increasingly been labelled as “incitement” and have been associated with the political opposition.

27. The Special Rapporteur was encouraged by the consultations on the draft law on NGOs carried out by the Ministry of Interior with the concerned parties, and expressed hope that this good practice will be replicated in other areas. However, for consultations to be meaningful, the final draft of this law should incorporate appropriate suggestions made during the consultations, so that the laws enacted will enable the concerned associations to strengthen their activities rather than restrict them.

28. At the time of writing, several aspects in the new draft still required careful attention; also, there should be a wider consultation in order to address the issues of concern raised by the NGOs themselves. An allegation letter, jointly sent on 13 May 2011 by the Special Rapporteur on the situation of human rights in Cambodia, the Special Rapporteur on the situation of human rights defenders, and the Special Rapporteur on the rights to freedom of peaceful assembly and of association, outlines concerns that the provisions contained in the second draft of the law on associations and non-governmental organizations (draft NGO Law) of Cambodia may hamper the legitimate work of NGOs in the promotion of human rights. The Special Rapporteurs pointed out that the registration process should be expeditious, easily accessible and inexpensive and the registering bodies independent of the Government. In this regard, clear procedures and timelines for review of applications should be established. The Government should guarantee the right of an association to appeal against any refusal of registration, and that there be effective and prompt recourse against any rejection of application, and independent judicial review regarding the decisions of the registering authority. The Government should also not criminalize or impose criminal penalties for activities in defence of human rights and for participating in unregistered entities.

29. An open, mutually respectful and constructive dialogue is necessary to jointly develop an NGO law that would further promote the development of civil society in Cambodia. While there is growing cooperation, there remain challenges, some of which could be resolved through increased contact and discussion.

30. In his letter of 24 August 2010 to the Prime Minister, the Special Rapporteur recalled the Prime Minister’s positive response to his proposal for the creation of a mechanism for meaningful and constructive cooperation between the Government and the civil society in their meeting in January 2010 and emphasized the need to work together to develop such a mechanism. To that effect, the Special Rapporteur forwarded a working draft of a proposal jointly prepared by some 300 human rights organizations in the country for the Prime Minister’s consideration.

31. In response, the Special Rapporteur was pleased to receive assurances from the Prime Minister that he had tasked relevant officials to make a thorough study of the points presented in September 2010. In his letter, the Prime Minister also expressed his hope that his colleagues and the Special Rapporteur could soon work out the way forward to address issues of concern. During their meeting in February 2011, the Prime Minister pointed out the need for participation by NGOs in such a mechanism to be truly representative and

inclusive of civil society. The Special Rapporteur encourages the Government and civil society to pursue dialogue with a view to establishing a regular consultation mechanism.

D. Draft trade union law

32. The Ministry of Labour is currently drafting a trade unions law and reviewing its compatibility with international standards on labour and human rights. However, the Special Rapporteur is concerned about limitations on the freedom of expression and assembly of trade union members. During the reporting period, trade union leaders had faced reprisals such as threats, charges of incitement of the commission of a crime (charges were subsequently dropped upon the request of the Prime Minister) and suspension from work. The Special Rapporteur encourages the Government to conduct inclusive consultations with the concerned parties on the draft law.

E. Extraordinary Chambers in the Courts of Cambodia

33. The Extraordinary Chambers in the Courts of Cambodia made significant achievements during the reporting period. Following the landmark conviction of Kaing Guek Eav, alias “Duch”, in July 2010, the Court has advanced its second case - against Nuon Chea, Ieng Sary, Ieng Thirith and Khieu Samphan (Case 002). The case was sent to trial in January 2011. An initial hearing was held in June 2011, and the trial is slated to begin in the latter half of 2011. At the same time, the Supreme Court Chamber of the tribunal has been considering the appeals in the case of Duch. The Chamber heard submissions from the co-prosecutors and the defence in March 2011. It is anticipated that the Chamber will issue its verdict in the coming months.

34. The Court’s activities in this regard continue to set an important example for the national sector of the administration of justice in accordance with international fair trial standards. In particular, the progress in Case 002 is commendable. In addition, the Court continues to open its doors to the Cambodian public for study tours about its work, and it received 32,000 visitors in 2010 alone. At the same time, the Victims Support Section continues to hold regional public forums throughout Cambodia, with forums being held in Battambang, Kampong Speu and Kampong Chhnang during the reporting period. At the time of writing, Cases 003 and 004 remained uncertain.

35. In December 2010, the Special Rapporteur wrote to the Prime Minister on the importance of the Extraordinary Chambers in the Courts of Cambodia setting an example to the international community of the country’s commitment to ensuring accountability for past atrocities, to protecting human rights, and to upholding the independence of the judiciary and the rule of law. He reiterated his hopes that the trials at the Extraordinary Chambers would have a positive impact on strengthening the independence of the judiciary, and serve as a catalyst for the Government to address impunity and accelerate its legal and judicial reforms.

IV. The role and effectiveness of Parliament in protecting human rights

A. General structure of Parliament

36. Cambodia has a bicameral parliament consisting of the Senate and the National Assembly. There are 123 seats in the National Assembly and 61 in the Senate. The term of

the National Assembly is five years and ends on the day when the new National Assembly takes office. The members of the National Assembly are elected for 21 multi-member constituencies corresponding to the country's provinces, using a proportional representation system.

37. The term of the Senate is six years. Of the 61 members of the Senate, 57 are elected by Commune/Sangkat Councillors while two others are elected by the National Assembly. The remaining two are appointed by the King. Both of these houses have a commission structure and each of them has nine commissions. All of these commissions are chaired by members of the ruling Cambodian People's Party.

38. The Cambodian Parliament has faced the same institutional and structural upheavals faced by the country as a whole in the last 40 or so years. Like the judiciary, Parliament and parliamentary culture had to be rebuilt from scratch following the systematic destruction of all democratic institutions during the Khmer Rouge period. The structure of Parliament and its physical facilities are now as good as any in a developing country and in many respects well above the average. Similar to many other parliaments, the Cambodian Parliament has oversight, legislative and representative functions.

39. Parliamentary activities as a whole – from legislating to overseeing the executive – cover the entire spectrum of human rights. Such activities have a direct impact on the ability of the people to enjoy their rights. With a view to focusing on human rights issues, the National Assembly and the Senate have each established a Commission for this purpose. The Commission on Human Rights of the Senate has received more than 300 complaints of human rights violations from members of the general public; in more than 100 of those cases it has received responses from relevant Government departments. The Commission has carried out investigations in about 40 cases in recent years. The Human Rights Commission of the National Assembly received a total of 1,158 complaints from members of the public between 2006 and 2010, the vast majority of them related to land disputes. Upon receiving these complaints, the Commission has taken action on a good number of them and written to relevant Government departments. The total number of responses received between 2006 and 2010 was about 250. The Commission has also examined various draft laws concerning the protection and promotion of human rights.

40. While the Special Rapporteur was encouraged by the progress made by the country in developing parliamentary practices within a relatively short period of time, there remain a number of shortcomings in the workings of Parliament in general and the National Assembly in particular.

B. Effectiveness of the Senate

41. Generally speaking, the parliamentary practices in the Senate are more advanced and more in tune with the principles of democracy and transparency. There is a great deal the National Assembly could learn from the practices of the Senate. The various commissions of the Senate, including the Commission on Human Rights, have been able to discharge their responsibilities more effectively. Altogether the nine Commissions of the Senate have conducted 24 fact-finding missions per year on average. However, the Senate itself has admitted that "the time given for scrutinising legal texts is too short". Further, the consultation on draft laws with concerned stakeholders "is not yet very transparent".²

² Cambodia, Secretary-General of the Senate, "A report on the self-assessment of the Senate on the Kingdom of Cambodia after 10 years of operation and development" (Phnom Penh, 2011), p. 24.

C. Effectiveness of the National Assembly

42. A key function of the parliament is to make new and amend existing laws. Another key function is to have oversight of the executive, by monitoring its activities and holding it accountable for its actions in order to defend the people's interests against possible abuse of power. A third function of the parliament is representation, which requires members of parliament to engage with their constituents in dialogue to better understand and represent their interests in the parliament.

43. Generally speaking, many bills are rushed through the Assembly without a proper debate. The tightly controlled system of adopting laws in the Assembly has meant in practice that amendments are rarely accepted at any stage of the process. This has highlighted the limited effectiveness of the Assembly in scrutinizing legislation prepared by the executive. While the Assembly asserted its independent role by sending the draft law on peaceful demonstrations back to the Council of Ministers in early 2008, other important laws, such as the Penal Code, the anti-corruption law and the law on expropriation were adopted with almost no debate, no amendments and little or no consultation, and in very short time frames. Furthermore, a number of pieces of legislation adopted in the recent past (and some regulations and subdecrees) have tended to narrow the scope of human rights. The ability of Parliament in Cambodia to restrain this executive tendency has been limited.

44. A key obstacle is the lack of a properly functioning parliamentary culture. The notions of pluralism and liberalism enshrined in the Constitution were designed to ensure space for all to participate in the process of democratization and nation-building. However, there is an absence of a culture of debate and discussion and political will to foster a climate that is conducive to constructive dialogue and accelerating the process of democratization of the society. Parliamentary practices are being developed but it seems to be taking time to accept the need for an effective opposition. Certain internal rules do not facilitate space for opposition voices. There is also a gap in knowledge and expertise among the Members of Parliament and professional parliamentarian staff whose qualifications and skills reflect a lack of fundamental legal training. This has impeded the capacity of the Members of Parliament to carry out their functions effectively. Overall, members of the National Assembly in Cambodia have not effectively used their powers of oversight to act as a check on the executive branch and hold the executive accountable for its actions.

45. None of the commissions in Parliament is chaired by a member of the opposition or a minority party. Many parliaments have the practice of having a member of the opposition or a minority party chair specific committees or commissions. It is an international practice to have equitable or proportionate representation of the opposition in such commissions or committees of the parliament. But this is not the case in Cambodia. Opposition or minority parties have a crucial role to play in holding the Government to account. They can provide alternative policy options for consideration by the Government and the public. For this, they should be guaranteed the right to place items for legislation and policy debate on the parliamentary agenda together with the time commensurate to this object and not be denied a voice to represent their constituents.

46. After the ruling Cambodian People's Party won more than two thirds of the seats in the National Assembly in the last general election, held in July 2008,³ the role and work of the National Assembly as a proper debating chamber seems to be declining. Only 23 per cent of the letters from the opposition party in Parliament received a response from the

³ The Cambodian People's Party won 90 out of 123 seats in the National Assembly; the Sam Rainsy Party 26 seats; the Human Rights Party 3 seats; the Norodom Ranariddh Party 2 seats; and the Funcinpec Party 2 seats.

Government and 90 per cent of the responses have come after more than a month. Ministers rarely attend the meetings in Parliament to answer questions from Members of Parliament. The Members of Parliament belonging to the main party in opposition and some other minority parties are virtually cut off from the law-making process. The Cambodian People's Party, with its large majority in the National Assembly, has a tendency to ignore the political role of other parties. The opposition party and many other minority parties complain that they are treated by the ruling party as an enemy of the State rather than as political partners with differing views.

47. Although the Constitution requires a secret ballot for important decisions in Parliament, most important decisions in the National Assembly are taken on the basis of bloc voting and by show of hands so that the Government can identify the people voting against any of its motions. The individual members of Parliament might therefore lack the courage to vote independently or against proposals tabled by the Government.

48. When the Cambodian People's Party won a two-thirds majority at the last general election, the National Assembly adopted new internal rules in September 2008 further narrowing the scope of effective participation in Parliament by the opposition and other minority parties. For instance, articles 48 and 55 of the rules require Members of Parliament to sit as a group of 10 and elect their own leader and deputy leader. This means that Members of Parliament from minority parties with fewer than 10 seats must join a group with representatives of other political parties.

49. Accordingly, an individual Member of Parliament cannot speak in Parliament without going through a group leader and without getting the permission to do so from the President of the National Assembly. These rules have the effect of denying Members of Parliament belonging to minority parties with fewer than 10 seats any meaningful role in Parliament and go beyond the scope of parliamentary procedures outlined in article 96 of the Constitution. For instance, currently the Human Rights Party has only three members in Parliament. Since they have not joined any group because they wish to retain their independence, they have no opportunity to function as normal Members of Parliament in parliamentary debate. For the reasons outlined above, the role of Parliament has been limited in overseeing the work of the executive.

D. Protecting the freedom of speech of Members of Parliament

50. Parliament is the soul of democracy. For democracy to work properly, all individual Members of Parliament should be able to exercise their freedom of speech in the course of discharging their official duties. It is a fundamental condition for a Member of Parliament to be able to speak his or her mind without fear. Democracy is about dialogue and debate on all issues of national importance, and this is especially so in the case of the parliament, which by definition is a chamber where members can debate freely any issues of national importance. It is for this reason that they have been accorded parliamentary immunity. However, some of the current internal rules of procedure of the National Assembly are not conducive to enabling all individual members to enjoy their freedom of speech when holding the executive to account and defending the rights of the people that they represent. In the recent past, the scope for Members of Parliament in Cambodia to participate in parliamentary debate has been limited and the parliamentary immunity of a number of Members of Parliament has been lifted, even for speaking out on issues of national importance. Further, many of these members have not been given an opportunity to make a representation in their defence, which goes against the basic principles of natural justice. A properly functioning democracy requires effective checks on the executive and on the majority.

51. Article 80 of the Constitution guarantees parliamentary immunity to Members of Parliament to enable them to enjoy their freedom of speech so that the conduct of ministers and the activities and policies of the executive could be scrutinized and criticized. Article 4 of the Law on the Status of National Assembly Members divides parliamentary immunity into two categories: absolute immunity and relative immunity. Absolute immunity applies to the expression of opinions and ideas during the adoption of the law by the National Assembly and relative immunity applies in relation to the protection of Members of Parliament from being prosecuted, detained or arrested. Only when parliamentary immunity has been lifted can a Member of Parliament be arrested, detained and subjected to criminal proceedings.

52. A request to remove the parliamentary immunity of any Member of Parliament who is alleged to have committed a crime should be submitted by the Minister of Justice to the President of the National Assembly. The National Assembly can remove the parliamentary immunity of a Member of Parliament by two-thirds majority vote of all members of the National Assembly. However, the Law on the Status of National Assembly Members does not provide an opportunity for the Member of Parliament in question to make a representation in his or her defence. Thus, a Member of Parliament could be stripped of his or her parliamentary immunity without having been given an opportunity for a fair hearing. The ruling party, with its two-thirds majority, has used these powers to lift the parliamentary immunity of Members of Parliament belonging to the opposition, without giving them an opportunity to defend their case.

53. Furthermore, some of the provisions of the Law on the Status of National Assembly Members seem to go beyond the freedom of speech guaranteed to members through the Constitution. Article 80 of the Constitution states that no Assembly member shall be prosecuted, detained or arrested because of opinions expressed while exercising their duties. However, article 5 of the Law on the Status of National Assembly Members narrows down protection by stating that if a Member of Parliament is found guilty of abusing an individual's dignity, social customs, public order or national security – without defining what these acts constitute – parliamentary immunity could be lifted. Provisions such as this can be misused if not defined properly and not coupled with adequate safeguards. In this context, it should be noted that the National Assembly has not yet restored the parliamentary immunity of one of the members of the opposition even after the fine that the Member of Parliament had to pay, according to a court order for alleged defamation of the Prime Minister, had been taken from her salary as a Member of Parliament.⁴ There is no clarity in the Law on the Status of National Assembly on how immunity will be restored if the National Assembly member is neither sentenced to serve a prison term nor acquitted.

54. The Special Rapporteur is of the view that defamation and disinformation should be decriminalized altogether in Cambodia. The main opposition political party members and other members belonging to minority parties in the National Assembly have been marginalized. They cannot work freely when they face the threat of a criminal charge of defamation, disinformation or incitement when criticizing not only the programmes and policies of the Government but also the conduct of Ministers. Owing to this culture of fear, members of the general public or even civil society workers seem to hesitate to attend the public meetings of most of the opposition parties. Therefore, the Special Rapporteur is concerned about the narrowing of the political space in Cambodia, which is not conducive to promoting and strengthening a democratic culture in the country.

⁴ The serving Member of Parliament had announced in a press conference, held on 23 April 2009, that she would bring a defamation lawsuit against the Prime Minister for derogatory statements he had made about her. Her lawsuit against the Prime Minister was dismissed and the decision upheld on appeal, her parliamentary immunity was lifted and she was found guilty of defamation.

V. The Constitutional Council, human rights and Parliament

55. The Constitutional Council was established under the Constitution to review the laws enacted by Parliament to ascertain their compatibility with the Constitution and thereby the fundamental freedoms and rights guaranteed by it and by international human rights treaties ratified by Cambodia. It consists of distinguished people drawn from various walks of public life. This is an innovative element of the Cambodian Constitution and a very welcome addition to the institutions designed to strengthen democracy. The Constitutional Council is a powerful body, at least on paper. Such a body for post-adoption review of the law does not exist in many countries. In many countries, is the constitutional court or the supreme court that has the power to declare a piece of legislation ultra vires of the constitution. The Council is composed of one president and eight members. The Council cannot examine any matter on its own initiative. Only the King, the President of the Senate, the President of the National Assembly, the Prime Minister, one quarter of the Senators, one tenth of the members of the National Assembly, or the Supreme Court can make a request to the Council to review the constitutionality of a law passed by Parliament.

56. In the exercise of its powers, the Cambodian Constitutional Council has delivered some decisions with far-reaching implications, such as its ruling on the Law on Aggravating Circumstances for Felonies in July 2007,⁵ drawing on international standards. However, the scope of its work is limited by the fact that private citizens have no direct opportunities to challenge the constitutionality of the laws enacted by Parliament. The citizens of Cambodia have to go through their Members of Parliament to the Council and the Members of Parliament seem to rarely exercise their powers to request the Council to review a piece of legislation that they themselves adopted in the first place.

57. Only a private citizen who is party to legal proceedings before a court of law can raise the question of the unconstitutionality of a piece of legislation or decisions of other State institutions including royal decrees, subdecrees and other administrative decisions, but even in this case it is up to the Supreme Court to refer the matter to the Council. The Supreme Court has not yet exercised this right even when it was called upon to do so in some recent court cases. The Council has very few cases before it for consideration. Given the passage of many laws and the controversy around them, some of the acts of Parliament or its internal regulations could have been reviewed by the Council. Although article 140 of the Constitution accords explicit powers to the Council to review the internal regulations of the National Assembly and the Senate before promulgation, the Council has not been as assertive and as active as it should be. It does not seem to have reviewed the constitutionality of some of the controversial provisions in the internal rules of the Assembly and the Senate before they were promulgated. The domination of the Cambodian People's Party in the State machinery seems to have led to some self-censorship by the Council.

⁵ This law, passed in 2002, removed both the discretion that judges previously had to consider the age of an offender in mitigation and the obligation judges had to halve any prison sentence for persons under 18 years of age. The Constitutional Council, in 2007, ruled that the Law was constitutional but on the basis that the Law was not intended to abrogate the protections provided to child offenders in the 1992 Provisions Relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia during the Transitional Period (United Nations Transitional Authority in Cambodia law), since that would have violated both the Constitution and the Convention on the Rights of the Child. It further clarified in its decision that international human rights treaties to which Cambodia was party were part of domestic law and directly applicable by judges in the courts. (See A/HRC/7/56, paras. 24-26).

58. Although the Constitutional Council is not grounded within the system and hierarchy of the judiciary or Parliament, it is the ultimate body responsible for reviewing the constitutionality of the laws enacted by Parliament. This function of the Council is judicial in nature and akin to the powers exercised in many other jurisdictions by the supreme or constitutional court of a country. Therefore, the Council should consist of the best independent legal brains of the country drawn from among the retired Supreme Court judges, distinguished professors of law and senior lawyers of the country. The practice of appointing to the Council people without a legal background and without a long legal service to the nation and on the basis of their party political affiliations should be discontinued.

VI. Conclusions

59. The Special Rapporteur on the situation of human rights in Cambodia has enjoyed a good level of cooperation from the Government. The dialogue with the Prime Minister and other senior Ministers has been candid but cordial and both sides have agreed to continue their cooperation. The meetings that the Special Rapporteur had with the President and Members of the National Assembly and Senate, representatives of political parties and civil society representatives were fruitful. His direct interaction with victims of human rights violations was helpful to understand the weaknesses that still exist in the implementation of domestic laws and international norms in the country.

60. The Special Rapporteur is concerned about the narrowing of space for people, including those belonging to different political parties, to express their views peacefully and without fear. He is particularly concerned in this regard by the use of the charge of incitement against human rights defenders. In his view, political actors and civil society organizations should work towards creating an environment which is conducive to the enjoyment of human rights by all and to economic development for the benefit of all.

61. Cambodia has come a long way since the conclusion of the Paris Peace Agreements. There is a democratic constitution in place and a number of State institutions have been established to protect and human rights. However, many of these institutions have not been effective in upholding people's rights. The judiciary remains a weak institution. Political issues have been taken to court and members of the opposition have been convicted of crimes which would not constitute crimes by international democratic standards.

62. What Parliament in general and the various specialized commissions in particular have been able to achieve in Cambodia is commendable. The work of the Human Rights Commissions of both houses of Parliament has been encouraging. All in all, Cambodia has made a huge transformation, from a State in which the institutional framework had all but been completely destroyed, to one whose law-making and institution-building processes are functioning. However, Cambodia has not yet successfully entered the phase of implementing the laws enacted to promote and protect human rights and to make its institutions independent, impartial and robust.

63. After focusing on economic, social and cultural rights such as food security and development, the Cambodian society is now anxious to make rapid progress towards implementing civil and political rights and issues such as freedom and justice, and strengthening parliamentary culture. However, the Government is not fully geared up to make a similar transition. The approach of the Government in relation to issues

concerning democracy and human rights is rather mechanical. As a result, despite the plethora of institutions created to promote and protect human rights, many of them have not been effective in performing their functions in an independent, impartial and robust manner. Many of the commitments undertaken by the Government have not been more than paper exercises. Therefore, what the Government of Cambodia needs is a shift in its mindset, and political will to accelerate the process of democratization and to associate democracy and human rights with human values that promote and protect the dignity of all individuals and respect their freedom.

VII. Recommendations

A. Parliament

1. General

64. Cambodia needs to accelerate the process of democratization in the country. There should be a genuine will and attempt at political reconciliation so that all political actors enjoy equal opportunities to make their contribution to the country's political and economic development and parliamentary process. The right of all parliamentarians, including minority as well as majority parties, to carry out their duties should be fully respected.

65. The Constitution of Cambodia makes it mandatory to hold a National Congress once a year under the chairmanship of the King to enable the people to be directly informed on various matters of national interest and to raise issues of concern to the authorities of all three main organs of the State. This is a unique and innovative provision of direct democracy which could constitute an appropriate forum for achieving national political reconciliation, reviewing the progress made in promoting and protecting human rights and for strengthening the sovereignty of the country. Since the King is the guarantor of the Constitution, the monarch should be able to receive people in audience and receive information from people from all walks of life. However, no such National Congress has ever been held. It should be held every year as mandated by the Constitution. For this, the organic law relating to National Congress should be enacted without any delay.

2. Strengthening the capacity and the workings of Parliament

66. The Human Rights Commissions in Parliament should mainstream human rights as a cross-cutting issue and work towards ensuring the compliance of domestic laws with international human rights standards.

67. The opposition parties should participate fully in the work of Parliament and cooperate, in particular in the work of the Commissions of the National Assembly.

68. The internal procedures of Parliament in general and the National Assembly in particular should be revised to encourage equitable or proportionate sharing of power and responsibility in parliamentary activities and especially in the leadership positions in the various parliamentary Commissions.

69. The procedure for removing parliamentary immunity and other disciplinary actions against sitting Members of Parliament should be brought in line with the principles of natural justice, constitutional standards and freedom of expression.

70. The Government should increase the resources allocated to Parliament to enhance the overall capacity of Parliament as an independent and effective institution

and the capacity of individual Members of Parliament to scrutinize draft laws tabled before Parliament by the Government.

71. Parliament in general and the National Assembly in particular should increase their effectiveness in overseeing the work of the executive and holding the latter to account. The environment should be made conducive for parliamentarians to openly question policies and decisions of their own parties. In this regard, there should be a clear understanding that being a Member of Parliament comes with specific responsibilities that transcend party lines.

72. The Secretary-General of both houses of Parliament should be an independent person and not an active member of any political party.

73. The recruitment of officials of Parliament in general and the National Assembly in particular should be conducted on the basis of merit and through a competitive and transparent process.

74. Draft laws should be published for public consultation and especially in outlets such as the *Official Gazette*. The *Gazette* itself should be made accessible to members of the public.

75. Laws should not be enforced until they are published in the *Official Gazette*.

76. Parliamentary Commissions should review regulations adopted by the Government to ascertain whether they exceed the scope of the original laws.

77. The requirement to be part of a group of 10 Members of Parliament in order to participate in parliamentary debate should be removed, affording all individual Members of Parliament equal opportunity to participate in such debate.

78. The main opposition party should have a constructive role to play in the appointment of members of various constitutional bodies, such as the election commission, to ensure that they are able to operate in an impartial and independent manner.

79. As in many other parliaments around the globe, the ruling party should invite the opposition parties to chair some of the Commissions in Parliament in general and in the National Assembly in particular. This would strengthen parliamentary culture as well as the culture of opposition. This used to be the case in Cambodia, but in recent years the situation has regressed in this regard.

80. Constituents should have easy access to parliamentarians in order for the latter to better represent them in Parliament.

3. Enhancing the effectiveness of the Constitutional Council

81. The Constitutional Council should review not only the laws enacted by Parliament but also the internal rules of Parliament in general and the National Assembly in particular to ascertain whether they are compatible with the Constitution, international human rights standards, and the principles of rule of law, including the principles of natural justice.

82. Any law enacted by Parliament which has direct implications for human rights should automatically be referred to the Constitutional Council for review before it is presented to the King for royal assent.

83. Access to the Constitutional Council should be widened: certain recognized non-State actors, such as professional associations of lawyers and law professors, as well as citizens under narrowly defined conditions and in exceptional cases, should have access to the Council.

84. The Council should consist of the best legal and independent brains of the country, drawn from among the retired Supreme Court judges, distinguished professors of law and senior lawyers of the country.

85. The practice of appointing to the Council people without a legal background and without a long legal service to the nation and on the basis of their party political affiliations should be discontinued.

4. Parliament and the freedom of expression

86. Parliament should review the new Penal Code with a view to ensuring its compliance with the permissible limitation to freedom of expression under international human rights law.

87. Parliament should safeguard the right to freedom of expression of its own members and protect their parliamentary immunity.

B. Freedom of expression

88. The judiciary should interpret the provisions of the Penal Code in line with international human rights standards of freedom of expression. The Ministry of Justice should call on the international community, including the Office of the United Nations High Commissioner for Human Rights, to provide training for judges, prosecutors and lawyers in this regard.

C. Land and housing rights

89. The Government is urged to examine the current trend of unresolved land disputes in the country and address the alarming patterns of violence by facilitating dialogue among potentially affected communities, local, provincial and national authorities, and private enterprises.

90. The Government should engage the people affected by land disputes in meaningful consultation regarding adequate compensation, or adequate alternative housing options, where applicable. Authorities should respect and protect the rights of such people, including by ensuring that they are not subjected to excessive use of force, harassment and intimidation, that they can exercise their right to peaceful protest, and that defamation, disinformation and incitement charges are not brought arbitrarily.

91. The Government is advised to exercise greater transparency in economic land concessions and other land deals involving Government officials or private enterprises, and is encouraged to strengthen the capacity and independence of the court system, the cadastral commissions, and the National Authority for Land Dispute Resolution so that they may exercise accountability, impartiality and greater efficiency in resolving disputes.

92. The Government is urged to enforce the existing provisions of the 2001 Land Law that prohibit interference with indigenous land and accelerate the pace of land registration for indigenous peoples to obtain collective title; interim protection measures should be implemented on all land where indigenous communities live until the registration process is completed and titles obtained.

93. When engaging in land deals either with the Government of Cambodia or other land owners, foreign Governments and international business organizations should

bear in mind that they have a responsibility under international law to respect the human rights of the people of Cambodia. Sponsorship of the use of armed law enforcement officials to carry out an unlawful eviction is illegal under international law and should be made illegal in Cambodia as well.
