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### TECHNICAL ASSISTANCE AND CAPACITY-BUILDING

**Written statement<sup>\*</sup> submitted by the Asian Legal Resource Centre (ALRC),  
a non-governmental organization in general consultative status**

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[28 August 2009]

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<sup>\*</sup> This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

### **CAMBODIA: Legal foundation and framework for the country's judiciary required**

The Asian Legal Resource Centre (ALRC) wishes to bring to the attention of the Human Rights Council a major lacuna that constitutes one of the most fundamental obstacles to the enjoyment, protection and promotion of human rights in Cambodia. The lack of the required laws on the statute of judges and prosecutors as well as the lack of the legal underpinning to the organisation of the judiciary are resulting in the judiciary not functioning effectively. This crucial institution is fundamental to the actualisation of human rights and remains ineffective and lacking in independence and capacity to function. It is imperative for any discussion on human rights in Cambodia, for these issues to take centre-stage. Without an effective, legally established and independent judiciary, human rights violations have no effective deterrent and impunity is guaranteed.

By virtue of the Paris Peace Agreements of 1991, Cambodia is bound to all relevant international norms and standards of human rights. It is to set up an independent judiciary so that, as §2 of Annex 5 on the “Principles for a New Constitution for Cambodia” to the “Agreement in a Comprehensive Political Settlement of the Cambodia Conflict,” aggrieved individuals will have the courts adjudicate and enforce their rights.

Cambodia has since honoured many of its international obligations as it has adhered to international human rights instruments and has enshrined many human rights in its 1993 Constitution. As spelled out clearly in the preamble to this Constitution, Cambodia is supposed to be a pluralistic liberal democracy governed by the rule of law and respecting human rights. Its Art.31 states that “The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women’s and children’s rights.” In its decision dated 10 July 2007, Cambodia’s Constitutional Council declared that all recognised human rights have become an integral part of Cambodian law.

Cambodia is a constitutional monarchy and, according to Art.8 of its Constitution the king is the guarantor of the rights and freedoms of his people. To perform this duty he has the assistance of the judiciary which, for its part, is also the protector of the rights and freedoms of the Cambodian people (Art.128 of the Constitution).

The Constitution has specifically stipulated a number of laws that need to be enacted, namely, the law on the statute of judges and prosecutors and also the law on the organization of the judiciary (ART. 135 of the Constitution). However, since the creation of the Constitution, these two important laws have not seen the light of day. Amongst the main reasons for this are corruption and executive control of the judiciary. As a result, Cambodians are not in practice entitled to be tried by an independent, competent and impartial tribunal established by law under Art.14-1 of the International Covenant on Civil and Political Rights, to which Cambodia is a State party.

Over this relatively long period of time, tens of thousands of people have been tried by judges whose status have not been defined by the required law and by courts of law whose establishment has never been based on a law on the organization of the judiciary, although both of these laws that have been specifically stipulated in the Constitution of 1993.

The Cambodian government has delayed, the enactment of these two important laws for what will be 16 years this coming September 24<sup>th</sup>; a delay that should by itself amount to an unconstitutional omission on the government's part, although the country's Constitution is silent on this omission. The delay in the enactment of these two laws stands in stark contrast to the law on the statute of civil servants and the law of members of the armed forces, both of which were enacted more than ten years ago, in the mid-1990s.

The government has preferred to continue to apply the old law on the nomination of judges and the activities of courts, enacted in the communist days on the eve of the country's pluralistic liberal democracy. This particular law no longer befits the new system of government that abandoned communism and embraced liberal democracy, in order, purportedly, to be governed by the rule of law. This new system adopts the principles of separation of powers, the independence of the judiciary and the jurisdiction of the Supreme Council of the Magistracy as an independent body belonging to the judiciary, and as the supreme judicial body of the judiciary, whose jurisdiction is the nomination and discipline of judges and prosecutors. Furthermore, this particular pre-liberal democracy law is not among laws and regulations that should continue to apply under the transitional provisions of the country's constitution (Art.158 of the Constitution).

The Constitution's transitional provision only recognizes the validity of past laws and standard documents pertaining to state properties and the rights and freedoms pertaining to lawfully acquired properties in the past. Art 158 on this transitional provision says: "Laws and standard documents in Cambodia that safeguard State properties, rights, freedom and legal private properties and in conformity with the national interests, shall continue to be effective until altered or abrogated by new texts, except those provisions that are contrary to the spirit of this Constitution."

The absence of the law on the statute of judges and prosecutors ensures that there are no guarantees concerning the independence of individual judges and prosecutors. The Supreme Council of the Magistracy belongs to the independent judiciary and is chaired by the king. It nominates and disciplines judges and prosecutors, both of which belong to this Council. This Council assists the king in ensuring the independence of the judiciary.

Due to the absence of this law, no age of retirement of judges and prosecutors has been fixed and there have been charges of favouritism levelled about older judges or prosecutors (including four of them recently), who have wished to remain in active service. Furthermore, there have been cases of infringement by the Ministry of Justice and even the government itself on the jurisdiction of the Supreme Council of the Magistracy. The Ministry of Justice controls the Secretariat of the Council, and has made nomination proposals and got the Council to approve them and submitted them to the king for signature, without the Council having much say at all in the process.

A couple of recent examples have illustrated the government's infringement upon the jurisdiction and independence of the Supreme Council of the Magistracy. On June 21, 2009, the government ignored the Supreme Council of the Magistracy altogether when it retired and replaced four out of eight (two-ex officio and two (of three) appointed) members of the Council and submitted the whole proposals for the king for signature. More recently, on August 4, the Minister of Justice proposed the appointments of over 32 judges and prosecutors (including four

over the de facto age of retirement of 60), and had the Council approve them and submitted these to the king for signature.

This practice is very much indicative of the executive's control over the judiciary. It is unconstitutional, but there is no procedure for constitutional review of acts of government by the country's Constitutional Council in the same way as the constitutional review of laws operates. This loophole should be removed, lest Cambodia continues to be ruled by decree instead of the rule of law, and the government continues to exercise control over the judiciary.

The prolonged absence of the law on the statute of judges and prosecutors poses a problem concerning the legitimacy of the Supreme Council of the Magistracy as well as of the Constitutional Council itself. Due to necessity during its formative years beginning in 1994, and the then-inability to enact the law on the statute of judges and prosecutors in time, an interim arrangement was made to appoint three judges as members of the Supreme Council of the Magistracy, pending the enactment of that law through which they would be elected by their peers. Since 1994, the law in question has not been passed despite the government's repeated promises to do so. The election of these three judges has been upheld and they have continued to be appointed. As time passes by the legitimacy of the composition of the Council is becoming increasingly questionable.

The dubious legitimacy of the composition of the Supreme Council of the Magistracy in turn puts into question the legitimacy of the composition of the country's Constitutional Council, whose jurisdiction is to ensure the constitutionality and interpretation of all laws and to serve as the court of final appeal for election conflicts. Three of the nine members of the Constitutional Council are appointed by the Supreme Council of the Magistracy whose composition lacks legitimacy. When the legitimacy of latter's composition is also dubious, it is very doubtful whether the Constitutional Council's authority has its full weight.

With the absence of the law on the statute of judges and prosecutors, and also of the law on the organization of the judiciary, both of which have been specifically stipulated in the country's constitution, the whole of Cambodia's justice system do not have any legal foundation and framework.

## **Recommendations**

There is still a long way to go before anyone in Cambodia can be guaranteed being tried by an independent, competent and impartial court established by law. However, it should not take very long to enact a law on the statute of judges and prosecutors and another law on the organization of the judiciary, in order to ensure that a trial court is at least established under the law and that judicial officers in charge of investigations and trials have proper legal status as judges or prosecutors. The Cambodian judiciary can no longer function as a judiciary without a proper legal foundation and framework.

The Asian Legal Resource Centre (ALRC) therefore recommends that the Special Rapporteur on the situation of human rights in Cambodia and the members of the Human Rights Council pay special attention to the need for an effective, independent judiciary with a proper, constitutionally legal foundation and framework. Without this, all discussions about and work on human rights in Cambodia is unrealistic and unlikely to lead to successes.

The ALRC recommends that the government of Cambodia enact the two laws on the statute of judges and prosecutors and on the organization of the judiciary, if it has any pretence of being serious about the protection and promotion of human rights and democracy in the country. This would greatly improve the conditions of nominations of judges and prosecutors, their independence, the prohibition on their political affiliation, the prohibition on their removal without their consent, their competence and impartiality, salaries, promotion, discipline and removal from judicial services under grave circumstances, and the age of retirement.

With these two laws, the judiciary would become one of the three branches of government with an equal footing with the legislature and the executive and could ensure a system of checks and balances befitting a pluralistic liberal democracy, which Cambodia is under its Constitution. The two branches of government should respect the principle of separation of powers and also the independence of the judiciary as enshrined in Articles 51 and 128 of the Constitution.

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