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**ADVISORY SERVICES AND TECHNICAL COOPERATION  
IN THE FIELD OF HUMAN RIGHTS**

**Report of the Special Representative of the Secretary-General  
for human rights in Cambodia, Yash Ghai**

## Summary

The present report is submitted in accordance with resolution 2005/77 of the Commission. On 1 November, Yash Ghai was appointed as the Special Representative of the Secretary-General for human rights in Cambodia.

During his first mission to Cambodia as Special Representative, from 28 November to 5 December 2005, Yash Ghai gave particular attention to the Constitution of Cambodia, the justice sector and the rule of law, and to freedoms of association, assembly and expression. He found a deteriorating environment for democratic participation and practice. The frequent use of lawsuits brought by the Government through the courts to counter dissent and opposition has made it increasingly difficult for opposition-party politicians, trade unions, journalists, civil society and human rights organizations to express their views or to function freely. At the time of finalizing this report, well known public figures and activists were either unable to return to Cambodia, or were in prison awaiting trial, charged variously with defamation, disinformation and incitement.

Cambodia has a good Constitution, which incorporates the core international human rights instruments to which the State is party, but the Constitution has been massively disregarded and its safeguards weakened. Cambodia continues to operate under a transitional code of criminal law and procedure adopted by the United Nations Transitional Authority in Cambodia that was intended to be temporary. However, laws that make up the basic legal framework, which are essential to establishing the rule of law in Cambodia, still have not been enacted. The Special Representative believes that there is also a pattern to the current enforcement of the law in Cambodia which suggests that the law is abused for political purposes. The present report also notes that there is a pervasive practice of impunity for persons who are politically or economically well placed.

The way Cambodia's land and natural resources are managed and used continues to be a major problem. The Government has not yet disclosed information on State land and natural resources conceded to private companies and the military in the name of development. The use and abuse of these resources have harsh consequences for the livelihoods of the rural poor, including indigenous peoples who are particularly vulnerable. The problem is extensive and needs serious attention at all levels and by all those involved.

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## **Introduction**

1. The present report is submitted in accordance with Commission on Human Rights resolution 2005/77. On 1 November, the Secretary-General announced his appointment of Yash Ghai as the new Special Representative of the Secretary-General for human rights in Cambodia, following the resignation of Peter Leuprecht on 31 October. This is Yash Ghai's first report to the Commission.

2. Yash Ghai undertook his first mission to Cambodia as Special Representative from 28 November to 5 December 2005. During his mission, he was granted an audience by King Norodom Sihamoni and met senior representatives of the Royal Government of Cambodia, including the President of the Senate, and Ministers of Women's Affairs, Foreign Affairs and International Cooperation, the Interior, Education and Justice. He also met with the President of Cambodia's governmental Human Rights Committee, the court authorities, representatives of political parties, non-governmental and community organizations, trade unions, the Resident Coordinator of the United Nations and the United Nations Country Team, bilateral and multilateral development cooperation agencies and the diplomatic community. The Special Representative was able to visit parliamentarian Cheam Channy in the Military Prison, and radio broadcaster Mam Sonando and trade union leader Rong Chhun in Correctional Centre 1, commonly known as Prey Sar prison. He gave a public lecture on "Constitutions and Democratization" at the Royal University of Law and Economics. He discussed issues related to land and the administration of justice with provincial non-governmental organizations (NGOs) and community groups in Kompong Speu province. He also participated in a radio programme on the occasion of Human Rights Day.

3. During his mission, the Special Representative sought to understand the overall situation of human rights in Cambodia. He gave particular attention to Cambodia's Constitution, the justice sector and the rule of law, freedoms of association, assembly and expression, land and the role of civic organizations in promoting social justice.

## **I. METHODOLOGY AND APPROACH**

4. In preparing his first report to the Commission on Human Rights, the Special Representative has been guided by key issues identified by the Commission on Human Rights in resolution 2005/77. In discharging his mandate, it is the Special Representative's intention to build on the reports and recommendations of his predecessors, to comment honestly and constructively on developments and to put forward recommendations to assist Cambodia in making steady progress towards the greater dignity and welfare of its citizens. The Special Representative hopes that this will not be understood as criticism for the sake of criticism, but as part of his role to advise the Government on measures that can be taken to advance the enjoyment of human rights under the rule of law. The Special Representative will undertake a second mission to Cambodia in March in order to discuss this report with the Government before he presents his recommendations to the Commission.

5. During his mission, the Special Representative met with groups and individuals drawn from many different sectors of society. This report also seeks to reflect their voices and concerns. It was clear that the people of Cambodia have a deep yearning for human rights and justice. This is as could be expected from a people who have lived through the terrible period of

the rule of the Khmer Rouge, when the most elementary rights and freedoms were denied. The Special Representative was pleased to be assured by Ministers and officials whom he met that the Royal Government of Cambodia was also committed to this goal.

6. Since this is his first report to the Commission, the Special Representative wishes to outline the approach that is implicit in his mandate. Cambodia was the first of several countries in which the United Nations or regional organizations have facilitated the rehabilitation of the State after a period of intense conflict. In each case a high priority was placed on human rights as central to stability, democratization and justice. The protection of human rights in Cambodia and the ending of impunity for human rights violations have been principal concerns of the international community since the Agreement on a Comprehensive Political Settlement of the Cambodia Conflict (1991 Paris Peace Agreements). In these Agreements, the Cambodian authorities undertook to protect human rights, including the right of citizens to defend their rights, and to ensure that the policies and practices of the past would never return. Noting that Cambodia's "tragic recent history requires special measures to ensure protection of human rights", the Agreements set out in some detail provisions for the establishment of democracy and the protection of human rights.

7. There is good reason to emphasize democratization and the protection of human rights, as the experience of other countries shows. Past troubles in countries where the international community has been similarly engaged were often the result of the denial of the most elementary rights of the people and their exclusion from the affairs of the State. A population traumatized by such horrors as those in Cambodia needs physical and psychological security. When people's dignity is constantly violated, when they are forced into subjugation or collaboration with the regime, many lose their self-respect. They need to build trust with other persons and communities. Victims of capricious and arbitrary exercise of power, people need a system where the exercise of State power is predictable, in accordance with the law for authorized purposes. They need to come to terms with the atrocities and betrayals of the past. An absolute imperative is the growth of trust in the Government; Government must be so structured and run that it can win their confidence. Living under tyranny often renders people submissive and fearful. The new Government must encourage people to express their views and encourage their participation in public affairs. The Government must be accountable to them. Information about the policies and acts of the Government must be available to the people. All citizens and communities must be treated equally, especially in the access to the basic necessities of life, and no community should be denied development opportunities because it withholds political support for the Government in power.

8. The regime of human rights provides a basis and guidance for all these objectives, including fundamental principles for the organization of the State and Government. A primary responsibility of the State is the promotion and protection of civil and political as well as economic, social and cultural rights; these constitute the framework of State policies. The participation and empowerment of the people that comes from the observance of human rights and norms of democracy is the first requirement of a post-conflict period. State-building must go hand in hand with the promotion of human rights and democracy. Otherwise those who represent the State may all too easily adopt the oppressive style of governance of their predecessors.

9. The international community which remains engaged after a transitional period has a special responsibility to ensure that human rights are fully observed. The challenge is to design and carry out assistance programmes that will benefit the country as a whole, facilitate the participation of people in the planning and implementation of development, and allow them to exercise their political, civil and economic rights. For reasons of both fairness and efficiency, the international community has paid much attention in the last decade to the incorporation of human rights into its development assistance. It recognizes that all human rights are interdependent, that the enjoyment of all rights, including economic, social and cultural rights, are essential to the exercise of genuine democracy and human development. This new approach is well captured in a seminal document of the United Nations Development Programme (UNDP), "Integrating human rights with sustainable human development" (1998), which describes its commitment to rights and development. Implicit in this broad framework, is also the responsibility of the private sector to respect and observe human rights.

## II. THE CONSTITUTION

10. These values are also fully reflected in Cambodia's Constitution. The Constitution was adopted in 1993 by the Constituent Assembly whose members were freely elected in elections, under the auspices of the United Nations Transitional Authority in Cambodia (UNTAC), in which an overwhelming number of Cambodia's citizens took part. The drafting and adoption of the Constitution were entirely the responsibility of Cambodians. Thus the Constitution reflects the values and goals to which the Cambodian people have committed themselves. The Constitution was intended to symbolize the rebirth of the nation and State. It is supreme law and any laws or policies inconsistent with it are void. The central values of the Constitution are liberal and pluralistic democracy and human rights. All adult citizens have the right to vote, to choose their representatives, and the legislature may remove the executive if it loses confidence in the executive. Most human rights, civil and political as well as economic and social, are included in the Constitution, and reinforced by adherence, as stipulated in the Constitution, to the core international human rights treaties. The Constitution upholds freedom of expression, the rights of association and assembly and those of participation. It provides protection to trade unions and civil society organizations. Along with the principle of constitutional monarchy, so fundamental are human rights and democracy, and the procedures to give effect to them, that they cannot be repealed or amended. An accompanying principle is the separation of powers, so that each institution of the State is free within its sphere, particularly the judiciary, whose independence is protected through various provisions. The Constitution of Cambodia specifically stipulates that the legislative, executive and judicial branches shall be separate. Article 128 prescribes that "the judicial power shall be an independent power" and article 130 goes further to say that "judicial power shall not be granted to the legislative or executive branches".

11. The Constitution provides a good framework for democratic, effective and accountable Government as well as a valuable starting point for human rights. However, the Special Representative is concerned about the way certain institutions established under the Constitution to uphold legality and human rights have been politicized and neutralized. Many of the issues

that trouble the Special Representative, in common with individuals and groups that he met in Cambodia, arise from the failure to fully implement the Constitution. By contrasting the formal status of four key institutions established to safeguard the Constitution and its values with the reality of their effectiveness, it is evident that there has been a massive disregard of the Constitution.

### **III. CONSTITUTIONAL SAFEGUARDS**

#### **A. The Monarchy**

12. Although the Constitution provides for a parliamentary system of government, a critical role is assigned to the King in ensuring respect for the Constitution and the independence of the judiciary. Article 8 acknowledges the status of the King as the “symbol of unity and the eternity of the nation”. It states that the King shall be the “guarantor of national independence, sovereignty, and territorial integrity of Cambodia and the protector of rights and freedoms of all citizens and the guarantor of international treaties”. The King has the “august role of arbitrator to ensure the faithful execution of public powers” (art. 9). The King has special powers so that he can discharge these duties. He can communicate with the National Assembly, has a role in the appointment of the Prime Minister and the Council of Ministers, has the right to be kept informed by the Government of affairs of State, is the Supreme Commander of the Royal Khmer Armed Forces and chairs the Supreme Council of National Defence, and in case the nation faces danger, it is up to the King to declare an emergency, after agreement with the Prime Minister and Chairs of the National Assembly and the Senate. If he considers that a law is incompatible with the Constitution, he can refer it to the Constitutional Council for review. He has special responsibility for the independence of the judiciary and chairs the Supreme Council of the Magistracy which has to assist the King in ensuring that independence through procedures for the appointment, disciplining and dismissal of judges and prosecutors.

13. It is thus clear that the King is more than a constitutional monarch, as that term is generally understood. He is required to intervene in affairs of the State when the Constitution, the rights of individuals and communities, or the independence of the judiciary and prosecutors are threatened or violated. The King is not merely a constitutional monarch who must follow the instructions of the Government, or be threatened with dismissal if he does not. Otherwise, a major constitutional safeguard would be rendered ineffective.

#### **B. The Constitutional Council**

14. Chapter XII of the Constitution provides for a Constitutional Council. The Council is not grounded within the system and hierarchy of the judiciary which is outlined separately in chapter XI of the Constitution. With its competence to control the constitutionality of acts and to adjudicate on disputes over legislative and senatorial elections, the Council is a regulating body, set up to ensure the smooth functioning of the three branches of power. Its role in ensuring the compatibility of laws with the Constitution is critical for the supremacy of the Constitution; Article 136 states expressly that “the Constitutional Council shall have the duty to safeguard respect for the Constitution, to interpret the Constitution, and the laws passed by the Assembly and examined by the Senate”. If a law is declared incompatible with the Constitution, it ceases to have any effect. The Council recalls in many respects the Constitutional Council of France with some differences, including the mandate for a posteriori control of the constitutionality of

acts and the public hearing of cases relating to general elections. The Council is composed of nine members, who must be independent and not tied to the Government, legislature, or judiciary, or hold a senior post in a political party or trade union (art. 139). Three members are appointed by the King, three by the Supreme Council of Magistracy and three are elected by the National Assembly. Currently six of the nine members are affiliated with the Cambodian People's Party, which calls into question the impartiality of the Council. Unfortunately, the Special Representative was unable to meet with the Council during his mission and hopes to do so on his next visit.

### **C. Supreme Council of Magistracy**

15. The Constitution, through articles 132 to 134, entrusts the task of ensuring judicial independence and disciplining judges and prosecutors to the King with the assistance of the Supreme Council of Magistracy which has the power to appoint, transfer and discipline judges and prosecutors. Although a law was passed in 1994 to establish the Council, disagreements over its membership delayed its formation, and since then the Supreme Council of Magistracy has not played its constitutional role - as an independent institution responsible for appointing, transferring and disciplining judges.

16. The Council is chaired by the King, with other members being the Minister of Justice, the President of the Supreme Court, the General Prosecutor at the Supreme Court, the General Prosecutor at the Appeals Court, the President of the Appeals Court and three judges elected by their peers. All members but one belong to the Cambodian People's Party, and two members are on its Central Committee. To decide on disciplinary matters, the Council may form separate disciplinary committees for judges and prosecutors, headed by the President of the Supreme Court and the Prosecutor General at the Supreme Court respectively. The disciplinary committees have adopted internal rules and regulations but these are not publicly available.

17. A draft bill to amend the Law on the Supreme Council of Magistracy aims simply to create a more effective secretariat of the Council. On 5 May 2005, the Prime Minister issued a sub-decree dissolving the secretariat and handing its functions to the Ministry of Justice. According to the Prime Minister, the secretariat was dissolved for failing to deal efficiently with numerous complaints filed against judges and prosecutors, although it would have been more consistent with the spirit of the Constitution to have strengthened the secretariat rather than transfer its functions to the Ministry of Justice which is part of the Government. The Special Representative was told by some prosecutors that the Council has failed to protect their independence or those of judges (see below). There is a tendency in the Government to use the King in his capacity as chair of the Council as a rubber stamp instead of the real decision maker as he is under the Constitution.

### **D. The National Congress**

18. The Constitution establishes the National Congress, symbolizing a gathering of the people, for dialogue with the Government, and for its accountability to the people. It is to be convened once a year by the Prime Minister, and is to be chaired by the King. According to the Constitution the purpose of the National Congress is to "enable the people to be directly informed on various matters of national interests and to raise issues and requests for the State Authority to solve" (art. 128). It has the power to adopt recommendations for consideration by



State authorities and the Assembly. In the period immediately following the adoption of the Constitution, the Congress was convened in accordance with the Constitution but the Special Representative was told that in recent years the Prime Minister has not convened the Congress. Thus a valuable opportunity where various sectors of society can meet to discuss national issues and to dialogue with the Government has been lost, at a time when communications between the people and the Government have become so problematic.

#### **IV. JUSTICE SECTOR AND RULE OF LAW**

19. During his mission, the Special Representative had the opportunity to hold discussions about the situation of the Cambodian judiciary and the efforts under way to bridge the gaps in legislation and to establish strong State institutions to safeguard human rights and freedoms, as provided for under the Constitution.

##### **A. Impunity**

20. In his report to the sixtieth session of the Commission, former Special Representative Peter Leuprecht reported that “impunity is both a main cause and main result of Cambodia’s many human rights problems” (E/CN.4/2005/116, para. 26). He called for an analysis of developments since the Agreements on a Comprehensive Political Settlement of the Cambodia Conflict. As a contribution to such an analysis, the former Special Representative completed a report on continuing patterns of impunity in Cambodia in October 2005 before the end of his mandate. The report traces forms and patterns of impunity in the years since the Agreement as recorded in public reports by successive Special Representatives and other experts working under United Nations auspices. Former Special Representatives Michael Kirby and Thomas Hammarberg fully associated themselves with the report insofar as it relates to the investigations, findings and recommendations that they made during their respective mandates. The following sections are drawn from this report.

21. Many of the continuing elements of impunity identified in the report had been reported by the United Nations Transitional Authority in Cambodia (UNTAC) in 1993. UNTAC reported that it found a society which lacked the basic institutions and processes upon which respect for human rights depended. Existing institutions were geared towards rigid political control by an authoritarian State backed by active military force and unwilling to accommodate alternative sources of authority. The existing legal and institutional structures were essentially those which had developed over the previous decade. There were inadequate or no legal texts, whether on civil law, contracts and property, criminal law and procedure, rules of court, evidence, or labour law. Institutions such as the police and courts were not fully organized or properly functioning. UNTAC defined the fundamental justice issue as the complete breakdown in the legal system. It drafted a transitional criminal law, which it saw as a stopgap measure, which would quickly be replaced by more permanent legislation. This was called the Provisions relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia during the Transitional Period (the UNTAC Law).

22. UNTAC initially sought to persuade the Cambodian authorities to investigate allegations of human rights abuses and to prosecute those responsible for serious rights violations in the courts. While this was effective in minor cases, UNTAC found a “reluctance” to take action against senior officials, and particularly to act in cases involving human rights violations.

In many such instances, the administrative authorities refused to conduct investigations, and senior officers said they did not have the capacity either to investigate or prosecute such matters. While the UNTAC Law provided a formal framework to address this problem, it became clear that such offences would not be prosecuted in practice by State-appointed prosecutors, who faced not only the threat of interference, but also physical danger should they seek to institute penal action against the will of the political authorities.

23. UNTAC established a Special Prosecutor's Office in January 1993, hoping that if the Office operated within the existing court structure this might, by the public nature of such prosecutions, play a role in altering the legal and official "culture" of the courts. But this proved to be impossible and UNTAC had to recognize that it would not be possible to conduct cases with political overtones in the Cambodian courts. Elements of the administration, particularly the security forces, were complicit in politically motivated violence which meant that the courts were not allowed to operate independently or impartially. The law, and the courts in particular, was still regarded as a tool of the governing political parties.

24. In his first report to the Commission at its fiftieth session, former Special Representative Michael Kirby set out an agenda for change (E/CN.4/1994/73). He urged the immediate establishment of a constitutional council and a supreme council of magistracy. A law was needed on the status of judges and prosecutors. A penal code, an evidence act and a new criminal procedure code, revised to reflect the new Constitution, were all necessary to create a comprehensive legal foundation for the criminal justice system, the work of the police, the operation of the courts and the rights of defendants. A law on the organization and functioning of courts, and a restructuring of the court system, was needed to establish and clarify the jurisdiction of the various levels of courts. Former Special Representative Kirby also pointed out that the rights which were now formally protected in the new Constitution would exist in a vacuum unless implementing legislation was passed. If the fundamental rights in the Constitution were to be respected, Cambodia needed to make, in effect, a clean break with many of its laws - insofar as laws existed - and with the practices which had fostered impunity.

25. The above-mentioned report shows that cases with political overtones during the ensuing decade were rarely properly investigated or prosecuted. The contract-style murders in Phnom Penh in 2004 of trade union leaders Chea Vichea and Ros Sovannareth are two cases among many cited in the report. The report concludes that the legal and political steps needed to create a culture of respect for human rights, and to ensure the protection of rights through the rule of law, have not yet been taken. And that although the failure to bring to justice those responsible for criminal acts and violations of human rights is often attributed to scarce resources and poor capacity within law enforcement institutions and to the absence of a well functioning judiciary, the failure of these institutions to uphold the law can also be attributed to an accepted practice of impunity and collusion by police, military and security agencies. Continuing deficits in laws and in institutions have also underwritten a protection vacuum, and have created an enabling environment for rights violations. The report concludes that the forthcoming trials of the Khmer Rouge leaders, which will be before "Extraordinary Chambers" of the Cambodian courts, have the potential to effect real change, and that every effort should be made to ensure that this potential is realized by raising standards of due process generally, creating a greater appreciation of the rule of law and the need for official accountability among both the leaders and the citizens of Cambodia, and by ensuring that the trials do not take place in isolation from the wider Cambodian court system.

26. The intention of the report is to encourage broad and constructive dialogue within Cambodia about the nature and impact of impunity and the measures that can be taken to overcome it. The Special Representative looks forward to working with the Government and the international community to this end.

### **B. Enactment of necessary laws**

27. In December 2004, the Government agreed that the Council of Ministers would adopt the drafts of eight laws essential to the rule of law and submit them to the National Assembly before the end of 2005, that the laws would be consistent with the Constitution of Cambodia and international best practice, such as reflected in international human rights treaties; and that they would be prepared through a satisfactory participatory process. The laws are the Penal Code; the Code of Criminal Procedure; the Civil Code and Code of Civil Procedure; the Organic Law on the Organization and Functioning of Courts; the Law on the Amendment of the Supreme Council of Magistracy; the Law on the Status of Judges and Prosecutors and the Law on Anti-Corruption. These goals were not met. The drafting process has continued to be hampered by chronic delays, a lack of overarching policy direction, a shortage of qualified available officers and the nature and extent of revisions required by the Council of Jurists.

28. Most of these laws have been on the agenda for the last decade. There are many ways in which the drafting process could be improved. For example, clear guidance at a policy level would help ease the passage of legislation and increased and meaningful public consultation would improve the quality of the legislation, and also ease its public acceptance and implementation. It is of utmost importance that these laws be consistent with Cambodia's international treaty obligations and Constitution, and are enacted without undue delay.

### **C. Independence of the judiciary**

29. The Special Representative received many complaints of executive interference in the work of the judiciary, and many examples of trials that failed to meet standards of due process. These are serious issues which he intends to examine closer during future visits. In this context, he was also briefed about the problem of corruption in the judiciary, and the steps taken under the "Iron fist policy" launched by the Prime Minister in March 2005 to address the problem. The Special Representative commends the Prime Minister for wishing to take firm action against corruption, but is concerned that the measures used should comply with the Constitution of Cambodia, do not allow the police undue influence in cases that come to the court, and do not result in the erosion of judicial independence. To achieve this goal, and in order to safeguard the integrity of the judiciary more generally, the principal objective must be to strengthen the Supreme Council of Magistracy, to make it broadly representative and free from political party and executive interference. A law on the Status of Judges and Prosecutors is also urgently needed. In the absence of detailed provisions for judges' appointment procedures and service conditions, old administrative procedures have continued to apply. Thus powers continue to be vested in the Ministry of Justice, which has been able to usurp powers which should reside in the Supreme Council of Magistracy by virtue of the Constitution. The Ministry remains influential over, for example, judges' security and tenure.

## V. LAND AND MANAGEMENT OF NATURAL RESOURCES

30. During his mission, the Special Representative learnt about the many difficulties rural and indigenous communities are facing in sustaining their livelihoods as a result of losing land and access to natural resources. He fully shares the view, also expressed by the Prime Minister, that how Cambodia uses and allocates its natural resources and for whose benefit is one of the most pressing issues facing Cambodia today. The use and abuse of Cambodia's fisheries, forests, land and other resources have impacted harshly on the human rights, livelihoods and culture of Cambodia's rural populations, including its indigenous peoples, who are especially vulnerable. The Special Representative will build on the reports and recommendations of his predecessors in assisting the Government and people of Cambodia in addressing these problems. The problems are extensive and need serious attention at all levels and by all those involved.

31. The Special Representative welcomes the adoption of the sub-decrees of the 2001 Land Law on State Land Management and on the granting and reduction of economic land concessions, although he has not yet had an opportunity to study them. He notes that steps have yet to be taken regarding the titling process for indigenous communities as provided for in the Land Law. He fully shares the growing concern about the future for Cambodia's indigenous peoples who are rapidly losing their land to private individuals and companies, and agrees that a moratorium should be declared on the award or sale of land that is eligible for indigenous title until the measures to secure indigenous title are in place.

32. First and foremost, it is essential for Cambodia's people to know how much State land and other natural resources has been given over to private companies or to Cambodia's military to manage and develop and for what purposes. At the Consultative Group for Cambodia meeting in December 2004, the Government committed to immediately disclose this information to the public. Some information on economic land concessions was eventually provided by the Ministry of Agriculture, Forestry and Fisheries in December, but is yet to be translated and analysed. Otherwise no information has been provided.

33. The situation in Tum Ring commune in Kompong Thom province illustrates well the vulnerability of rural communities in remote areas, and the serious situations that can arise. For several years Tum Ring has struggled with security problems, mostly attributed to security guards employed by the private companies that operate in that area, some of which are engaged in illegal logging. The local population has had frequent confrontations with company security guards, especially when trying to stop the illegal cutting down of the resin trees upon which they depend for their livelihoods. They have set up forest communities to look after their interests. The strongest and most infamous security guard group is commanded by Kok Heang, brother of the director of the Seng Keang Company. His group is reliably reported to have been involved in bribery, coercion, harassment, threats and actual shooting incidents, including of two forestry community activists in July 2005. The provincial authorities say they are concerned, but need help from the national authorities to disarm and investigate Kok Heang and his group, and to improve the security situation in Tum Ring. The problem has been brought to the attention of the Ministry of the Interior and the Special Representative hopes that its intervention will be effective. As previously recommended, criminal offences committed by company security guards and militia on concessions and rubber plantations must be investigated and prosecuted; and they should be disarmed, in compliance with existing law.

34. During his mission, the Special Representative visited Kompong Speu Province, where he had the opportunity to meet with community representatives and NGOs. Of the 49 land concessions for economic purposes listed by the Ministry of Agriculture in 2005, 11 are located in Kompong Speu. Concessions for other purposes not mentioned in the list are located in Aural Wildlife Sanctuary.

35. One such concession is a concession for ecotourism which was awarded to New Cosmos Development (Cambodia) Co., Ltd, a Chinese company, in 2004. The company registered with the Ministry of Commerce with a capital of US\$ 5,000 in February 2003. A month later, it requested 900 hectares for 99 years in an area with natural hot springs in the Aural Wildlife Sanctuary to develop a resort and entertainment facility, including a hot spring tourism village, an international conference centre, folk cultural villages, a theme park, a luxury residential area and a golf course. The Government agreed in principle, and in May 2004 appears to have agreed to a request from the company to expand the requested area to 1,900 hectares. The company began operating in mid-2004. No environmental and social impact assessment was conducted.

36. The Suy indigenous people have inhabited the Aural mountain area for many generations. After the Khmer Rouge regime, they turned from shifting to permanent cultivation. The present community consists of some 200 households with a total population of around 900. The hot springs and the surrounding forests have great spiritual significance for the Suy. They also depend on the forests, the habitats of wildlife, including deer, bears and over 60 species of birds, for their livelihoods. Recognizing that the hot springs, forests, river, and the Suy culture have rich potential to develop ecotourism, the Lutheran World Federation and Flora and Fauna International have been working with the Suy and local authorities for several years to help them manage the hot springs under a community-based ecotourism project. When the Suy learnt about the project of New Cosmos, they and NGOs appealed to all levels of government to stop the project, but to no avail.

37. Eventually, the Government agreed to an environmental impact assessment. According to the initial report of June 2005, prepared by Strategic Consultancy Services Co. Ltd, the impact of the project will be minor and manageable, and will not have significant or accumulative impact on the environment. The report found that investment in such projects presented a unique opportunity for Cambodia to convert natural assets into cash flow in a sustainable manner with huge benefits for the country. In order to accommodate the Suy and to enable them to practice their beliefs, the company said that it would either allow them access to the hot springs and surrounding area, or would pay the costs of relocating and building a small shrine for their spirit goddess, Yeay Te, and for their religious ceremonies. The report said that local people supported the project, and want to see the development come soon, so that they could get jobs. However, in carrying out the assessment, it appears that only a few families, mostly outsiders who settled near the hot springs, appear to have been consulted.

38. The Suy have reacted strongly to this assessment, and say they have never been consulted. They fear the extinction of their culture and way of life, a concern shared widely by NGOs and others. The community and its representatives have come under continuing and increasing pressure and threat. Commune council members, police and district and provincial officials have told them to accept the company, and to stop their protests or they could be arrested because the Government has already granted the concession to the company.

39. The Special Representative was also briefed about several other ongoing land disputes in the province in which poor families are increasingly pitted against military officials or highly-placed officials. He was also told that when cases come to the court, the people always lose. By way of illustration, one dispute concerns a conflict between a group of some 20 poor families and Military region 3 in which the military claim the land in question while the people say they have owned it since 1997, when the military moved away. The military also accuse settlers along road 42 leading to the disputed land of illegally encroaching on State land. On 14 November, violent conflict erupted when police and military came threatening to burn down the homes of the settlers and the 20 families, unless they left. No one was injured, but eight people were arrested and at the time of writing are detained at the provincial prison charged with “violation of the occupation of an immovable property and on the use of violence”.

40. Almost immediately following the incident, the Commander of Military Region 3 prepared a report for General Meas Sophea, commander-in-chief of the Infantry Military of the Ministry of Defence. The report linked the dispute with an advocacy training course on 7 November run by the Lutheran World Federation, which has long enjoyed close cooperative relations with the local authorities and communities in its efforts to promote sustainable development and poverty reduction in the area and peacefully resolve any conflicts that arise. The report blamed the advocacy course for the violence, and complained that NGOs were generally inciting villagers to go against the authorities.

41. The report to the Commission of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, provides additional information on land disputes and their impact on housing, especially in urban areas (see E/CN.4/2006/41/Add.3). The Special Representative hopes that his report will be given serious consideration by the Government and international community and that his recommendations will be taken up.

## **VI. CREATING AN ENVIRONMENT CONDUCTIVE TO LEGITIMATE POLITICAL ACTIVITY**

42. The Commission, in resolution 2005/77, underlined the importance of continuing to create an environment conducive to the conduct of legitimate political activity, as well as support the role of NGOs in order to solidify democratic development in Cambodia. The extent to which Cambodians can exercise their freedoms of expression, association and assembly in an effective and meaningful way is key to creating such an environment. These fundamental freedoms constitute the essential foundations for a democratic society, and one of the basic conditions for its progress. However, legitimate political discourse and public debate were increasingly challenged, especially through the courts.

### **A. The lifting of parliamentary immunity**

43. On 3 February 2005, the National Assembly lifted the immunity of Sam Rainsy and two other party members, Chea Poch and Cheam Channy. The National Assembly vote was taken without advanced notification, in closed session by a show of hands, and no record of the meeting has been disclosed.

44. While the lifting of the immunity of Sam Rainsy and Chea Poch related to defamation suits, the arrest of Cheam Channy was linked to accusations the Prime Minister had made on 18 July 2004, three days after the formation of the coalition Government on 15 July, that he was organizing a secret army. Cheam Channy was arrested on 3 February 2005 and charged with “organized crime” and “fraud” under articles 36 and 45 of the UNTAC Law. In contravention of national and international law applicable in Cambodia, he was held in military detention and tried before a military court, although he is a civilian. On 8 August, he was found guilty and sentenced to seven years’ imprisonment. The Military Court failed to observe his basic legal rights. The judge prevented defence counsel from calling witnesses to testify, and prevented cross-examination of all prosecution witnesses. No evidence was presented to substantiate the charges that Cheam Channy had organized weaponry or plotted in a concrete way with the intention of toppling the Government. The day before the two-month appeal period expired, Cheam Channy instructed his defence counsel not to appeal, and the judgement became final and binding on 9 October. He is currently serving his sentence in the Military Prison. The Special Representative was able to visit Cheam Channy during his mission. The Special Representative has joined others in calling for his release.

45. On 22 December, Sam Rainsy was found guilty in absentia by the Phnom Penh Municipal Court of criminal defamation on two counts and sentenced to 18 months’ imprisonment. On 27 December 2005, the Special Representative issued a public statement expressing his deep concern, and his firm belief that dissenting views and opinions should be challenged through public debate, not through criminal law suits. In his opinion, trials in absentia are inconsistent with the guarantees of due process provided in the Constitution and the International Covenant on Civil and Political Rights.

## **B. Defamation**

46. Increasing use of the law of defamation under article 63 of the UNTAC Law to deal with controversies that are essentially political in nature is both a symptom and a cause of the closing of political space. The Special Representative is equally concerned about the use of incitement and disinformation provisions of the UNTAC Law, and also about the many irregularities that have characterized the courts’ handling of recent cases. He believes that this trend is a serious threat to freedom of expression and political pluralism in Cambodia.

47. Defamation under article 63 of the UNTAC Law carries a maximum one-year prison sentence, while incitement not leading to the commission of a crime or misdemeanour under article 60 can lead to up to five years of imprisonment. Disinformation under article 62 is punishable by up to three years in prison.

48. The UNTAC Law was intended to be temporary. It was enacted under very particular circumstances, which no longer reflect the situation in today’s Cambodia. Its temporary nature is made clear not only by references in the Preamble to the situation at the time of its drafting, but also to numerous references in the text to UNTAC, which ceased to exist in 1993. It was also passed before Cambodia adopted its Constitution and acceded to the core international human rights treaties, in particular the International Covenant on Civil and Political Rights.

49. Penalizing speech by means of criminal law has a long history. In many countries that history is closely tied to sedition, and has been more concerned with keeping the peace than with protecting reputation. According to modern thinking, a clear distinction should be made between protecting reputations and preventing or penalizing breaches of the peace. Imprisonment is no longer considered appropriate as a penalty for defamation, or indeed that the criminal law should be used at all for defamation. In many countries, even civil law remedies are very rarely available to political figures, to Governments or even to public figures more widely defined.

50. In a number of countries where in theory the criminal law of defamation is available, it is rarely used. In France, for example, the Press Act of 1881 still penalizes offence to the President (art. 26), but has apparently not been invoked since the 1960s and not because the French have ceased to be offensive to their President. In several countries criminal defamation offences have been abolished. When it reported its intention to do so to the Human Rights Committee, the Government of Sri Lanka said: "In repealing these provisions, which are essentially a hangover of colonialism, Sri Lanka would be joining growing international consensus, which sees such provisions as unnecessary and repressive" (CCPR/C/LKA/2002/4, para. 360).

51. Special Rapporteurs on the promotion and protection of the right to freedom of opinion and expression have commented on several occasions on the use of the criminal law of defamation. Points they have made include that the International Covenant on Civil and Political Rights does not contemplate injury to Governments as a legitimate restriction on freedom of speech; that special protection should not be given by the criminal law to senior public officials; that the question of truth or untruth should be a matter for the prosecution to establish, and that imprisonment for defamation should not be permitted.

52. In its initial report to the Human Rights Committee, the Government of Cambodia said: "As in the past, some newspaper editors exceed their rights: they do not express their opinions to criticize the Government, but undisguisedly insult the co-Prime Ministers. For example, they describe, and draw caricatures portraying the Kingdom of Cambodia as a country of robbers headed by thieving government leaders, etc. Faced with such a disorderly and anarchic situation, in which the subjection of its leaders to a virtually constant stream of baseless criticism and humiliating and offensive insults makes the performance of its task almost impossible, the Government has no choice but to bring the matter before the courts." (CCPR/C/81/Add.12, para. 289). This referred to the 1990s and, perhaps in deference to the position of Cambodia as a new democracy, the Human Rights Committee made no comment on this when it considered the report at its sixty-sixth session.

53. But the Government seems increasingly unwilling to tolerate any sort of criticism, and it readily succumbs to the temptation to invoke the broad defamation laws. Clearly it is better to have good laws, but when a Government has a choice it is disingenuous to suggest that it is somehow compelled to make use of the existing bad laws.

54. The Special Representative concludes that governmental use of defamation, disinformation and incitement laws are inconsistent with the Constitution of Cambodia and international human rights treaties; that imprisonment should not be used for defamation; that the use of the defamation laws is an abuse of the law, a constraint upon democratic development and denies the people of Cambodia the opportunity to express and hear different views; and that the penalization of opinion, at least expressed in reasoned terms, is contrary to Cambodian law.



He therefore urges that serious consideration be given to suspending and repealing these provisions of the UNTAC Law as unfortunate remnants from Cambodia's troubled past, for all charges that have been brought under these provisions to be dropped, and for the release of all those currently detained. The new criminal code currently under preparation offers a welcome opportunity for amending the law so as to make it compliant with Cambodia's treaty obligations and Constitution.

### C. Recent cases

55. Several persons active and well known in public life were charged variously with defamation, disinformation and incitement in the last quarter of 2005. Most law suits brought by the Government, and immediately pursued by the courts, related to views expressed on border issues in the context of the supplementary border agreement. Prime Minister Hun Sen signed the agreement with the Government of Viet Nam on 10 October 2005, and it was ratified by King Sihamoni on 30 November. The Special Representative understands the sensitivities of border issues in Cambodia, but believes these are best dealt with through public discussion and debate. He is also concerned that the Government may be opportunistically using the border agreement as a means of silencing critical voices.

56. Mam Sonando, owner and director of a popular radio station, was arrested on 11 October, and charged with defamation and later with disinformation, in connection with a telephone interview of the Paris-based Chairman of the Cambodian Overseas Committee on Border Affairs, who criticized the Prime Minister for having "sold" Koh Trol island to Viet Nam under the treaties he signed with Viet Nam in the 1980s. On 11 October, Rong Chhun, President of the Independent Teachers' Association, and three other trade union leaders, Men Nath, Director of the Civil Servants' Independent Association, Chea Mony, President of the Free Trade Union of the Kingdom of Cambodia, and Ear Channa, Deputy Secretary-General of the Students Movement for Democracy, issued a statement which called on "workers, employees, students, monks, civil servants, teachers, royal families and all Cambodian people to join in the mourning for the serious danger to the territorial integrity of Cambodia". Rong Chhun was arrested on 15 October on charges of defamation and incitement not leading to the commission of a crime. The others were similarly charged, but are outside Cambodia. Mam Sonando and Rong Chhun are detained in Correctional Centre 1. All their requests for bail have been rejected, and no trial date has been set. The Special Representative has called for their early release.

57. Two advisors to the former King Sihanouk, Prince Thomico Sisowath and jurist Say Bory, were also charged with defamation in connection with views they expressed on border issues. Say Bory expressed his views in a personal letter to the former King which was placed on the latter's home page to which the public has access. The views of Prince Thomico, who left the country just before charges were brought, were also placed on the above-mentioned home page. Say Bory was outside Cambodia and has not been able to return since.

58. As he was finalizing this report, the Special Representative was alarmed and dismayed to learn of the arrest and detention on 31 December 2005 of the President of the Cambodian Centre for Human Rights, Kem Sokha, and the Director of the Cambodian Community Legal Education Centre, Yeng Virak, and of the arrest of Pa Nguong Teang, Deputy of Kem Sokha, on 5 January 2006. All were charged with defamation, and immediately detained in Correctional Centre 1.

59. The court had acted on a complaint lodged by the Government in relation to a Centre for Human Rights 2003 election banner that the organization reused during a non-governmental commemoration of Human Rights Day on 10 December in Phnom Penh. The organisers had received permission from the authorities shortly before. The defamation charge was based on one of many messages scrawled by members of the public on the banner during the election campaign, which were critical of the Government and the Prime Minister. The banner was taken down immediately following a request by the police. The Special Representative fully shares the regret expressed by the United Nations High Commissioner for Human Rights in the statement she issued on 4 January 2006 over these events.

60. All these cases were characterized by serious irregularities. Procedurally the arrests were illegal. Under Cambodian law, a writ of *habeas corpus* may only be issued when the accused fails to appear before the court on a specific date, after having received a properly communicated summons. No such summonses were communicated. The investigating judges ordered preliminary detention orders without providing details on the legal grounds of their decision in accordance with article 14 of the UNTAC Law. A charge of incitement leading to the commission of a crime that failed must specify the crime or misdemeanour committed, but no crime was specified.

#### **D. Civil society and freedoms of association and assembly**

61. Cambodia has an active citizenry and non-governmental and community-based organizations, which play an essential role in protecting and promoting human rights and in contributing to the democratic and sustainable development of their country. During his visit, the Special Representative was greatly encouraged by their work. It is of utmost importance that they be allowed to continue to contribute to the development of Cambodia. The Special Representative received many reports about the restrictions and intimidation they face. Threats of legal action against activists also appear to be increasing, with activists working at the local level to protect natural resources and rural livelihoods being especially vulnerable. Guidelines issued by the Ministry of Interior of 24 June 2005 to support the *sangkat* (commune) councils have been used coercively by several provincial authorities.

62. The Government has recently revived a draft law on NGOs, under discussion since 1995, and the Ministry of the Interior has asked the World Bank to assist in its drafting. Problems in past drafts have included an emphasis on registration and structural requirements for associations and NGOs, restrictions on sources of funding and the possibility of dissolving an NGO or association by administrative decision. It will be essential to allow for extensive and meaningful participation of NGOs in drafting the law, especially human rights and advocacy organizations. It will also be important to consult the Office of the High Commissioner for Human Rights to ensure that the law complies with the Constitution and international human rights treaties binding Cambodia and the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (General Assembly resolution 53/144).

63. The Government is also drafting a new Law on Freedom of Assembly and Non-Violent Demonstration, which came to public light during the mission of the Special Representative. Again, it will be essential to engage in broad public consultations, for the law to fully comply

with the Constitution and international treaties and to consult the International Labour Organization and OHCHR in this regard. There is no good reason to rush such an important law, and every reason to correct the deficiencies in the current law which do not comply with the Constitution.

64. The Special Representative received many reports about the continuing disregard of the right of peaceful assembly. Applications continued to be routinely rejected on arbitrary grounds. Where demonstrations or gatherings took place without permission, excessive force was sometimes used against otherwise peaceful protestors, leaders were detained and compelled to thumbprint documents promising no further disruptions of public order, or charged and brought to court. He was also very disturbed to learn that electric batons are now routinely carried and used by police.

## VII. CONCLUSIONS AND RECOMMENDATIONS

65. **The Special Representative of the Secretary-General for Human Rights in Cambodia has carefully studied the wide-ranging set of recommendations presented by his predecessors, and notes that many are still valid, as the problems they aim to address remain unresolved. He looks forward to working with the Government of Cambodia to explore ways in which these recommendations could be implemented without further undue delay. In addition, he would like to present the following conclusions and recommendations based on his own initial observations and findings.**

66. **The Special Representative is greatly concerned about the deterioration of the environment for democratic participation and practice, where it is becoming increasingly difficult for opposition politicians, trade unions, journalists, civic society and human rights organizations to express their views or carry out their activities freely. The overall impression of the Special Representative is that fundamental freedoms and democracy in Cambodia are at risk. The continuing and increasing use of defamation, disinformation and incitement charges to counter political opposition and dissent is a matter of great concern. The Special Representative is firmly of the view that issues of public interest, even when they may be sensitive or contentious, should be dealt with and resolved through dialogue and debate, and not through the courts. The Government and other State institutions must take urgent steps to restore an environment which is conducive to public debate, transparent and accountable administration and the exercise of democratic rights. Freedoms of expression, association and peaceful assembly must be respected and upheld.**

67. **When the Special Representative expressed his concerns to Ministers on the state of human rights and the deterioration of the environment for democratic participation and practice, he was told that the Government was simply discharging its responsibility in enforcing the law - and that much of the law in question was enacted by the United Nations Transitional Authority in Cambodia (UNTAC). The Special Representative does not share this view. The UNTAC Law was to be transitional, to deal with an extraordinary situation, and it was made when there were no human rights legal provisions in Cambodia. Since then the Constitution of Cambodia, with a strong bill of rights and several human rights treaties have been adopted. These render aspects of the UNTAC Law unconstitutional. It is the responsibility of the Government to ensure that those provisions which contradict human rights are repealed.**

68. Even if a law provides for a criminal offence, the Government is not obliged to invoke it, as often the law becomes outdated with changing ideas and circumstances as to what is regarded as proper conduct. As the present report shows, most countries that previously criminalized defamation or insults, have either repealed that law or do not rely on it. The Government must always act fairly and reasonably in the way it uses the law. In this context, it is the Special Representative's view that the law has not been applied in accordance with the norms of a liberal legal system. Bail has been routinely denied to those accused by the Government; in most cases the evidence on which the prosecution relies is in the public domain, as in defamation cases, and the justification that further investigations are necessary is unconvincing, and in any case is no valid reason for detention. Finally, the law is used selectively and unevenly. The Special Representative urges the reinstatement of parliamentary immunity to members of the opposition Sam Rainsy Party; the dropping of all charges of defamation, disinformation and incitement; the granting of guarantees of non-arrest upon return for persons presently in exile under such charges; and for those charged with or convicted of offences of defamation, disinformation and incitement to be immediately released.

69. The Constitution of Cambodia, adopted by the people through their representatives in the Constituent Assembly in 1993, has yet to be fully implemented, and critical constitutional safeguards have been undermined. As a matter of priority, the Government, working in conjunction with civic organizations, should strengthen the capacity and integrity of the Constitutional Council and the Supreme Council of Magistracy, as the two institutions most central to upholding and implementing the Constitution.

70. As this report notes, little progress has been made in enacting fundamental laws despite very considerable external technical and financial assistance for this task. At the Consultative Group for Cambodia meeting in December 2004, the Government agreed that the Council of Ministers would adopt the drafts of eight key laws and submit them to the National Assembly before the end of 2005. This work is now seriously behind schedule. The Government needs to complete the drafting process and present this legislation to the National Assembly without further undue delay. These laws should further be prepared through a satisfactory participatory process and they must be consistent with Cambodia's Constitution and international human rights treaties.

71. The Special Representative is also concerned about the independence and integrity of the Cambodian judiciary. High priority should be given to adopting the Law on the Status of Judges and Prosecutors, as well as strengthening the independence of the legal and judicial process and making technical improvements in its functioning. The Special Representative further notes that there is no formal system of legal aid or other ways to facilitate people's access to courts and the legal profession. As a result, the entire responsibility for providing legal assistance to poor people and to people in rural areas generally, has fallen on civic organizations, which lack adequate financial and professional resources.

72. As the present, and previous reports have shown, there is a pervasive practice of impunity for persons who are politically or economically well placed, while those who offer no threat to law and order, act in good faith, but run foul of the Government, are accused and convicted. The Special Representative considers that there is a pattern to the

enforcement of the law, through prosecutors and judges who do not respect legal procedures and due process, which suggests that the law is abused for political purposes. There is a need for a broad and constructive dialogue within Cambodia about the nature and impact of impunity and the measures that must be taken to overcome it. The recommendations that former Special Representatives and the human rights treaty bodies have made to end impunity must be taken up. The Special Representative looks forward to working with the Government and the international community to this end.

73. Rights to land and housing are major problems. The report of the former Special Representative to the Commission at its sixtieth session identified a number of critical issues as regards land policy (E/CN.4/2004/105, paras. 41-47). There are many disputes about land ownership which are seldom resolved in an impartial way. Communities, particularly those of indigenous peoples, find themselves displaced from their ancestral lands without any protection of the law. Forests are being destroyed at an alarming rate. The Government has not yet disclosed information on the land and natural resources it has conceded to private companies and the military in the name of development. The report to the Commission of its Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, provides information on forced evictions, displacement and land “swaps” which are harshly impacting on the poor (see E/CN.4/2006/41/Add.3). The Special Representative encourages the Government to give serious consideration to the present report and its recommendations. He also urges the Government to ensure the prompt implementation of the Land Law and provide fair and just procedures to resolve disputes over land in accordance with domestic and international law.

74. The Special Representative welcomes Cambodia’s signing of the Optional Protocol to the International Covenant on Civil and Political Rights in 2004, and the Optional Protocol to the Convention on the Elimination of Discrimination against Women in 2001. He hopes that these will be ratified in the very near future. The Special Representative also urges the Government to energetically pursue the submission of Cambodia’s initial report under the International Covenant on Economic, Social and Cultural Rights, and its periodic reports to the other treaty bodies. He welcomes the completion of Cambodia’s report under the Convention on the Elimination of All Forms of Discrimination against Women, which will be considered in January 2006.

75. The international community also has a crucial role to play in supporting Cambodia in its quest to strengthen human rights and democratic and accountable institutions functioning under the rule of law. In accordance with its commitments under the Agreement on a Comprehensive Political Settlement of the Cambodia Conflict, the international community, through the United Nations and other multilateral and bilateral means, must assist the Government to design and implement policies and programmes that will benefit the country as a whole, and allow the people of Cambodia to exercise their political, civil and economic rights, which was the primary rationale for their engagement in Cambodia in the early 1990s.

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