

# State of Migration

An overview of forced displacement in Cambodia

July 2012



# *Table of Contents*

<b>LIST OF ABBREVIATIONS</b>	<b>iv</b>
<b>LIST OF KEY TERMS</b>	<b>vi</b>
<b>LIST OF LEGAL INSTRUMENTS</b>	<b>ix</b>
<b>FOREWORD</b>	<b>xiii</b>
<b>INTRODUCTION</b>	<b>xiv</b>
<b>EXECUTIVE SUMMARY</b>	<b>xvi</b>

## **Chapter one**

<b>THE ROYAL KINGDOM OF CAMBODIA</b>	<b>1</b>
COUNTRY OVERVIEW	2
GOVERNMENT, LAW AND POLICY	4
WOMEN IN CAMBODIA	8
CHILDREN IN CAMBODIA	14

## **Chapter two**

<b>REFUGEES AND ASYLUM SEEKERS</b>	<b>19</b>
WHO ARE REFUGEES AND ASYLUM SEEKERS?	20
INTERNATIONAL, DOMESTIC AND REGIONAL LAW	22
REFUGEES AND ASYLUM SEEKERS IN CAMBODIA	28
REASONS FOR BECOMING A REFUGEES OR ASYLUM SEEKER	30
THE EXPERIENCE OF REFUGEES AND ASYLUM SEEKERS	31
PARTICULAR ISSUES AFFECTING WOMEN AND CHILDREN	34
COMPLIANCE WITH INTERNATIONAL LAW AND IMPLEMENTATION OF DOMESTIC LAW	35
AVENUES FOR FUTURE ACTION	37
PARTNERS IN ACTION	38

## **Chapter three**

<b>STATELESSNESS</b>	<b>39</b>
WHAT IS STATELESSNESS?	40
INTERNATIONAL, DOMESTIC AND REGIONAL LAW	41
STATELESSNESS IN CAMBODIA	46
REASONS FOR STATELESSNESS	49
THE EXPERIENCE OF STATELESSNESS	51
PARTICULAR ISSUES AFFECTING WOMEN AND CHILDREN	52
COMPLIANCE WITH INTERNATIONAL LAW AND IMPLEMENTATION OF DOMESTIC LAW	53
AVENUES FOR FUTURE ACTION	54
PARTNERS IN ACTION	56

<b>Chapter four</b>	
<b>LABOUR MIGRATION</b>	<b>57</b>
WHAT IS LABOUR MIGRATION?	58
INTERNATIONAL, DOMESTIC AND REGIONAL LAW	59
LABOUR MIGRATION IN CAMBODIA	77
REASONS FOR LABOUR MIGRATION	83
THE EXPERIENCE OF LABOUR MIGRATION	84
PARTICULAR ISSUES AFFECTING WOMEN AND CHILDREN	92
COMPLIANCE WITH INTERNATIONAL LAW AND IMPLEMENTATION OF DOMESTIC LAW	95
AVENUES FOR FUTURE ACTION	97
PARTNERS IN ACTION	99
<b>Chapter five</b>	
<b>TRAFFICKING IN PERSONS</b>	<b>101</b>
WHAT IS TRAFFICKING IN PERSONS?	102
INTERNATIONAL, DOMESTIC AND REGIONAL LAW	104
TRAFFICKING IN PERSONS IN CAMBODIA	119
REASONS FOR TRAFFICKING IN PERSONS	122
THE EXPERIENCE OF TRAFFICKING IN PERSONS	123
PARTICULAR ISSUES AFFECTING WOMEN AND CHILDREN	133
COMPLIANCE WITH INTERNATIONAL LAW AND IMPLEMENTATION OF DOMESTIC LAW	135
AVENUES FOR FUTURE ACTION	140
PARTNERS IN ACTION	142
<b>Chapter six</b>	
<b>LAND DISPUTES AND FORCED EVICTIONS</b>	<b>145</b>
WHAT ARE LAND DISPUTES AND FORCED EVICTIONS?	146
INTERNATIONAL, DOMESTIC AND REGIONAL LAW	148
LAND DISPUTES AND FORCED EVICTIONS IN CAMBODIA	160
REASONS FOR LAND DISPUTES AND FORCED EVICTIONS	166
THE EXPERIENCE OF LAND DISPUTES AND FORCED EVICTIONS	167
PARTICULAR ISSUES AFFECTING WOMEN AND CHILDREN	171
COMPLIANCE WITH INTERNATIONAL LAW AND IMPLEMENTATION OF DOMESTIC LAW	173
AVENUES FOR FUTURE ACTION	178
PARTNERS IN ACTION	179
<b>LIST OF RESOURCES</b>	<b>182</b>

## *List of Abbreviations*

<b>ACMW</b>	ASEAN Committee on the Implementation of the <i>ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers</i>
<b>AICHR</b>	ASEAN Intergovernmental Commission on Human Rights
<b>ASEAN</b>	Association of Southeast Asian Nations
<b>ASEAN Practitioner Guidelines</b>	<i>ASEAN Practitioner Guidelines on Effective Criminal Justice Responses to Trafficking in Persons</i>
<b>Bali Process</b>	Bali Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime
<b>Basic Principles on Evictions</b>	See paragraph 6.2.1.9
<b>Basic Principles on the Use of Force and Firearms</b>	<i>United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials 1990</i>
<b>BFC</b>	Better Factories Cambodia
<b>BWI</b>	Building and Wood Workers' International
<b>C.CAWDU</b>	Coalition of Cambodian Apparel Workers' Democratic Union
<b>CAMBOW</b>	Cambodian Committee of Women
<b>CCHR</b>	Cambodian Center for Human Rights
<b>CDRI</b>	Cambodia Development Resource Institute
<b>CEDAW Committee</b>	United Nations Committee on the Elimination of Discrimination Against Women
<b>CERD</b>	United Nations Committee on the Elimination of Racial Discrimination
<b>CESCR</b>	United Nations Committee on Economic, Social and Cultural Rights
<b>CESCR Eviction Guidelines</b>	See paragraph 6.2.1.8.
<b>CFS</b>	United Nations Committee on World Food Security
<b>CLEC</b>	Cambodian Legal Education Centre
<b>CMDGs</b>	Cambodian Millennium Development Goals
<b>COMMIT</b>	Coordinated Mekong Ministerial Initiative against Human Trafficking
<b>COMMIT SPA III</b>	<i>COMMIT 3<sup>rd</sup> Sub-Regional Plan of Action for 2011-2013</i>
<b>COMMIT Taskforce</b>	Coordinated Mekong Ministerial Initiative Against Trafficking Task Force in Cambodia
<b>CPP</b>	Cambodian People's Party
<b>CWCC</b>	Cambodia Women's Crisis Center
<b>DCC</b>	District Cadastral Commission
<b>ECCC</b>	Extraordinary Chambers in the Courts of Cambodia
<b>ELC</b>	economic land concession
<b>EPS</b>	Employment Permit Scheme (Republic of Korea)
<b>ERW</b>	explosive remnants of war
<b>ETA</b>	Emergency Transit Agreement
<b>FAO</b>	United Nations Food and Agriculture Organisation
<b>GMAC</b>	Garment Manufacturers Association in Cambodia
<b>GMAGs</b>	Gender Mainstreaming Action Groups
<b>GMS</b>	Greater Mekong Sub-Region
<b>HDI</b>	Human Development Index
<b>HRTF</b>	Housing Rights Task Force
<b>HRW</b>	Human Rights Watch
<b>ICRC</b>	International Committee of the Red Cross
<b>IDCs</b>	immigration detention centres
<b>IDPs</b>	internally displaced persons
<b>ILO</b>	International Labour Organisation
<b>IMTM</b>	Cambodian Inter-Ministerial Taskforce for Migration

<b>IOM</b>	International Organisation for Migration
<b>JRS</b>	Jesuit Refugee Service
<b>Korean MoL</b>	Ministry of Labour of the Republic of Korea
<b>Law Enforcement Code of Conduct</b>	<i>United Nations Code of Conduct for Law Enforcement Officials</i>
<b>LICADHO</b>	Cambodian League for the Promotion and Defence of Human Rights (Ligue Cambodgienne de Defense des Droits de l'Homme)
<b>LMAP</b>	Land Management and Administration Project
<b>LSCW</b>	Legal Support for Children and Women
<b>MMTC</b>	ASEAN Ministerial Meeting on Transnational Crime
<b>MoFAIC</b>	Cambodian Ministry of Foreign Affairs and International Cooperation
<b>MoI</b>	Cambodian Ministry of Interior
<b>MoLMUPC</b>	Cambodian Ministry of Land Management, Urban Planning and Construction
<b>MoLVT</b>	Cambodian Ministry of Labour and Vocational Training
<b>MoP</b>	Cambodian Ministry of Planning
<b>MoSAVY</b>	Cambodian Ministry of Social Affairs, Veterans and Youth Rehabilitation
<b>MoU</b>	Memorandum of Understanding
<b>MoWA</b>	Cambodian Ministry of Women's Affairs
<b>MTOSB</b>	Manpower Training and Overseas Sending Board
<b>NAP on Violence on Women</b>	<i>National Action Plan to Prevent Violence on Women 2009 – 2012</i>
<b>NARLD</b>	National Authority for the Resolution of Land Disputes
<b>National Committee to Lead STSLS</b>	National Committee to Lead the Suppression of Human Trafficking, Smuggling, Labour Exploitation and Sexual Exploitation in Women and Children
<b>NCC</b>	National Cadastral Commission
<b>NIS</b>	Cambodian National Institute of Statistics
<b>NPA on STSLS</b>	<i>National Plan of Action on the Suppression of Human Trafficking, Smuggling, Labour and Sexual Exploitation 2011 – 2013</i>
<b>NRIII</b>	<i>Nearly Ratanak III 2009 – 2013</i>
<b>NSDP</b>	<i>National Strategic Development Plan 2006 – 2010</i>
<b>NSDP Update</b>	<i>National Strategic Development Plan Update 2009 – 2013</i>
<b>NV Process</b>	National Verification Process (Thailand)
<b>OAS</b>	Organisation of American States
<b>OHCHR</b>	United Nations Office of the High Commissioner for Human Rights
<b>OHS</b>	occupational health and safety
<b>PCC</b>	Provincial Cadastral Commission
<b>PSP Document</b>	Preliminary Stay Permission document
<b>RCAF</b>	Royal Cambodian Armed Forces
<b>RCF</b>	Regional Cooperation Framework
<b>Regional Roundtable on Statelessness</b>	Regional Expert Roundtable on Good Practices for the Identification, Prevention and Reduction of Statelessness and the Protection of Stateless Persons in South East Asia
<b>RGC</b>	Royal Government of Cambodia
<b>RS</b>	<i>Rectangular Strategy for Growth, Employment, Equity and Efficiency in Cambodia</i>
<b>RSD</b>	refugee status determination
<b>RSII</b>	<i>Rectangular Strategy for Growth, Employment, Equity and Efficiency in Cambodia – Phase II</i>
<b>RSO</b>	Regional Support Office
<b>SLC</b>	social land concession
<b>SOMTC</b>	ASEAN Senior Officials Meeting on Transnational Crime
<b>STT</b>	Sahmakum Teang Tnaut
<b>Tenure Governance Guidelines</b>	<i>CFS Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security</i>
<b>TF-AMW</b>	Task Force on ASEAN Migrant Workers

## State of Migration

An overview of forced displacement in Cambodia

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<b>UN Special Rapporteur on Adequate Housing</b>	United Nations Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living
<b>UN Women</b>	United Nations Entity for Gender Equality and the Empowerment of Women
<b>UN.GIFT</b>	United Nations Global Initiative to Fight Trafficking
<b>UNCT</b>	United Nations Country Team
<b>UNDP</b>	United Nations Development Programme
<b>UNESCAP</b>	United Nations Economic and Social Commission for Asia and the Pacific
<b>UNHCR</b>	United Nations High Commissioner for Refugees
<b>UNIAP</b>	United Nations Inter-Agency Project on Human Trafficking
<b>UNICEF</b>	United Nations Children’s Fund
<b>UNODC</b>	United Nations Office on Drugs and Crime
<b>UNTAC</b>	United Nations Transitional Authority in Cambodia
<b>WCCCs</b>	Women’s and Children’s Consultative Committees

## List of Key Terms

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<b>3D Jobs</b>	Jobs which are dirty, dangerous and degrading (or disliked).
<b>accountability (political)</b>	The acknowledgment and assumption of responsibility for actions, decisions and policies by the government and government officials.
<b>Administrative Commission</b>	A government body established to resolve disputes over registered land. See paragraph 6.2.2.19.
<b>Arbitration Council Awards</b>	An alternative dispute resolution tribunal responsible for resolving workplace disputes and other disputes concerning labour rights. After hearing a dispute the Arbitration Council issues a decision (or ‘Award’). Whether or not the Award is binding and enforceable against the parties will depend on whether they mutually agreed to have the dispute arbitrated by the Arbitration Council.
<b>asylum seeker</b>	See paragraph 2.1.2.1.
<b>Cadastral Commissions</b>	The National, Provincial and District Cadastral Commissions are dispute resolution bodies established to resolve disputes concerning unregistered land in areas outside those which have been designated for systematic land registration. See paragraphs 6.2.2.4 and 6.2.2.18.
<b>cadastre</b>	See paragraph 6.1.1.5.
<b>Chbab Srey</b>	The traditional code of conduct which sets moral guidelines for the appropriate behaviour of women in Cambodian society.
<b>complementary protection</b>	Legal protections afforded to people who have fled their homes who may or may not satisfy the international legal definition of a refugee and be entitled to protection under the Refugee Convention.
<b>convention (international law)</b>	A written agreement between States on certain matters; a legally-binding treaty.
<b>country of asylum</b>	The country in which an asylum seeker seeks protection as a refugee.
<b>customary international law</b>	International law which is derived from custom. Custom is established by the consistent conduct of States which act in a certain way out of a belief that they are legally bound to do so. Customary international law is binding on all States and may or may not be contained in a treaty.
<b>de facto stateless person</b>	See paragraph 3.1.2.2.
<b>de jure stateless person</b>	See paragraph 3.1.2.1.
<b>debt bondage</b>	A situation where a person pledges his or her personal services or the services of a person under his or her control as security for a debt (loan), if the value of those services as reasonably assessed is not applied towards the repayment of the debt or the length and nature of those services are not limited and defined.

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<b>documented migrant worker</b>	A migrant worker with valid travel and work permits. See paragraph 4.1.2.2.
<b>domestic worker</b>	Workers who are employed to perform domestic tasks within the home of their employer. See paragraph 4.1.2.1.
<b>economic migrant</b>	A person who travels from one country or area to another in order to improve his or her standard of living.
<b>extraordinary acquisitive possession</b>	See paragraph 6.2.2.10.
<b>food insecurity</b>	The state or risk of not being able to access at all times sufficient, safe and nutritious food to maintain a healthy and active life.
<b>forced eviction</b>	See paragraph 6.1.2.1
<b>forced labour or services</b>	All work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered him or herself voluntarily.
<b>Human Development Index (HDI)</b>	A composite index which measures a country's average achievements in three basic aspects of human development: life expectancy at birth, knowledge (literacy and education) and a decent standard of living.
<b>internal labour migration</b>	See paragraph 4.1.1.1.
<b>internal migrant worker</b>	A migrant worker who moves to find work within his or her own country. See paragraph 4.1.2.1.
<b>internally displaced persons (IDPs)</b>	People who are forced to flee their homes but remain within the borders of their country.
<b>international labour migration</b>	See paragraph 4.1.1.1.
<b>irregular migration</b>	See paragraph 4.1.1.1.
<b><i>jus sanguinis</i></b>	See paragraph 3.1.1.2.
<b><i>jus soli</i></b>	See paragraph 3.1.1.2.
<b>Khmer Krom</b>	An ethnic minority group from southern Vietnam. See paragraph 3.3.2.3.
<b>land concession</b>	See paragraph 6.2.2.14.
<b>Land Register</b>	See paragraph 6.2.2.4.
<b>land registration system</b>	See paragraph 6.1.1.2.
<b>land tenure</b>	See paragraph 6.1.1.6.
<b>land tenure insecurity</b>	See paragraph 6.1.1.7.
<b>liberal democracy</b>	A form of representative democracy based on the principles of free and fair elections and a competitive political process with multiple and distinct political parties.
<b>Memorandum of Understanding (MoU)</b>	A non-binding written agreement between two or more States expressing a common intention to act on certain matters.
<b>migrant worker</b>	A person engaged in a remunerated activity in a county of which he or she is not a national. See paragraph 4.1.2.1.
<b>minor</b>	A child under 18 years of age.
<b>Montagnard</b>	An ethnic minority group living primarily in the central-highlands region of Vietnam. See paragraph 2.3.2.3.
<b>mutual legal assistance</b>	See paragraph 5.2.4.5 (note 385).
<b>National Authority for the Resolution of Land Disputes (NARLD)</b>	A dispute resolution body established to resolve land disputes. See paragraph 6.2.2.22.
<b>nationality</b>	The legal relationship between a person and a State. See paragraph 3.1.1.2.
<b>naturalisation</b>	The legal process by which a foreigner is granted the citizenship of a State.
<b><i>non-refoulement</i></b>	See <i>refoulement</i> .

## State of Migration

An overview of forced displacement in Cambodia

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<b>organised criminal group</b>	For the purpose of the CATOC and its Protocols: a structured group of three or more persons existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established under the CATOC, in order to obtain, directly or indirectly, a financial or other material benefit.
<b>pluralism (political)</b>	The principle that power should be shared amongst diverse and independent sources, including multiple and distinct political parties.
<b>prakas</b>	See paragraph 1.2.3.1.
<b>protocol (international law)</b>	An agreement or treaty which supplements an earlier treaty or convention.
<b>protracted stateless situations</b>	Situations of statelessness which continue unresolved for decades or generations. See paragraph 3.1.2.4.
<b>refoulement</b>	See paragraph 2.2.1.2.
<b>refugee</b>	See paragraph 2.1.1.2.
<b>region</b>	Southeast Asia, comprising Cambodia, Brunei Darussalam, Indonesia, Lao PDR, Malaysia, Myanmar (Burma), the Philippines, Singapore, Thailand, Timor-Leste and Vietnam.
<b>regular migration</b>	See paragraph 4.1.1.1.
<b>Rohingya</b>	A stateless ethnic minority group. See paragraphs 2.3.2.3 and 3.3.2.2.
<b>rule of law</b>	The principle that all people and institutions, including the government, are subject and accountable to law that is fairly applied and enforced.
<b>sarachor</b>	See paragraph 1.2.3.1.
<b>signatory</b>	A State which has signed (but not ratified) a convention. For the obligations of signatories under international law see note 182.
<b>slavery or practices similar to slavery</b>	When any or all of the powers attaching to the right of ownership are exercised over a person. Practices similar to slavery include debt bondage and practices whereby women and children are treated as property.
<b>smuggling of migrants</b>	The procurement of the illegal entry of a person into a State of which the person is not a national or a permanent resident in order to obtain, directly or indirectly, a financial or other material benefit.
<b>sporadic land registration</b>	See paragraph 6.2.2.5.
<b>State</b>	A country, or the civil government of a country.
<b>State Party</b>	A State which has ratified or acceded to an international treaty and is legally bound by its terms.
<b>stateless person</b>	See <i>de jure</i> stateless person.
<b>statelessness</b>	A legal term describing a person's lack of nationality. See paragraph 3.1.1.1.
<b>sub-decree</b>	See paragraph 1.2.3.1.
<b>systematic land registration</b>	See paragraph 6.2.2.5.
<b>title</b>	A legal right of ownership of land. See paragraph 6.1.1.2.
<b>trafficking in persons</b>	See section 5.1.1.
<b>transnational in nature</b>	For the purpose of the CATOC and its Protocols: an act which is: (a) committed in more than one State; (b) committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; (c) committed in one State but involves an organised criminal group that engages in criminal activities in more than one State; or (d) committed in one State but has substantial effects in another State.
<b>transparency (political)</b>	Openness and accountability in decision-making processes.
<b>Uighur</b>	An ethnic minority group living primarily in north-western China. See paragraph 2.3.2.3.
<b>undocumented migrant worker</b>	A migrant worker without valid travel and work permits. See paragraph 4.1.2.2.

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## List of Legal Instruments

### International legal instruments

Abbreviation	Name	Cambodia a State Party?
<b>Apartheid Convention</b>	<i>United Nations International Convention on the Suppression and Punishment of the Crime of Apartheid 1973</i>	✓
<b>CAC</b>	<i>United Nations Convention Against Corruption 2003</i>	✓
<b>Cartagena Declaration</b>	<i>Cartagena Declaration on Refugees 1984</i>	n/a
<b>CAT</b>	<i>United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984</i>	✓
<b>CATOC</b>	<i>United Nations Convention Against Transnational Organised Crime 2000</i>	✓
<b>CEDAW</b>	<i>United Nations Convention on the Elimination of All Forms of Discrimination Against Women 1979</i>	✓
<b>Cluster Munitions Convention</b>	<i>United Nations Convention on Cluster Munitions 2008</i>	✗
<b>CRC</b>	<i>United Nations Convention on the Rights of the Child 1989</i>	✓
<b>CRC Optional Protocol</b>	<i>United Nations Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography 2000</i>	✓
<b>CRPD</b>	<i>United Nations Convention on the Rights of Persons with Disabilities 2006</i>	Signatory only
<b>Domestic Workers Convention</b>	<i>International Labour Organisation Domestic Workers Convention 2011 (No. 189)</i>	
<b>Genocide Convention</b>	<i>United Nations Convention on the Prevention and Punishment of the Crime of Genocide 1948</i>	✓
<b>ICCPR</b>	<i>United Nations International Covenant on Civil and Political Rights 1966</i>	✓
<b>ICERD</b>	<i>United Nations International Convention on the Elimination of All Forms of Racial Discrimination 1966</i>	✓
<b>ICESCR</b>	<i>United Nations International Covenant on Economic, Social and Cultural Rights 1966</i>	✓
<b>ICPED</b>	<i>United Nations International Convention for the Protection of All Persons from Enforced Disappearance 2006</i>	✗
<b>ICRMW</b>	<i>United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families 1990</i>	Signatory only
<b>ILO Conventions</b>	See section 4.2.1.	n/a
<b>ILO Declaration</b>	<i>ILO Declaration on Fundamental Principles and Rights at Work 1998</i>	
<b>ILO Recommendations</b>	See section 4.2.1.	
<b>Migrant Smuggling Protocol</b>	<i>United Nations Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organised Crime 2000</i>	✓
<b>Mine Ban Convention</b>	<i>United Nations Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction 1997</i>	✓
<b>OAU Refugee Convention</b>	<i>Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa 1969</i>	n/a

## State of Migration

An overview of forced displacement in Cambodia

Abbreviation	Name	Cambodia a State Party?
<b>Paris Peace Agreement</b>	<i>Agreements on a Comprehensive Political Settlement of the Cambodia Conflict</i> signed on 23 October 1991	n/a
<b>Refugee Convention and its Protocol</b>	<i>United Nations Convention Relating to the Status of Refugees 1951 and its Protocol Relating to the Status of Refugees 1967</i>	✓
<b>Rome Statute</b>	<i>United Nations Rome Statute of the International Criminal Court</i>	✓
<b>Statelessness Convention 1954</b>	<i>United Nations Convention Relating to the Status of Stateless Persons 1954</i>	✗
<b>Statelessness Convention 1961</b>	<i>United Nations Convention on the Reduction of Statelessness 1961</i>	✗
<b>Supplementary Slavery Convention</b>	<i>United Nations Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery 1956</i>	✓
<b>Trafficking Protocol</b>	<i>United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organised Crime 2000</i>	✓
<b>UDHR</b>	<i>Universal Declaration of Human Rights 1948</i>	✓
<b>VCLT</b>	<i>United Nations Vienna Convention on the Law of Treaties 1969</i>	Signatory only
	<i>United Nations Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live 1985</i>	n/a

## Cambodian legal instruments

Abbreviation	Name
<b>Cambodian TIP Law</b>	<i>Law on Suppression of Human Trafficking and Sexual Exploitation 2008</i>
<b>Civil Code</b>	<i>Civil Code 2007</i>
<b>Constitution</b>	<i>Constitution of the Kingdom of Cambodia 1993</i>
<b>Labour Law</b>	<i>Labour Law 1997</i>
<b>Land Law</b>	<i>Land Law 2001</i>
<b>Law on Anti-Corruption</b>	<i>Law on Anti-Corruption 2010</i>
<b>Law on Domestic Violence</b>	<i>Law on the Prevention of Domestic Violence and the Protection of Victims 2005</i>
<b>Law on Foreign Property Ownership</b>	<i>Law on Providing Foreigners with Ownership Rights in Private Units of Co-Owned Buildings 2010</i>
<b>Law on Immigration</b>	<i>Law on Immigration 1994</i>
<b>Law on Marriage and Family</b>	<i>Law on Marriage and Family 1989</i>
<b>Law on Nationality</b>	<i>Law on Nationality 1996</i>
<b>Order on ELCs</b>	<i>Order on the Measures to Strengthen and Increase the Effectiveness of the Management of Economic Land Concessions (7 May 2012)</i>
<b>Penal Code</b>	<i>Penal Code 2009</i>
<b>Penal Procedure Code</b>	<i>Code of Penal Procedure 2007</i>
<b>Sub-decree on Civil Registration</b>	<i>Sub-decree no. 103 on Civil Status (Civil Registration) 2000</i>
<b>Sub-decree on ELCs</b>	<i>Sub-decree no. 146 on Economic Land Concessions 2005</i>
<b>Sub-decree on ID Cards</b>	<i>Sub-decree no. 36 on Khmer Nationality Identity Cards 1996</i>
<b>Sub-decree on Indigenous Land</b>	<i>Sub-decree no. 83 on Procedures of Registration of Land of Indigenous Communities 2009</i>

Abbreviation	Name
Sub-decree on MTOSB	<i>Sub-decree no. 70 on the Creation of the Manpower Training and Overseas Sending Board 2006</i>
Sub-decree on Private Recruitment Agencies	<i>Sub-Decree no. 190 on the Management of the Sending of Cambodian Workers Abroad Through Private Recruitment Agencies 2011</i>
Sub-decree on RSD	<i>Sub-decree no. 224 on Procedure for Recognition as a Refugee or Providing Asylum Rights to Foreigners in the Kingdom of Cambodia 2009</i>
Sub-decree on SLCs	<i>Sub-decree no. 19 on Social Land Concessions 2003</i>
Sub-decree on Sporadic Land Registration	<i>Sub-decree no. 48 on Sporadic Land Registration 2002</i>
Sub-decree on State Land Management	<i>Sub-decree no. 118 on State Land Management 2005</i>
Sub-decree on Systematic Land Registration	<i>Sub-decree no. 46 on the Procedures to Establish Cadastral Index Map and Land Register 2002</i>
Sub-decree on the Cadastral Commission	<i>Sub-decree no. 47 on Organization and Functioning of the Cadastral Commission 2002</i>
	<i>Prakas no. 108 on Education of HIV/AIDS, Safe Migration and Labour Rights for Cambodian Workers Abroad 2006</i>
	<i>Sarachor no. 2647 on Directing Recruitment, Training, Transferring and Management of Cambodian Migrants to Work Abroad 2010</i>
	<i>Sub-decree no. 168 on the Composition of the National Authority for the Resolution of Land Disputes 2008</i>

## Regional legal instruments

Abbreviation	Name
ACTIP	<i>ASEAN Convention on Trafficking in Persons (prospective)</i>
ADHR	<i>ASEAN Declaration on Human Rights (prospective)</i>
ADMW	<i>ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers 2007</i>
ADTIP	<i>ASEAN Declaration Against Trafficking in Persons, Especially Women and Children 2004</i>
COMMIT MoU	<i>Memorandum of Understanding on Cooperation against Trafficking in Persons in the Greater Mekong Sub-region (2004)</i>
ETA	<i>Memorandum of Agreement Concerning the Emergency Transit of Refugees (Emergency Transit Agreement) between the Philippines, IOM and UNHCR (2009)</i>
Malaysian Recruitment Procedures	<i>Bilateral agreement on Recruitment Procedures for Cambodian Nationals for Employment in Malaysia between Cambodia and Malaysia (1999)</i>
MLA Treaty	<i>ASEAN Treaty on Mutual Assistance in Criminal Matters 2004</i>
MoU on EPS	<i>Memorandum of Understanding on the Sending of Workers to the Republic of Korea under the Employment Permit System between Cambodia and the Republic of Korea (2006)</i>
Thai-Cambodian Labour MoU	<i>Memorandum of Understanding in the Employment of Workers between Cambodia and Thailand (2003)</i>
	<i>Agreement on Bilateral Cooperation for Eliminating Trafficking in Women and Children and Assisting the Victims of Trafficking between Cambodia and Vietnam (2005)</i>
	<i>Agreement on Cooperation Against Vietnam-Cambodia Cross-border Human Trafficking, Especially Trafficking in Women and Children between Cambodia and Vietnam (2007)</i>
	<i>ASEAN Convention on the Protection and Promotion of the Rights of Migrant Workers (prospective)</i>

## State of Migration

An overview of forced displacement in Cambodia

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Abbreviation	Name
	<i>Cooperation Agreement on Standard Operating Procedures for the Identification and Repatriation of Trafficked Victims</i> between Cambodia and Vietnam (2009)
	<i>Guidelines for Cooperation on Criminal Justice Process Trafficking-Related Crimes</i> between Cambodia and Thailand (2006)
	<i>Memorandum of Understanding on Bilateral Cooperation for Eliminating Trafficking in Children and Women and Assisting Victims of Trafficking</i> between Cambodia and Thailand (2003)
	<i>Memorandum of Understanding on the Field of Exchange of Manpower</i> between Cambodia and Kuwait (2009)
	<i>Memorandum of Understanding</i> (on the sending of Cambodian workers to Malaysia) between Cambodia and Malaysia (prospective)
	<i>Memorandum of Understanding</i> (on the sending of Cambodian workers to Qatar) between Cambodia and Qatar (2011)
	<i>Memorandum of Understanding</i> (on trafficking in persons) between Cambodia and Malaysia (prospective)

## Other legal instruments

### Malaysia

- *Anti-Trafficking in Persons Act 2007* (**Malaysian TIP Law**)
- *Employment (Restriction) Act 1968*
- *Employment Act 1955*
- *Immigration Act 1959-1963* and *Immigration Regulations 1963*
- *Industrial Relations Act 1967*
- *Penal Code*
- *Workmen's Compensation Act 1952*

### Republic of Korea

- *Act on Foreign Workers' Employment, Etc. 2003* (**EPS Act**)
- *Employment Insurance Act 1993*
- *Framework Act on Labour Welfare 2001*
- *Immigration Control Act 1963*
- *Industrial Accident Compensation Insurance Act 1994*
- *Labour Standards Act 1997*
- *Minimum Wage Act 1986*
- *Trade Union and Labour Relations Adjustment Act 1997*

### Thailand

- *Alien Working Act 2008 B.E. 2551*
- *Anti-Trafficking in Persons Act 2008 B.E. 2551* (**Thai TIP Law**)
- *Immigration Act 1979 B.E. 2522*
- *Labour Protection Act 1998 B.E. 2541*
- *Labour Relations Act 1975 B.E. 2518*
- *Ministerial Regulation on Protection of Domestic Workers B.E. 2547*
- *Ministerial Regulation on Protection of Labour in the Agricultural Sector B.E. 2547*
- *Penal Code B.E. 2499*
- *Social Security Act 1990 B.E. 2533*
- *Workmen's Compensation Act 1994 B.E. 2537*

### Vietnam

- *Law on Prevention, Suppression Against Human Trafficking 2011* (**Vietnamese TIP Law**)
- *Law on Vietnamese Nationality 2008*
- *Penal Code*

# Foreword

The story of Cambodia evokes some of the most poignant memories of forced displacement in the whole of Asia. From the 1970s until the dawn of the new century it experienced the dislocation of its entire population as the Khmer Rouge forced people to leave their homes to create its new agrarian society. Two million of its people subsequently faced death by starvation or execution while the survivors endured the atrocities of forced labour, rape and submission. The majority of refugees fleeing Cambodia remained in limbo for thirteen years in camps along the Cambodian border, while others resettled to Japan, Canada, the United States, Australia, France and other countries in Europe. Ongoing civil war culminated in the Peace Agreement of 1991 and the repatriation of 400,000 displaced persons from camps in Thailand, Vietnam and Indonesia. Cambodia's rich and fertile land was left scarred and hazardous because of landmines and other explosive remnants of war.

In 2012, small numbers of refugees still come to Cambodia seeking asylum, but they are now joined by other displaced groups of people on the move: labour migrants, trafficked persons and forced evictees. Meanwhile, a number of those who had previously been displaced suffer from the lack of an official identity, including many people of Vietnamese ethnicity who face the risk of statelessness.

The Jesuit Refugee Service has been involved with Cambodian displaced populations since 1980 and remains so today. We continue to be concerned for Cambodians who leave their homes for days or seasons or years in search of opportunities to earn enough money to support their families. Some of these migrants are trafficked by others who use displacement to make a profit and satisfy their own greed. Land grabbing and land evictions are also causing significant internal forced displacement.

We have previously released studies such as *Restoration of Life* by Nani Garcia Rodicio on the situation of people who were repatriated from the border camps, *Untitled* by Nick Henderson and other authors on land titling issues and evictions, *The Search* by Taya Hunt and Nikola Errington on protection space for asylum seekers in our region and a summary of perceptions on the role of the United Nations in Cambodia by Kateena O'Gorman.

This study, entitled *State of Migration*, was initiated by JRS to help all actors and partners who strive for a truly just and compassionate Cambodia to understand the situation of forced displacement, particularly in terms of the applicable legal frameworks and possible avenues for collaborative future action. It draws together five distinct but intimately interconnected forms of displacement affecting Cambodia today: refugees and asylum seekers, statelessness, labour migration, trafficking in persons and land disputes and evictions.

Madeline Gleeson, an Australian lawyer and John Monash Scholar, has compiled this research in a thoroughly systematic and thoughtfully creative way. JRS hopes that it encourages governments, international organisations and civil society to dialogue and take action to achieve tangible results which improve the lives of all people in Cambodia, particularly the poorest and most vulnerable.

May the memories of the past and the deep, unimaginable suffering which has been endured urge us all to ensure that everyone who lives or seeks protection in Cambodia has a place they can truly call home. At the same time, may governments in the region and beyond ensure that migrant workers live in dignity with their rights respected and that the trafficking of persons for abusive reasons be abolished. This is our hope and our commitment.

Denise Coghlan  
JRS Country Director Cambodia

# Introduction

## Purpose of this book

Cambodia is a country on the move. Refugees, asylum seekers, stateless persons, labour migrants, victims of trafficking in persons, parties to land disputes and forced evictees are being compelled to move into, out of and within Cambodia in search of safety, a home and a better quality of life. Most of these people are not alone on their journeys: both within Cambodia and in the region they are accompanied by a diverse and multi-layered network of local and international organisations, human rights defenders, United Nations agencies, religious groups and other civil society organisations and support services. Certain groups also enjoy the support of the Royal Government of Cambodia which has demonstrated an increasing political will to extend protection to some people affected by migration and displacement. Collectively, these organisations and entities have generated a mass of data, research and experience concerning the movement of people in Cambodia.

Despite this rich network of legal and social support and the wealth of knowledge which has been accumulated about forced displacement, the full benefit of this experience is not equally available to all persons working in these fields. Few organisations work with all five groups of displaced persons identified in this book, despite the fact that their symbiotic inter-relationship informs the structure and nature of Cambodian society. Confusion about difficult but important legal concepts and their application in the context of Cambodia exists within local and international organisations and amongst government and law-enforcement officers. In some areas there is ‘too much’ information and, faced with the constant stream of comprehensive research, reports and government regulations, some smaller organisations which lack the capacity to keep abreast of these developments may fall behind. Local and international organisations with a more narrow focus on one or another form of displacement may not have an opportunity to engage with the full range of issues which shape human movement in and around Cambodia. The pathways for experience-sharing and collaboration between grass-roots workers and those who operate at the national, regional and international levels (both as civil society workers and law-enforcement) remain relatively unexplored.

In light of the above, the purpose of this book is to offer a synthesis of the mass of information available on forced displacement in Cambodia and to harmonise the perspectives of key stakeholders on the ground and at higher levels. It seeks to present a snapshot of this information in an accessible form which demonstrates the links between various groups of people on the move. Within each chapter, particular attention is given to the legal terminology and instruments which provide the framework for all other action on displacement. Special attention is also given to the unique experiences of women and children, in recognition of the fact that these groups are often the most vulnerable and the least represented in the processes of decision-making and policy-formation.

## How to use this book

This book has been designed as a working tool. All paragraphs are individually numbered and internal paragraph references draw links between various interrelated sections. Key terms are placed in **bold** where they first appear and defined in the List of Key Terms on page vi. The List of Legal Instruments on page ix sets out the abbreviations for key legal instruments as they appear in the text and provides an overview of the international human rights law instruments which apply in Cambodia.

For ease of reference, chapters 2 to 6 follow an identical structure. Each chapter deals with a different aspect of forced displacement and opens with a general introduction to the concept. The following sections within each chapter look at: the relevant international, domestic and regional law; the nature of the particular form of forced displacement within Cambodia; the reasons for displacement; the experience of displacement; particular issues affecting women and children; compliance with international standards and implementation of domestic laws; avenues for future action and partners in action.

Since it is intended to be a productive practical guide, the focus of this book is on information-sharing and the clarification of key concepts. Thus, rather than proposing specific recommendations, it presents possible avenues for future collaborative action on each of the forced displacement issues identified in chapters 2 to 6.

## Research and future action

The content of this publication is drawn from more than twenty years of experience of the Jesuit Refugee Service (**JRS**) and the Jesuit Service in Cambodia, an extensive literature review and interviews conducted with local and international organisations, United Nations agencies, law-enforcement officers and affected communities in Cambodia between March and June 2012.

All information drawn from publicly available reports has been referenced in the footnotes and/or bibliography. All interviews were conducted on the basis of confidentiality and, as such, a significant amount of the information and experiences reported in and informing the content of this book are not attributed to a specific source. Whilst this approach may not be academic protocol, it is a necessary consequence of the sensitive nature of the issues addressed in this book and the desire of certain contributors to remain anonymous.

Caution and judgement have been exercised in selecting which reports to include, especially where they relate to issues which fall outside the traditional fields of expertise of JRS Cambodia. Many of these issues are contentious and there is a considerable lack of consensus amongst local, international and governmental stakeholders as to key facts and the application of legal concepts. JRS Cambodia welcomes ongoing dialogue and engagement in these areas of difference, especially between government and civil society. All aspects of Cambodian society are encouraged to cooperate to forge a common understanding of forced displacement and to find positive and practical solutions for the future.

JRS Cambodia hopes that in time our neighbouring countries will prepare and produce similar publications, in recognition of the trans-national aspects of many types of forced displacement and the need to strengthen collaboration on issues which affect the region.

# *Executive Summary*

## **Chapter one: The Royal Kingdom of Cambodia**

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Forced displacement in Cambodia, in all its forms, is a product of the past and a reflection of the present. Emerging from a turbulent and destructive recent history of civil war and genocide, Cambodia has made incredible progress in rebuilding its institutions, elaborating a good framework for the protection of human rights and pushing forward towards social and economic development. Despite this progress, however, certain challenges continue to undermine respect for the rule of law and the effective exercise of basic rights by all sectors of the population. Of particular concern are the lack of an effective separation of powers, the weak institutional capacity and lack of independence of the judiciary, rigid suppression of social and political dissent and ongoing difficulties in promoting the advancement and protection of women and children. Whilst these areas of concern affect all Cambodians and foreigners living in Cambodia, they carry particular implications for persons experiencing displacement. Without the social and structural support of a home and in search of safety, peace and a means of making a living, forcibly displaced persons constitute the groups most in need of protection but least likely to be shielded from discriminatory and inadequate laws and practices.

## **Chapter two: Refugees and Asylum Seekers**

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Amongst the many categories of people forcibly displaced from their homes, refugees and asylum seekers are two distinct groups which have been universally recognised as warranting a unique suite of legal protections. Refugees and asylum seekers are forced from their homes by persecution on the grounds of innate or defining characteristics: their race, religion, nationality, membership of a particular social group or political opinion. Refugees have been denied the protection of their own State, and therefore are forced to move and seek asylum and protection from other governments. Whilst in some ways the experiences of refugees and asylum seekers may overlap with those of other displaced groups, persecution and an inability to return home set them apart as people with particular protection needs. Cambodia is not an asylum country of first choice for many refugees, and relatively small numbers of asylum seekers arrive in search of protection. Whilst Cambodia is a leader in the region in terms of establishing a refugee protection framework and ratifying the *United Nations Convention Relating to the Status of Refugees*, the implementation of this framework and compliance with Cambodia's international obligations remain incomplete. There have been a number of serious failures to protect refugees, especially in politically sensitive cases, and asylum seekers continue to face lengthy delays in the determination of their refugee claims.



**Chapter three: Statelessness**

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Statelessness is a critical problem hidden in plain sight in Cambodia. Just as stateless persons have fallen between the cracks of various domestic nationality law frameworks, so too has statelessness as a concept fallen between the cracks of international and local human rights discourses. Whilst rough estimates place the number of stateless people in Cambodia at between several thousand and several hundred thousand people, the concept of statelessness is not recognised by law, is not included in any national policies or programmes and is noticeably absent from almost all advocacy and action of local and international organisations (including United Nations agencies) operating in Cambodia. The failure of government and civil society to engage with this issue renders it all the more worthy of urgent attention. The lack of effective Cambodian nationality is a problem in the daily life of stateless and potentially stateless communities, including the Khmer Krom and ethnic-Vietnamese communities. Denied access to the services and rights of citizens, these communities face higher risks of unemployment, poverty, discrimination, landlessness, arrest and harassment. The condition of statelessness is synonymous with a failure to access a wide range of civil, political, economic, social and cultural rights. To the extent that statelessness arises as a result of gaps and flaws in the administrative and legal framework of Cambodia's nationality laws, steps should be taken to resolve protracted situations of statelessness which have been left to continue and worsen as an ongoing legacy of the country's destructive past.

**Chapter four: Labour Migration**

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In a country with substantial disparities between urban and rural employment opportunities, a local job market which is already oversaturated with unskilled workers and a lack of job opportunities for university graduates, labour migration is a practical inevitability for many Cambodians. Driven from their homes by economic necessity and the desire for a better quality of life, Cambodian workers are on the move both within the country and in the region to countries such as Thailand, Malaysia and the Republic of Korea. In these countries, and within Cambodia itself, the experience of labour migration can be both fruitful and destructive. In light of a regional resistance to being bound by international labour standards and significant gaps in the protective framework of domestic labour laws, migrant workers – especially undocumented and domestic migrant workers – have been left exposed to deceptive, abusive and exploitative recruitment and employment practices. Cambodian workers, who are amongst the poorest and most vulnerable in the region, are over-represented in low-wage, unskilled positions with long hours and poor and dangerous working conditions. Workers who seek to assert their rights through the avenues of freedom of expression, association and peaceful demonstration are suppressed. Government regulation and intervention on behalf of workers – especially foreign workers – is minimal or non-existent. By law and in practice, power is often concentrated in the hands of employers who exploit the facts that few Cambodians can afford to remain unemployed and that many are willing to take certain risks for the chance of upward economic mobility. The exploitative nature of employment can create considerable overlap between migration for employment and trafficking in persons and blur the lines between domestic labour laws, social policies and transnational crime.

## Chapter five: Trafficking in Persons

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Trafficking in persons is a complex and loaded concept in Cambodia. Whilst an international legal definition of the term has been in place since 2000 and governments in the region have increasingly carved out a place for it within their domestic legislative frameworks, it remains a difficult concept to ground in the reality of Southeast Asia. The margins between trafficking in persons and labour migration involving exploitation are not always clear, and research has revealed a lack of consensus even within civil society organisations in Cambodia about which cases involve trafficking and which do not. A strict application of the legal definition runs into further difficulties when it is applied to minors, especially in a country such as Cambodia which has relatively high rates of economically-active children and has long struggled with the commercial and sexual exploitation of underage girls and boys. Even those cases which fall clearly within the parameters of the domestic and international legal frameworks for trafficking may not be seen as such by the victims and perpetrators themselves. These conceptual and legal challenges, combined with corruption and weak institutions, have created an enabling environment for trafficking in persons both within Cambodia and in the countries whose trafficking networks are most closely entwined with those of Cambodia: Malaysia, Thailand and Vietnam. Traffickers in these countries enjoy relative impunity as they derive profit from the extraordinary suffering and abuse of male, female and child victims. Whilst Cambodia has taken certain commendable steps to prevent and, in some cases, to prosecute trafficking in persons, the protection of victims and the strengthening of the capacity of institutions to address trafficking issues remain urgent areas for future action.

## Chapter six: Land Disputes and Forced Evictions

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A more localised but equally contentious form of forcible displacement is taking place within villages and provinces in Cambodia. In 2012, more than a decade after the systems of land ownership and land registration established under the *Land Law 2001* were introduced, large tracts of land remain unregistered and communities living on prime real-estate have failed to be protected against the loss of their land and livelihoods as a result of land-grabbing and land-ownership disputes. Land tenure insecurity has become destructive of social development, local economies, Indigenous cultures and the environment. Disputes over land, which plague both urban and rural areas, can be divided into disputes as to the ownership and use of State land by private individuals (often in the context of the grant of a land concession over the land in question) and disputes which arise between private individuals as to the ownership of land (in particular where wealthy individuals claim to own entire stretches of land which have been lived on and cultivated by villagers for decades). Entire families, many of whom have inhabited their land since the 1980s or 1990s, are facing the risks of forcible and violent eviction from their homes, subsequent landlessness and intimidation and violence if they attempt to protest or assert their land and other human rights. As land disputes and forced evictions continue to affect increasingly large portions of the population, this form of forced displacement has come to occupy a critical position in political, social, economic and human rights discourses and evolved into one of the greatest threats to stability in Cambodia since peace was re-established at the end of the last century.

# Chapter One

## The Royal Kingdom of Cambodia

*“We, the people of Cambodia,  
Having known a grand civilization of a  
prosperous, powerful, and glorious nation whose  
prestige radiates like a diamond,  
Having endured sufferings and destructions  
and having experienced a tragic decline in the  
course of the two decades,  
Awakened, stood up with a resolute determination to  
strengthen the national unity, to preserve and defend  
Cambodia’s territory and its precious sovereignty and  
the prestige of Angkor civilization, and to restore  
Cambodia into an “Island of Peace” based on a multi-  
party liberal democratic regime guaranteeing human  
rights and the respect of law, and responsible for the  
destiny of the nation always evolving toward  
progress, development, prosperity, and glory...”*

– Preamble to the *Constitution of the Kingdom of Cambodia* 1993

## 1.1 Country overview

### 1.1.1 Key facts

1.1.1.1. The Kingdom of Cambodia covers an area of approximately 181,035 km<sup>2</sup> in Southeast Asia. It is bordered by Thailand in the northwest, Lao PDR in the northeast, Vietnam in the east and the Gulf of Thailand in the southwest. After emerging from civil war, genocide and political uncertainty, Cambodia has experienced significant economic growth since the 1990s and made progress in achieving peace and stability, establishing institutions, enacting laws and policies and becoming an active member of regional organisations. Steps have been taken to alleviate poverty and stimulate economic growth and social development to improve the lives of Cambodian citizens.

1.1.1.2. Despite these developments, the scars of Cambodia's violent and destructive past are yet to fade. The country continues to struggle with poverty, **food insecurity**, illiteracy, unemployment and a surplus of unskilled labour, land-ownership issues, significant and increasing urban-rural disparities, gender imbalances, corruption and **rule of law** difficulties. It remains a predominantly rural country which is one of the poorest and least developed in Asia.

### 1.1.2. Development indicators

1.1.2.1. In 2011 Cambodia was ranked 139 out of 187 countries in the **Human Development Index (HDI)** and 45 out of the 47 countries with medium human development.<sup>1</sup> Cambodia has one of the lowest human development rankings and some of the highest poverty rates in the East Asia and Pacific region. Table 2 shows a range of development indicators for Cambodia.

1.1.2.2. In 2003 Cambodia adopted nine Cambodian Millennium Development Goals (**CMDGs**) to achieve by 2015: (1) eradicating extreme poverty and hunger; (2) achieving universal primary education; (3) promoting gender equality and empowering women; (4) reducing child mortality; (5) improving maternal health; (6) combatting HIV/AIDS, malaria and other diseases; (7) ensuring environmental sustainability; (8) developing a global partnership for development and (9) de-mining, clearing explosive remnants of war (**ERW**) and victim assistance.

1.1.2.3. Cambodia's progress in achieving the CMDGs has been mixed. Remarkable progress has been achieved in reducing child mortality rates and combatting HIV/AIDS, malaria and other diseases. Good progress has been made in increasing access to primary education for all children, reducing gender disparities in certain sectors, addressing gender-based violence, demining and clearing ERW. Unfortunately, other goals and targets are unlikely to be achieved by 2015 due to a range of factors including the global economic crisis, the effect of sharp increases in food and fuel prices in Cambodia in 2008, disputes over land ownership and prevailing cultural and traditional attitudes about gender.<sup>2</sup>

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<sup>1</sup> United Nations Development Programme (**UNDP**), *Human Development Report 2011*, New York, 2011, p 126.

<sup>2</sup> See for example: Ministry of Planning (**MoP**), *Achieving Cambodia's Millennium Development Goals: Update 2010*, Phnom Penh, 14 September 2010; United Nations Children's Fund (**UNICEF**), *Annual Report 2010*, 10 January 2011.

**Table 1**  
**Demographic profile of Cambodia (2008 – 2012 estimates)<sup>3</sup>**

<b>Total population</b>	14.3 million	
<b>Population by gender</b>	male	48.6%
	female	51.4%
<b>Population by urban-rural residence</b>	urban	20.4%
	rural	79.6%
<b>Population by age group</b>	0 – 14	33.7%
	15 – 64	62.0%
	65+	4.3%
<b>Average age</b>	22.9 years	
<b>Population growth rate</b>	1.54%	
<b>Ethnicity</b>	Khmer (90%), ethnic-Vietnamese (5%), ethnic-Chinese (1%), other ethnic minorities (4%)	
<b>Religion</b>	Buddhism (95%), other (5%)	
<b>Languages</b>	Khmer, French, English and Indigenous languages	

**Table 2**  
**Key development indicators for Cambodia (2008 – 2011 estimates)<sup>4</sup>**

<b>HDI ranking</b>			
<b>Year</b>	<b>HDI value</b>	<b>Rank</b>	<b>Tier</b>
2011	0.523	139 out of 187 countries	Medium human development
<b>Poverty</b>			
Percentage of population living below the international poverty line of \$1.25 (PPP) <sup>5</sup>			28.3%
Percentage of population living in multidimensional poverty (suffering deprivations in education, health and standard of living)			52.0%
Percentage of population in severe multidimensional poverty			22.0%
<b>Health and well-being</b>			
	<b>Cambodia</b>	<b>Average for East Asia and Pacific Region</b>	
Life expectancy at birth	63.1 years	72.4 years	
Number of years a person can expect to live in full health	53 years	64 years	
Overall life satisfaction (out of 10)	4.1	-	
<b>Other development indicators</b>			
	<b>Total</b>	<b>Urban</b>	<b>Rural</b>
Percentage of households with access to improved water sources (piped water, tube/pipe well, protected dug well and rain water)	47.0%	76.0%	41.0%
Percentage of households with electricity as main source of light	26.4%	87.0%	13.1%
Percentage of households with toilet facility within premises	33.7%	81.5%	23.2%

<sup>3</sup> National Institute of Statistics (NIS), *General Population Census of Cambodia 2008 – National Report on Final Census Results*, Phnom Penh, August 2009; UNDP, *op. cit.* (note 1); Central Intelligence Agency, 'Cambodia', *The World Factbook*, 25 June 2012, < <https://www.cia.gov/library/publications/the-world-factbook/geos/cb.html> > last accessed 30 June 2012.

<sup>4</sup> UNDP (2011), *op. cit.* (note 1); NIS, *op. cit.* (note 3).

<sup>5</sup> The international poverty line is an income level established by the World Bank to determine which people in the world are poor. A person is considered poor if he or she has an income of less than \$1.25 per day calculated by reference to purchasing-power parity (PPP), a form of currency conversion which determines the amount of money needed to buy the same goods in two different countries so that poverty rates in different countries can be compared.

**Table 3**  
**Economic profile of Cambodia (2010 – 2012 estimates)<sup>6</sup>**

<b>Currency</b>	Cambodian Riel (KHR)
<b>Gross domestic product (GDP)</b>	US\$14.08 – 14.20 billion
<b>GDP per capita</b>	US\$931 – 955
<b>GDP growth rate</b>	6.2 – 6.7%
<b>Inflation</b>	4.03 – 5.4%
<b>Primary industries</b>	Garment and shoe manufacturing, agriculture, tourism, construction, fishing, wood and wood products, textiles, cement, rubber production, paper and food processing.
<b>Remittance inflows</b>	US\$364 million

## 1.2 Government, law and policy

### 1.2.1 Political history from independence to 2012

- 1.2.1.1 On 9 November 1953, Cambodia achieved independence from France, established a constitutional monarchy with Preah Bath Norodom Sihanouk as the King and Head of State and entered a period of peace and prosperity. In the 1960s, internal tensions began to develop fueled by resentment of the urban elite and the dynamics of the war in neighbouring Vietnam which had started to spill over into Cambodia. In March 1970 General Lon Nol, a Cambodian politician with the support of the United States, launched a coup d'état to overthrow King Sihanouk. General Nol abolished the monarchy and established the Khmer Republic.
- 1.2.1.2 On 30 April 1970, United States and South Vietnamese forces invaded Cambodia in an effort to flush out the Vietnamese communist troops who were using Cambodian bases in the Vietnamese war. Five years of conflict ensued during which the Communist Party of Kampuchea – the Khmer Rouge – came to assume a dominant position in the effort to overthrow the Khmer Republic. On 17 April 1975 the Khmer Rouge, under the leadership of Pol Pot, took control of Phnom Penh and toppled the Khmer Republic.
- 1.2.1.3 The three year, eight month and twenty day rule of the Khmer Rouge between 1975 and 1979 was one of the darkest and deadliest periods of Cambodia's history. The Khmer Rouge enforced a radical restructuring of society in an attempt to transform Cambodia into a peasant-dominated agrarian society. Currency and private property rights were abolished, the Khmer Rouge proclaimed the year to be Year Zero and the entire urban population was forcibly expelled to the countryside to perform arduous agricultural labour in back-breaking conditions with minimal food and rest. It is estimated that approximately a quarter of the population – up to two million Cambodians – died during this period. Many thousands died from exhaustion, starvation and sickness whilst others were killed as part of a 'cleansing campaign' during which students, lawyers, intellectuals, civil servants, monks, religious practitioners and many other people were executed.

<sup>6</sup> Economic Institute of Cambodia, *Key Economic Indicators*, 31 January 2012, < <http://www.eicambodia.org/> > last accessed 30 June 2012; United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP), *Economic and Social Survey of Asia and the Pacific 2012*, Thailand, April 2012; World Bank, *Migration and Remittances Factbook 2011*, 2<sup>nd</sup> edition, Washington D.C., 2011; International Monetary Fund, *World Economic Outlook Database: Cambodia report*, report generated 30 June 2012, < <http://www.imf.org/external/pubs/ft/weo/2012/01/weodata/index.aspx> > last accessed 30 June 2012.

- 1.2.1.4 On 7 January 1979 Vietnamese-based Cambodian exiles with the support of Vietnamese armed forces liberated Cambodia from the Khmer Rouge who fled but were not formally disarmed or demobilised. Hundreds of thousands of Cambodians fled to ‘refugee’ camps along the Thai-Cambodian border and elsewhere. International isolation and civil conflict (particularly along the Thai-Cambodian border) continued throughout the country until the signing of the *Agreements on a Comprehensive Political Settlement of the Cambodia Conflict* on 23 October 1991 (**Paris Peace Agreement**). Lower-level insurgency and political uncertainty continued until 1998.
- 1.2.1.5 The United Nations Transitional Authority in Cambodia (**UNTAC**) was established and arrived in Cambodia in March 1992 to monitor the implementation of the Paris Peace Agreement and to help organise general elections. In May 1993 the first post-war general elections were held and in September 1993 a new Constitution was promulgated. Ongoing political tensions continued to threaten the peace until a series of events in 1998 brought a measure of stability to the country, including the death of Pol Pot, the disbanding of remaining Khmer Rouge forces and the convincing win of the Cambodian People’s Party (**CPP**) in the 1998 election. Since 1998 Cambodia has seen great progress in consolidating peace and security, although in 2012 the granting of full civil, political, economic, social and cultural rights to all sectors of the population remains a work in progress.

## 1.2.2 Governance

- 1.2.2.1 The *Constitution of the Kingdom of Cambodia 1993* (**Constitution**) declares Cambodia to be an “*independent, sovereign, peaceful, permanently neutral and non-aligned country*” and an “*indivisible State*” with only one territory, one legislative system, one government and one judicial system.<sup>7</sup> The Constitution establishes Cambodia as a parliamentary constitutional monarchy based on the principles of **liberal democracy** and **pluralism**.<sup>8</sup> Cambodia is in the course of its fourth legislature (2008 – 2013) with Prime Minister Hun Sen as the head of the Royal Government of Cambodia (**RGC**) and currently the longest serving leader in Southeast Asia. King Samdech Preah Norodom Sihamoni is the Head of State for life: he reigns but does not govern and must abide by the Constitution.<sup>9</sup> The ruling CPP has dominated the political scene since 1998.
- 1.2.2.2 The territory of Cambodia is divided into 24 provinces administered by provincial governors, 185 districts administered by district heads, 1,621 communes administered by commune chiefs and several thousand villages administered by village leaders.
- 1.2.2.3 The Constitution declares that all powers in Cambodia belong to the people and divides the exercise of power between three separate arms of government:
- the legislature (the National Assembly and the Senate) which exercises legislative power, being the power to make laws;
  - the executive (the Prime Minister and Council of Ministers) which exercises executive power, being the power to oversee the administration of the State; and

<sup>7</sup> Constitution, articles 1 and 3.

<sup>8</sup> *ibid.*, articles 1 and 51.

<sup>9</sup> *ibid.*, article 7.

## State of Migration

### An overview of forced displacement in Cambodia

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- the judiciary (the Supreme Court and lower courts) which exercises judicial power, being the power to hear and decide cases and to interpret, enforce or declare void laws made by the legislature.<sup>10</sup>

1.1.2.4. The Constitutional Council is a separate organ responsible for safeguarding respect for the Constitution and interpreting the Constitution and other laws passed by the legislature.<sup>11</sup>

1.1.2.5. Despite this framework for the separate exercise of legislative, executive and judicial power, Cambodia continues to struggle with weak institutions, corruption, a lack of judicial independence and executive interference in the other arms of government. In 2011, the World Justice Project ranked Cambodia between 61 and 66 out of 66 countries for rule of law indicators, including limits on government powers, the absence of corruption, protection of fundamental rights, open government, regulatory enforcement and access to civil justice.<sup>12</sup> Of particular concern in Cambodia are:

- the lack of **accountability** and **transparency** in some sectors of government;
- the lack of independence of certain elements of the judiciary from political and financial influence;
- a general public perception that the judiciary is corrupt and unreliable and, as a result, a lack of faith in the legal system as an institution of justice;
- reports of illegal trials and the use of the judiciary to silence political opposition and repress dissent on sensitive issues;
- other obstacles to justice in the legal system, including lengthy delays and a shortage of legal aid; and
- allegations of irregularities in the election process.

These issues can negate many of the positive efforts made by the RGC towards good governance, be major contributors to rising inequality and hinder economic growth, poverty reduction and social development.

### 1.2.3 Legal framework

1.2.3.1 The hierarchy of domestic legal instruments in Cambodia is as follows:

- the Constitution is the supreme (highest) source of law and all other laws must comply with its terms;
- laws (*chbab*) are adopted by the National Assembly and the Senate, promulgated by the King (by royal decree or *kram*) and are legally binding;
- royal decrees (*reachkret*) are issued by the King in the exercise of his constitutional powers; and

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<sup>10</sup> *ibid.*, article 51.

<sup>11</sup> *ibid.*, chapter XII.

<sup>12</sup> Agrast, M., Botero, J. and Ponce, A., *World Justice Project Rule of law Index 2011*, Washington, D.C., 2011, p 49.



- regulations or subordinate legislation are made by the RGC and include:
  - **sub-decrees** (*anukret*) which are often issued to fill gaps where there is no legislation concerning a particular issue. Sub-decrees are the highest form of regulation and may expressly authorise the making of other regulations on certain matters. If a law authorises the making of a sub-decree it will be legally binding, otherwise it will act as a guideline;
  - ministerial decisions or proclamations (*prakas*) and circulars (*sarachor*) which are issued to clarify a certain point or provide instructions; and
  - local regulations (*deika*) which are orders given by provincial governors or commune councils.<sup>13</sup>

#### 1.2.4 Key policies

- 1.2.4.1 The national motto of Cambodia is: “*Nation, Religion, King.*”<sup>14</sup> The RGC seeks to rally Cambodians under this motto with the objective “*to build and protect the nation and social achievements while ensuring the country’s independence, integrity, sovereignty, peace, democracy and progress.*”<sup>15</sup>
- 1.2.4.2 The *Rectangular Strategy for Growth, Employment, Equity and Efficiency in Cambodia (RS)* is the national socio-economic policy setting out the RGC’s long-term development agenda for Cambodia. The RS was launched in 2004 and updated in 2008 as the *Rectangular Strategy Phase II (RSII)*. ‘Good governance’ sits at the core of the policy and is implemented through four strategic growth areas: 1) enhancement of the agricultural sector; 2) further rehabilitation and construction of physical infrastructure; 3) private sector development and employment and 4) capacity building and human resource development.
- 1.2.4.3 The *National Strategic Development Plan 2006 – 2010 (NSDP)* and the *National Strategic Development Plan Update 2009 – 2013 (NSDP Update)* are the overarching national policy documents for implementing the RS and RSII and achieving the CMDGs.

#### 1.2.5 Human rights

- 1.2.5.1 The Constitution states that Cambodia “*shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights [and] the covenants and conventions related to human rights, women’s and children’s rights.*”<sup>16</sup> Any legislation which is incompatible with the terms of international human rights treaties to which Cambodia is a **State Party** will be inconsistent with this provision, unconstitutional and not promulgated.<sup>17</sup> On 10 July 2007 the Constitutional Council handed down a decision reaffirming that judges should interpret legislation and make decisions in light of Cambodia’s international human rights obligations and that no law should be applied by the courts in such a way as to violate the Constitution or these obligations.<sup>18</sup>

<sup>13</sup> Oberndorf, R. B., *Law Harmonisation in Relation to the Decentralisation Process in Cambodia*, Cambodia Development Resource Institute (CDRI) Working Paper 31, Phnom Penh, May 2004, pp 14-17.

<sup>14</sup> Constitution, article 4.

<sup>15</sup> Prime Minister Hun Sen, *Address on Rectangular Strategy for Growth, Employment, Equity and Efficiency Phase II*, First Cabinet Meeting of the Fourth Legislature of the National Assembly, Phnom Penh, 26 September 2008, para 10; RGC, *National Strategic Development Plan Update 2009 – 2013*, Phnom Penh, 30 June 2010, p i.

<sup>16</sup> Constitution, article 31.

<sup>17</sup> *ibid*, article 142. For a full list of international human rights law treaties to which Cambodia is a State Party see page ix. For a list of ILO Conventions to which Cambodia is a State Party see section 4.2.1.

<sup>18</sup> Constitutional Council decision no. 092/003/2007 of 10 July 2007.

- 1.2.5.2 Despite this robust legal framework, the practice of human rights protection within Cambodia remains flawed. Of particular concern in relation to Cambodia's human rights record are:
- illegal land confiscations, forced evictions and the excessive use of force, intimidation and arbitrary arrests to subdue persons who seek to assert or defend land and human rights (see Chapter 6);
  - allegations of misuse of the judiciary and criminal justice system to suppress dissent;
  - allegations of political interference by the RGC in the Khmer Rouge Tribunal within the Extraordinary Chambers of the Courts of Cambodia (ECCC) which has undermined its independence and led to the resignations of co-investigating Judge Siegfried Blunk in October 2011 and his successor Judge Laurent Kasper-Ansermet in March 2012;
  - allegations of arbitrary detentions and the use of torture by police and military police to extract confessions to obtain convictions; and
  - allegations of rape, harassment, extortion, arbitrary arrest and detention of women and girls in the commercial sex industry by law-enforcement officers.<sup>19</sup>

## 1.3 Women in Cambodia

### 1.3.1 Law and policy

- 1.3.1.1 Cambodian women are influential in nurturing the family, pushing for progress and social development and shaping the character of the next generation. To an extent these important roles are recognised in law. Cambodia is a State Party to the *United Nations Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW)* and a range of international human rights instruments which confer rights on women (see page ix). The Constitution affirms that these rights must be recognised and respected in Cambodia and that women and men are equal before the law and enjoy rights without discrimination on the basis of their sex.<sup>20</sup> In addition, the Constitution and other domestic legislation:
- prohibit all forms of discrimination against women, provide that laws which discriminate against women shall not be promulgated and criminalise a range of discriminatory acts, including the refusal to employ a person or provide them with property or services on the basis of their sex;<sup>21</sup>
  - expressly recognise and confer on women equal rights as men in relation to nationality (including the right to pass nationality to children), voting, employment (including equal pay for equal work), access to the courts, freedom of expression, assembly, association, belief and worship, basic health, land ownership, obtaining credit or loans, marriage and the family;<sup>22</sup> and

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<sup>19</sup> For more information see: Brown, E., *The Ties That Bind: Migration and Trafficking of Women and Girls for Sexual Exploitation in Cambodia*, International Organisation for Migration (IOM), August 2007.

<sup>20</sup> Constitution, article 31.

<sup>21</sup> *ibid.*, articles 45 and 142; *Penal Code 2009 (Penal Code)*, articles 265 to 270.

<sup>22</sup> Constitution, articles 34-36, 38-39, 41-45, 65, 68, 72 and 75; *Law on Nationality 1996 (Law on Nationality)*; *Labour Law 1997 (Labour Law)*, articles 12 and 106; *Civil Code 2007 (Civil Code)*, articles 2, 6 and chapter 3; *Code of*

- provide certain additional protections for women, including protections against violence and exploitation, recognition of the work of housewives and special protections for pregnant women and mothers at work.<sup>23</sup>

1.3.1.2 The government bodies responsible for protecting and enforcing women's rights include the Ministry of Women's Affairs (**MoWA**) at the national level, Gender Mainstreaming Action Groups (**GMAGs**) within each Ministry and Women's and Children's Consultative Committees (**WCCCs**) at the sub-national level. A vast number of local and international organisations also promote the realisation of women's rights.

1.3.1.3 The key policy implementing these rights and protections is the *Neary Ratanak III 2009 – 2013 (NRIII)*, a five-year strategic plan for gender equality and the empowerment of women in Cambodia. The RGC has introduced a range of additional policies and programmes to address violence against women, combat gender inequality and increase access to education and employment for women and girls.<sup>24</sup>

### 1.3.2 Attitudes towards women and awareness of women's rights

1.3.2.1 The RGC and human rights groups have made significant efforts to promote gender equality in Cambodian society. The RGC has established GMAGs in each Ministry with the purpose of training government officials on the contents and purpose of the CEDAW. WCCCs are responsible for providing opinions and recommendations on issues related to gender equality, women, youth and children to Provincial Councils. Women's rights and gender issues have been included in key national policies and laws. Efforts have been made to increase knowledge about women's rights through public awareness campaigns in communities and training courses for government officials, law-enforcement officers and the judiciary.

1.3.2.2 Despite these developments, deep-rooted cultural norms continue to obstruct the empowerment of women, especially in rural areas. Of particular concern are reports that:

- traditional attitudes and behaviour continue to place men in decision-making positions of power and relegate women to subordinate roles within the family and home;
- there is ongoing adherence to the Cambodian saying that “*a cake is never bigger than the pot*” which prevents children living in the care of their parents from having the right to make their own decisions. This attitude can result in the practice of arranging ‘suitable’ partners for marriage for daughters rather than prioritising their education and economic empowerment;

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*Penal Procedure 2007 (Penal Procedure Code)*, article 3; *Land Law 2001 (Land Law)*, article 4; *Law on Marriage and Family 1989 (Law on Marriage and Family)*, in particular articles 4 and 29.

<sup>23</sup> Constitution, articles 36, 45-46 and 73; *Law on the Prevention of Domestic Violence and the Protection of Victims 2005 (Law on Domestic Violence)*; *Law on Suppression of Human Trafficking and Sexual Exploitation 2008 (Cambodian TIP Law)*; Labour Law, articles 182-187 and 219-226. Some reports suggest that these protections do not go far enough to protect women against violence and exploitation: Cambodian Committee of Women (**CAMBOW**), *Violence Against Women: How Cambodian Laws Discriminate Against Women*, Phnom Penh, November 2007.

<sup>24</sup> See for example: MoWA, *National Action Plan to Prevent Violence on Women 2009 – 2012*, Phnom Penh, July 2009 (**NAP on Violence on Women**); National Committee to Lead the Suppression of Human Trafficking, Smuggling, Labour Exploitation and Sexual Exploitation in Women and Children (**National Committee to Lead STSLS**), *National Plan of Action on the Suppression of Human Trafficking, Smuggling, Labour and Sexual Exploitation 2011 – 2013*, Phnom Penh, 7 December 2011 (**NPA on STSLS**).

## State of Migration

### An overview of forced displacement in Cambodia

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- the woman's code of conduct (*Chbab Srey*) which governs women's moral and social behaviour in Cambodia still has a strong influence which prevents gender equality in social, economic and political sectors. The RGC describes the *Chbab Srey* as "a burden... strictly imposed on women in the social and cultural fields... [It] has become a wall denying the rights and freedoms of women leading to inequality between men and women in social and cultural fields";<sup>25</sup>
- the virginal standards expected of women and traditional beliefs that women can more easily stain their reputation and bring shame to their families are still deeply engrained in Cambodian society. These attitudes contribute to the idea that female victims of rape and sexual violence are responsible for bringing dishonour to themselves and their families and prevent them from seeking assistance and reporting violent crimes; and
- changes in traditional attitudes are least evident amongst older women and in rural areas where women are less likely to be aware of their rights and where non-discriminatory laws and policies are less strictly enforced.

### 1.3.3 Health

- 1.3.3.1 The RGC reports excellent progress in advancing the health status of women and girls and improving their access to primary health care, use of vaccines and knowledge about HIV/AIDS, sexually transmitted diseases and malaria.<sup>26</sup> In relation to reproductive and maternal health, women have better access to family planning, reproductive health services and maternal and child care health programmes. Advances have also been made in the number of women receiving antenatal care, giving birth with trained midwives and giving birth in health centres. The maternal mortality rate dropped from 461 per 100,000 live births in 2008 to around 206 per 100,000 live births in 2010, representing one of the steepest declines in maternal mortality rates in the **region**.<sup>27</sup> The RGC has also implemented programmes to prevent mother-to-child transmission of HIV and to ensure that women have as equal access as men to antiretroviral drugs.
- 1.3.3.2 Despite these improvements, the RGC acknowledges that health services for women remain "limited."<sup>28</sup> Ongoing areas of concern regarding women's health include reports that:
- the maternal mortality rate is still relatively high despite its recent dramatic decrease and that the number of women giving birth in health centres and with skilled health personnel continues to lag behind regional averages;
  - women constitute an increasing proportion of the number of people living with HIV, partly due to women being exposed to the risk of infection through employment in the commercial sex industry;

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<sup>25</sup> RGC, *Initial, Second and Third Report on the Implementation of the International Convention on Elimination of All Forms of Discrimination Against Women in Cambodia*, October 2003, UN Doc CEDAW/C/KHM/1-3 (issued 11 February 2004), para 137.

<sup>26</sup> For more information see: NRIII.

<sup>27</sup> UNICEF, *Maternal, Newborn and Child Health and Nutrition*, Phnom Penh, undated, p 1; Plan Australia, *Maternal mortality in Cambodia*, 2 April 2012, < [http://www.plan.org.au/mediacentre/features/maternal\\_mortality\\_in\\_cambodia\\_lowering\\_the\\_risks\\_when\\_crossing\\_the\\_river](http://www.plan.org.au/mediacentre/features/maternal_mortality_in_cambodia_lowering_the_risks_when_crossing_the_river) > last accessed 30 June 2012.

<sup>28</sup> RGC, *Fourth and Fifth National Reports on Implementation of the International Convention on the Elimination of All Forms of Discrimination Against Women in Cambodia*, May 2010, UN Doc CEDAW/C/KHM/4-5 (issued 11 August 2011), para 177(a).

- there continue to be obstacles to women accessing health care, including a culture of shyness which discourages women from having medical check-ups or consulting with doctors (especially male doctors);
- there are significant disparities between urban and rural health education and services for women; and
- women continue to suffer from malnutrition and vitamin deficiencies, including Iron Deficiency Anaemia which reportedly affects approximately 57% of pregnant women and is associated with a high maternal mortality rate.<sup>29</sup>

### 1.3.4 Education

1.3.4.1 The RGC reports excellent progress in achieving higher enrolment rates of girls in schools, decreased dropout rates for female students, increased gender parity in primary and secondary school enrolments and near gender equity in literacy rates and mean levels of education amongst young people under 20 years of age.<sup>30</sup> This progress is attributable in part to the increasing number of scholarships provided by the RGC to facilitate access to education for girls and increases in the number of female teachers. The number of female students and trainees at technical and vocational training institutions has also increased.

1.3.4.2 Ongoing areas of concern regarding the education of women include reports that:

- boys continue to be given priority for education in all income levels (although there are some recent reports which suggest that these attitudes may be starting to change);<sup>31</sup>
- the overall mean level of education for women of all ages remains relatively low, especially amongst women of work and child-bearing age (with reports that 40% of women aged 25 to 44 years old are illiterate compared to 22% of men in the same age group);<sup>32</sup>
- there are relatively low rates of secondary education for women (with reports that only 11.6% of women aged 25 years and older had reached this level of education in 2010 compared to 20.6% of men)<sup>33</sup> and that improvements in enrolment rates for girls and gender equity in higher levels of education have mostly been limited to higher income groups; and
- there are particularly low rates of tertiary education amongst women who comprised less than 39% of the total tertiary student population in 2010.<sup>34</sup>

<sup>29</sup> MoP, *op. cit.* (note 2), p 25.

<sup>30</sup> For more information see: NRIII.

<sup>31</sup> Gourley, S., *The Middle Way: Bridging the Gap Between Cambodian Culture and Children's Rights*, NGO Committee on the Rights of the Child, Phnom Penh, 2009, p 78.

<sup>32</sup> NRIII, p 4.

<sup>33</sup> UNDP (2011), *op. cit.* (note 1), p 141.

<sup>34</sup> RGC (May 2010), *op. cit.* (note 28), para 132.

#### 1.3.5 Employment

1.3.5.1 The RGC recognises women as “*the backbone of society and the economy.*”<sup>35</sup> Progress has been made in increasing the employment of women, with women’s share of wage employment achieving parity in agriculture and industry. Efforts to assist the economic empowerment of women and increase their employment opportunities include vocational training and counseling on entrepreneurship development, micro- and small credit programs, non-formal education, income generating activities, literacy programmes and rights awareness programmes.

1.3.5.2 Ongoing areas of concern regarding women’s employment include reports that:

- there are significant gender disparities in certain sectors of employment due to the fact that women generally have lower literacy and education levels than men and traditional attitudes about ‘appropriate’ occupations for women. These attitudes relegate women to informal sectors at the bottom of the occupation ladder in terms of income and status and increase their vulnerability to abuse and exploitation;
- women still receive lower wages than men for equal work in certain sectors; and
- there are widespread failures to enforce the provisions of the Labour Law concerning pregnant women and mothers at work.

#### 1.3.6 Participation in political and public life

1.3.6.1 The RGC reports good progress in increasing the representation of women in decision-making and policy-making positions.<sup>36</sup> The number of women in the civil service and in elected positions in the National Assembly, the Senate, commune councils and other village leadership positions has increased. The RGC has introduced affirmative action initiatives to further increase the participation of women in national institutions and the civil service by giving female candidates preferential treatment, setting quotas for female recruits and reserving certain leadership positions for women.<sup>37</sup> The RGC has taken steps to ensure women’s representation in leadership positions outside of Cambodia (for example in Cambodian Embassies and Consulates) and participation in international organisations.

1.3.6.2 Ongoing areas of concern regarding women’s participation in political and public life include reports that:

- the representation of women in all levels and branches of government, the judiciary and public office remains relatively low, especially in senior decision-making positions at the national level of the executive and in the judiciary as judges, prosecutors or lawyers;
- traditional attitudes towards the role of women in leadership positions continue to be prevalent, including beliefs that women are not well suited for these roles; and

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<sup>35</sup> Prime Minister Hun Sen (26 September 2008), *op. cit.* (note 15), para 102.

<sup>36</sup> For more information see: NRIII.

<sup>37</sup> RGC (May 2010), *op. cit.* (note 28), paras 59-62.

- women face additional burdens as care-givers and household workers which pose considerable barriers to their participation in higher-level decision-making and political life.

### 1.3.7 Protection against violence and exploitation

1.3.7.1 The RGC reports very good progress in strengthening the legal framework to protect women and increasing awareness and understanding of gender equality and women's rights.<sup>38</sup> Key developments in this regard include the introduction of laws and policies to protect women from violence, exploitation and trafficking in persons,<sup>39</sup> public awareness campaigns for communities and training courses for government officials, law-enforcement officers, judges and prosecutors. Local and international organisations also provide assistance to victims of trafficking in persons, gender-based violence and exploitation.

1.3.7.2 Ongoing areas of concern regarding violence against and exploitation of women include reports that:

- domestic, sexual, physical and psychological violence against women continue to be prevalent;
- traditional attitudes and behaviour which underlie gender-based violence, stigmatise survivors and victims of violence and discourage women from reporting crimes and seeking help have been difficult to change;
- trafficking in persons of women and girls both within Cambodia and abroad continues to be a problem (see Chapter 5); and
- the use of sexual violence as a weapon of oppression during the Khmer Rouge era has not been taken up as a priority issue by the ECCC.<sup>40</sup>

**Table 4**  
**Changes in perceptions of general population about the acceptability of various acts of domestic violence: 2005 and 2009<sup>41</sup>**

Form of violence	Percentage of population who consider violence acceptable (%)	
	2005	2009
Curse	93	77
Throw an object	80	46
Knock on the head	69	36
Tie up and hit	40	18
Threaten with knife	37	13
Burn or choke	24	10
Throw acid	28	9

<sup>38</sup> For more information see: NRIII.

<sup>39</sup> See for example: Law on Domestic Violence; NAP on Violence on Women; Cambodian TIP Law; NPA on STSLS. For more information see: United Nations Entity for Gender Equality and the Empowerment of Women (**UN Women**), *The UN Secretary-General's Database on Violence Against Women: Cambodia*, undated, < <http://sgdatabase.unwomen.org/countryInd.action?countryId=297> > last accessed 30 June 2012.

<sup>40</sup> For more information about sexual violence in conflict see: Nobel Women's Initiative, *Sexual Violence in Conflict*, undated, < <http://nobelwomensinitiative.org/sexual-violence-in-conflict/> > last accessed 30 June 2012.

<sup>41</sup> MoP, *op. cit.* (note 2), p 21.

### **1.3.8 Rural women**

- 1.3.8.1 Women in rural areas face particular difficulties and deprivations of rights. Under the Constitution the RGC is required to provide opportunities for women, especially rural women living in areas without adequate social support, to access employment and medical care, send their children to school and have decent living conditions.<sup>42</sup> Despite this requirement, rural women lag behind urban women in terms of gender equality, empowerment and the exercise of rights. Significant efforts have been made to alleviate poverty, encourage development and promote the empowerment of women, however rural areas lack the education and primary health services, infrastructure, employment opportunities and social development necessary for women to fully realise their rights.

## **1.4 Children in Cambodia**

### **1.4.1 Law and policy**

- 1.4.1.1 Cambodia has one of the biggest youth populations as a percentage of the overall population in Southeast Asia as a result of a post-Khmer Rouge era baby-boom in the 1980s. The average age in Cambodia is 22.9 years of age.<sup>43</sup> It is estimated that more than 30% of the population is aged between 10 and 24 years of age with approximately 83% of young people living in rural areas.<sup>44</sup>

- 1.4.1.2 Cambodia is a State Party to the *United Nations Convention on the Rights of the Child 1989 (CRC)* and a range of international human rights instruments which confer rights and protections on children (see page ix). The Constitution affirms that these rights must be recognised and respected in Cambodia.<sup>45</sup> In addition, Cambodian domestic law confers on children special rights and protections in relation to their general health and well-being, the employment of children and their mothers and the exploitation and trafficking of children.<sup>46</sup> Whilst Cambodian society is increasingly becoming aware of these rights, their enforcement lags significantly behind awareness due to poverty, a lack of resources and infrastructure and the customary position of the child within the hierarchy of Cambodian family and society.

### **1.4.2 Health**

- 1.4.2.1 Remarkable progress has been made in reducing infant and child mortality rates (see Table 5), increasing access to immunisations and increasing breastfeeding rates in Cambodia. Despite this progress, infant and child mortality rates remain amongst the highest in the region with many child deaths being due to preventable and treatable causes. Child malnutrition is a significant problem, reaching critical levels after the global economic crisis and the steep rise in food and fuel prices in Cambodia in 2008 placed a particularly heavy burden on the poorest families.

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<sup>42</sup> Constitution, article 46.

<sup>43</sup> UNDP (2011), *op. cit.* (note 1), p 164.

<sup>44</sup> United Nations Country Team (UNCT), *Situation Analysis of Youth in Cambodia*, May 2009, p 15.

<sup>45</sup> Constitution, article 31.

<sup>46</sup> *ibid.*, articles 48 and 73; Law on Marriage and Family, articles 27, 70 and 73-75; Labour Law, section VIII; Cambodian TIP Law.



1.4.2.2 The most significant ongoing areas of concern in relation to child health include reports that:

- infant and child mortality rates remain relatively high. Recent reports state that an estimated 10,000 babies per year die during or shortly after delivery due to complications at birth and a lack of postpartum care, and an estimated 50 children under 5 die every day mainly from preventable and treatable diseases;<sup>47</sup>
- acute and chronic malnutrition and micronutrient deficiencies are widespread and a cause in approximately one third of child deaths;<sup>48</sup>
- there are wide regional disparities in child health, with infant and under-5 mortality rates being almost double the national average in some regions;<sup>49</sup> and
- the mental health needs of teenagers are unmet, with one report claiming that the leading cause of death of young people aged 15 to 17 years old is suicide.<sup>50</sup>

**Table 5**  
**Trends in infant and child mortality: 2000 – 2010<sup>51</sup>**

Indicator	2000	2010
Infant mortality rate (per 1,000 live births)	95	45
Child mortality rate for children under 5 years (per 1,000 live births)	124	54

### 1.4.3 Education

1.4.3.1 As part of recent efforts to achieve the CMDG of ensuring that all children have access to primary education by 2015, the RGC has invested heavily in a large expansion of school infrastructure, trained and deployed more teachers, taken steps to reduce the cost of primary education for parents and provided scholarships to girls and rural students. As a result of these efforts, school enrolment and literacy rates have improved significantly with reports that:

- 95.9% of primary school aged children were enrolled in primary education in 2010;<sup>52</sup>
- most families live within 2.25km of a primary school, even in poor and rural areas, and access to primary education is relatively equal for poor and rural compared to wealthier and urban children;<sup>53</sup> and
- there are practically no disparities between female and male enrolment in primary and lower secondary education.<sup>54</sup>

<sup>47</sup> UNICEF (undated), *loc. cit.* (note 27).

<sup>48</sup> *ibid.*

<sup>49</sup> MoP, *op. cit.* (note 2), p 23.

<sup>50</sup> UNCT, *op. cit.* (note 44), p 20.

<sup>51</sup> MoP, *op. cit.* (note 2), p 22; UNICEF Cambodia (undated), *op. cit.* (note 27), p 5; World Bank, *Cambodia Overview*, undated, < <http://www.worldbank.org/en/country/cambodia/overview> > last accessed 30 June 2012.

<sup>52</sup> UNESCAP, *op. cit.* (note 6), p 188.

<sup>53</sup> UNCT, *op. cit.* (note 44), p 18.

<sup>54</sup> MoP, *op. cit.* (note 2), p 18.

## State of Migration

### An overview of forced displacement in Cambodia

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1.4.3.2 Despite these advances, ongoing areas of concern in relation to children’s education include reports that:

- there are relatively high-drop out and repetition rates and overall low enrolment rates in secondary education, such that despite high enrolment rates in primary education only half of young people complete primary school and only a quarter proceed to lower secondary school;<sup>55</sup>
- there continue to be disparities in education, literacy and access to upper secondary education based on gender, rural-urban residence and income, with poor, rural and female children significantly more likely to be illiterate;<sup>56</sup>
- the quality of public education still has room for considerable improvement, particularly in rural areas, as a result of a shortage of resources, insufficiently trained and poorly paid teachers and principals, inadequate professional development opportunities and weak local capacity to take responsibility for school improvements; and
- other obstacles to education affect school attendance and academic success including poverty, food insecurity, malnutrition, child labour, children following their parents who migrate for work and a lack of necessary infrastructure to access schools, including roads and public transport.

## 1.4.4 Employment

1.4.4.1 The UNCT has deemed employment to be *“the single most important issue confronting youth in Cambodia today.”*<sup>57</sup> Cambodia’s labour force youth participation rates are amongst the highest in the region with reports that one third of Cambodia’s labour force is comprised of young people aged 15 to 24 years of age.<sup>58</sup> The majority of this young labour force has not completed primary education and is employed in the agriculture industry. Children enter the labour force at very young ages with reports that 48.1% of young people aged under 14 years of age were economically active in 2004.<sup>59</sup> Rural youth are more likely to be working than urban youth, but are also more likely to need to migrate to find work and thereby be exposed to increased risks of exploitation and trafficking in persons (see Chapters 4 and 5).

1.4.4.2 Ongoing areas of concern in relation to the employment of children include reports that:

- a large proportion of young people are economically active, especially young people under the age of 15 years, and that this employment can critically interfere with a child’s education;

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<sup>55</sup> UNCT, *op. cit.* (note 44), p 7.

<sup>56</sup> *ibid.*, p 16.

<sup>57</sup> UNCT, *op. cit.* (note 44), p 3.

<sup>58</sup> *ibid.*, p 17.

<sup>59</sup> *ibid.*, p 55.

- Cambodia's poor and very poor youth cannot afford to be unemployed so will accept work for low pay with poor conditions and little or no social or safety protection on short-term and informal contracts. Young people in these positions are particularly vulnerable to workplace injuries, exploitation and abuse;
- the law concerning the employment of children does not extend to informal sectors in which many children are employed, including domestic work; and
- there are significant risks of damage to the physical, mental and social health and development of children as a result of long and harsh working conditions at a critical stage of their life.

#### 1.4.5 Participation in political and public life

1.4.5.1 Conservative cultural and traditional values in Cambodia encourage social deference to elders and obedience to parents. As a result, the voices of youth are limited in political and public life and decision-making processes. Many parents discourage the civic engagement of their children and the perspectives of youth are not adequately reflected in government policies and programmes. Instead, *“youth voices are often excluded, their interest in contributing to their communities is frequently discounted.”*<sup>60</sup> Despite these discouragements, reports indicate that young people in Cambodia are willing and have the potential to contribute to decision-making and public life if they are equipped with the necessary skills and knowledge and given the opportunity to do so.<sup>61</sup>

1.4.5.2 Ongoing areas of concern regarding the participation of children in political and social life include reports that:

- there are relatively limited levels of knowledge and understanding amongst young people about democratic processes and institutions, the concept of good governance and civil engagement;
- there are very low levels of participation of young people in political and public life and decision-making; and
- prevailing cultural attitudes dissuade and prevent youth from actively participating and voicing their opinions in political and public life.

#### 1.4.6 Protection against violence, exploitation, abuse and other harm

1.4.6.1 The RGC and local and international rights groups have worked collaboratively to increase the protection framework for children and build child protection networks within Cambodia. In particular, laws and policies have been introduced to protect children, public awareness campaigns on child safety and protection have been launched and steps have been taken to combat trafficking of children and reduce international demand for child sex tourism and trafficking in persons.<sup>62</sup>

<sup>60</sup> *ibid.*, p 22.

<sup>61</sup> UNDP, *Youth Civic Participation in Cambodia: Knowledge, Attitudes, Practices and Media*, November 2010.

<sup>62</sup> See for example: Law on Domestic Violence; NAP on Violence on Women; Cambodian TIP Law; NPA on STSLS. For examples of the child protection projects which have been implemented by local and international organisations in Cambodia see: Friends International, *Where We Work > Cambodia*, < <http://friends-international.org/wherewework/cambodia.asp> > last accessed 30 June 2012.

## State of Migration

### An overview of forced displacement in Cambodia

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1.4.6.2 Despite these efforts, ongoing areas of concern regarding violence against children include reports that:

- there is a lack of resources and structures to protect children, including children in dysfunctional or difficult family situations and children involved with the legal system as offenders, witnesses or victims;
- rates of physical, sexual, domestic and other forms of violence and abuse against children continue to be high;
- there is an increasing number of children in orphanages; and
- traditional attitudes and cultural beliefs create a disjuncture between knowledge of children's rights and enforcement, especially within family and community structures where children are not considered to be individual rights holders.

## Chapter Two

# Refugees and Asylum Seekers

***“Millions around the globe continue to fight against human rights violations, discrimination and deprivation of their rights. Billions of dollars have been spent on military expenditures, but so little is spent on the weak sections of society such as refugees and asylum seekers... with meagre resources and ability, refugees and asylum seekers never run out of steam, we struggle against all odds and never lose hope in order to reclaim our fundamental rights.”***

– Refugees living in Cambodia on  
International Human Rights Day 2011<sup>63</sup>

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<sup>63</sup> Errington, N., and Hunt, T., *The Search: Protection Space in Malaysia, Thailand, Indonesia, Cambodia and the Philippines*, JRS Asia Pacific, Bangkok, 2012, p 23. This Chapter draws heavily from *The Search*. For a copy of this publication please visit < [http://jrscambodia.org/publication%5CThe\\_Search\\_report.pdf](http://jrscambodia.org/publication%5CThe_Search_report.pdf) > or contact JRS Cambodia.

## 2.1 Who are refugees and asylum seekers?

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*“Migrants, especially economic migrants, choose to move in order to improve the future prospects of themselves and their families. Refugees have to move if they are to save their lives or preserve their freedom. They have no protection from their own State – indeed it is often their own government that is threatening to persecute them. If other countries do not let them in, and do not help them once they are in, then they may be condemning them to death – or to an intolerable life in the shadows, without sustenance and without rights.”*

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– United Nations High Commissioner for Refugees<sup>64</sup>

### 2.1.1 Refugees

2.1.1.1 Whilst the terms ‘refugee’ and ‘asylum seeker’ are often used interchangeably, these terms refer to separate groups of people in overlapping but legally distinct situations.

2.1.1.2 A **refugee** is defined under international law as a person who:

- either:
  - is outside the country of his or her nationality; or
  - does not have a nationality and is outside the country of his or her former habitual residence;
- has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and
- is unable or, owing to such fear, unwilling to avail him or herself of the protection of the country of his or her nationality or former habitual residence.<sup>65</sup>

2.1.1.3 Under this definition, a person with more than one nationality will not be deemed a refugee unless he or she is unable or unwilling to avail him or herself of the protection of all of the countries of which he or she is a national.<sup>66</sup>

2.1.1.4 In other contexts a broader definition of the term ‘refugee’ has been adopted, for example:

- in ordinary usage, the term refugee may be used to describe any person in flight who seeks to escape intolerable or life-threatening conditions or circumstances and is considered deserving of assistance and protection;

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<sup>64</sup> United Nations High Commissioner for Refugees (UNHCR), *Refugees: Flowing Across Borders*, undated, < <http://www.unhcr.org/pages/49c3646c125.html> > last accessed 30 June 2012.

<sup>65</sup> The *United Nations Convention Relating to the Status of Refugees 1951*, article 1A(2); *United Nations Protocol Relating to the Status of Refugees 1967*, article 1(2) (collectively, the **Refugee Convention and its Protocol**). The Protocol removes the geographical and time limits from the definition of a refugee which initially restricted the protection of the Refugee Convention to persons who became refugees due to events occurring in Europe before 1 January 1951.

<sup>66</sup> Refugee Convention, article 1A(2).

- for the purpose of its advocacy and service, the Jesuit Refugee Service (**JRS**) understands the term refugee to include not only persons who satisfy the international legal definition but also **internally displaced persons (IDPs)** and ‘de facto refugees’, being persons who are driven from their homes by armed conflict, erroneous economic policy or natural disasters;<sup>67</sup>
- the African Union defines a refugee as any person who satisfies the international legal definition as well as “every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his [or her] country of origin or nationality, is compelled to leave his [or her] place of habitual residence in order to seek refuge in another place outside his [or her] country of origin or nationality”;<sup>68</sup> and
- the Organisation of American States (**OAS**) defines a refugee as any person who satisfies the international legal definition as well as “persons who have fled their country because their lives, safety or freedom have been threatened by generalised violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.”<sup>69</sup>

## 2.1.2 Asylum Seekers

2.1.2.1 The term **asylum seeker** is not defined under international law. In ordinary usage this term is used to describe any person who says he or she is a refugee but whose claim has not yet been definitively evaluated.<sup>70</sup>

2.1.2.2 An asylum seeker who applies for recognition as a refugee goes through a Refugee Status Determination (**RSD**) process managed by either the UNHCR or the government of the **country of asylum**. Upon the conclusion of this process:

- some asylum seekers will be deemed to be refugees and by law will become entitled to certain protections and rights; and
- other asylum seekers will be deemed not to be refugees, but rather persons who have left or fled their homes for reasons other than persecution.

## 2.1.3 Other groups

2.1.3.1 Other categories of persons who may share similar experiences with but are legally distinct from refugees and asylum seekers include IDPs, stateless persons<sup>71</sup> and **economic migrants**.

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<sup>67</sup> JRS, *Strategic Framework 2012 – 2015*, 1 March 2012, p 5.

<sup>68</sup> *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa 1969*, article 1.

<sup>69</sup> *Cartagena Declaration on Refugees 1984*, part III.3 (approved by the OAS General Assembly in 1985).

<sup>70</sup> See for example: UNHCR, *Asylum Seekers*, undated, < <http://www.unhcr.org/pages/49c3646c137.html> > last accessed 30 June 2012.

<sup>71</sup> A stateless person may also be a refugee: see Chapter 3.

## 2.2 International, domestic and regional law

***“No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion.”***

– Refugee Convention, article 33(1)

### 2.2.1 International law

#### *The Refugee Convention and its Protocol*

- 2.2.1.1 The Refugee Convention and its Protocol are the key international legal instruments defining who is a refugee, the rights of refugees and the legal obligations of States Parties towards refugees. Cambodia acceded to the Refugee Convention and its Protocol in 1992 and is one of only three countries in the region which is a State Party to these instruments.<sup>72</sup>
- 2.2.1.2 The most important protection afforded to refugees and asylum seekers under the Refugee Convention is the principle of ***non-refoulement***. This principle prohibits States from expelling or returning (*refouling*) a refugee in any manner whatsoever, either directly or indirectly, to a country where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion.<sup>73</sup> The prohibition on *refoulement* applies to any form of forcible removal including deportation, expulsion, extradition, informal transfer and non-admission at the border in certain circumstances. As a general rule, this prohibition requires States to grant asylum seekers access to their territory and ensure that all claims for asylum are fairly and effectively assessed before the claimant is removed to any other country.<sup>74</sup> This principle is considered to be a rule of **customary international law** and as such it applies to all States, regardless of whether or not they are States Parties to the Refugee Convention and its Protocol.<sup>75</sup>

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<sup>72</sup> The Philippines became a State Party to the Refugee Convention and its Protocol in 1981 and Timor-Leste became a State Party in 2003.

<sup>73</sup> Refugee Convention, article 33(1). The Refugee Convention excludes from this protection any refugee for whom there are reasonable grounds for regarding as a danger to the security of the country of asylum or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country: Refugee Convention, article 33(2). Refugees falling within this exclusion may nevertheless enjoy protection against *refoulement* under other international human rights law instruments: see paragraph 2.2.1.6.

<sup>74</sup> UNHCR Executive Committee, *Conclusion No. 6 (XXVIII): Non-Refoulement*, 1977; UNHCR Executive Committee, *Conclusion No. 22 (XXXII): Protection of Asylum-Seekers in Situations of Large-Scale Influx*, 1981; UNHCR Executive Committee, *Conclusion No. 99 (LV): General*, 2004.

<sup>75</sup> UNHCR, *The Principle of Non-Refoulement as a Norm of Customary International Law: Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93*, 31 January 1994; UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, para 15.



- 2.2.1.3 The Refugee Convention also confers on refugees rights relating to freedom of religion, access to courts, employment, housing, public education, protection under labour laws and social security benefits, freedom of movement within the territory of the country of asylum, identity and travel documents, freedom from punishment for illegal entry into the territory of the country of asylum and protection against expulsion except under certain, strictly defined conditions.<sup>76</sup>
- 2.2.1.4 Refugees have an obligation to abide by the laws and regulations of the country of asylum and to respect measures taken for the maintenance of public order.<sup>77</sup>
- 2.2.1.5 The Refugee Convention does not prescribe a particular procedure for the determination of whether a person is a refugee. In practice RSD processes are done as individual or group assessments and carried out by either the UNHCR or the government of the country of asylum. In Cambodia the RSD process is managed by the RGC (see section 2.2.2).

### ***Complementary protection***

- 2.2.1.6 Refugees and asylum seekers also enjoy **complementary protection** under international human rights law instruments which confer rights and protections on all persons, including refugees and asylum seekers. Most importantly, the principle of *non-refoulement* is reaffirmed in the *United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (CAT)* which prohibits expelling, returning or extraditing a person to another country where there are substantial grounds for believing that he or she will be in danger of being subjected to torture.<sup>78</sup> Other international human rights law instruments create similar obligations for States Parties not to *refoule* any person to a country where he or she will face violations of his or her rights to protection against torture, inhuman and degrading treatment or punishment and threats to life, liberty and security of the person.<sup>79</sup>
- 2.2.1.7 Refugees and asylum seekers are also entitled to the rights contained in international human rights law instruments to which Cambodia is a State Party, including:
- the right to recognition as a human being born free and equal in dignity and rights, equal before the law and with the right to freedom from discrimination of any kind including on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status;<sup>80</sup>
  - the right to seek and to enjoy in other countries asylum from persecution;<sup>81</sup>
  - the right to leave any country, including their own;<sup>82</sup>
  - the right to freedom from arbitrary arrest, detention or exile;<sup>83</sup>

<sup>76</sup> Refugee Convention, articles 4, 16-20, 21-22, 27-28 and 31-32.

<sup>77</sup> *ibid.*, article 2.

<sup>78</sup> CAT, article 3(1).

<sup>79</sup> *Universal Declaration of Human Rights 1948 (UDHR)*, articles 3 and 5; *International Covenant on Civil and Political Rights 1966 (ICCPR)*, articles 6, 7 and 9; CRC, articles 6 and 37.

<sup>80</sup> UDHR, articles 1, 2 and 7; ICCPR, articles 2(1), 3 and 26; *International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR)*, articles 2(2) and 3; CRC, article 2(1); CEDAW, see in particular articles 2 and 15; *United Nations International Convention on the Elimination of All Forms of Racial Discrimination 1966 (ICERD)*, see in particular article 5.

<sup>81</sup> UDHR, article 14(1).

<sup>82</sup> *ibid.*, article 13(2); ICCPR, article 12(2); CRC, article 10(2); ICERD, article 5(d)(ii).

## State of Migration

### An overview of forced displacement in Cambodia

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- the right to an effective remedy determined by competent judicial, administrative or legislative authorities for acts constituting a violation of fundamental human rights;<sup>84</sup>
- the right to freedom of thought, conscience, religion, opinion, expression and peaceful assembly and association;<sup>85</sup> and
- the right to a standard of living which is at least adequate for their health and well-being and that of their family.<sup>86</sup>

2.2.1.8 Accompanied and unaccompanied children who are asylum seekers or refugees in Cambodia are entitled to receive appropriate protection and humanitarian assistance to ensure that they enjoy the full range of rights contained in the CRC and other international human rights and humanitarian law instruments.<sup>87</sup>

## 2.2.2 Cambodian domestic law

2.2.2.1 After Cambodia became a State Party to the Refugee Convention and its Protocol on 15 October 1992, the UNHCR continued to have responsibility for the RSD process in Cambodia. In mid-2008 the RGC established the Refugee Office to manage RSD jointly with the UNHCR. The Refugee Office was established within the Ministry of Interior (**Mol**) as part of the Department of Immigration and under the direction of the National Police Commissariat. In December 2009 the RGC enacted *Sub-decree no. 224 on a Procedure for Recognition as a Refugee or Providing Asylum Rights to Foreigners in the Kingdom of Cambodia 2009 (Sub-decree on RSD)* which introduced a domestic framework for the processing of asylum claims “in conformity with the spirit” of the Refugee Convention<sup>88</sup> and vested RSD decision-making powers exclusively in the RGC.

2.2.2.2 The Sub-decree on RSD provides that asylum seekers applying for refugee status may receive temporary permission to enter and remain in Cambodia and sets out the RSD process in relative detail, including time frames for each step. Positive features of the Sub-decree on RSD include that:

- it requires that asylum seekers be provided with a qualified interpreter free of charge in order to assist them in each stage of the RSD process;<sup>89</sup>
- it purports to confer on refugees the rights to receive a resident card, work and operate a business and sponsor dependent family members for migration to Cambodia;<sup>90</sup> and
- it contains a prohibition on *refoulement* of refugees to the frontiers of countries in cases of threat to life or freedom and threat to a person’s rights on account of his or her race, religion, nationality, membership of a particular social group or political opinion.<sup>91</sup>

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<sup>83</sup> UDHR, article 9; ICCPR, article 9; CRC, article 37(b).

<sup>84</sup> UDHR, article 8; ICCPR, articles 2(3) and 14; ICERD, article 6.

<sup>85</sup> UDHR articles 18, 19 and 20; ICCPR, articles 18, 19, 21 and 22; ICESCR, article 8; CRC, articles 12-15; ICERD, article 5(d)(vii)-(ix).

<sup>86</sup> UDHR, article 25; ICESCR, article 11; CRC, article 27.

<sup>87</sup> CRC, article 22.

<sup>88</sup> Sub-decree on RSD, article 2.

<sup>89</sup> *ibid.*, article 13.

<sup>90</sup> *ibid.*, articles 15-17.

<sup>91</sup> *ibid.*, article 23.

- 2.2.2.3 The Sub-decree on RSD states that refugees in Cambodia have the same rights and obligations as legal immigrant foreigners.<sup>92</sup> In theory these rights and obligations include:
- the right to apply for **naturalisation** and acquire Cambodian citizenship (as of July 2012 JRS Cambodia is not aware of any refugee who has accessed the naturalisation process or been granted citizenship: see paragraph 2.5.2.6);<sup>93</sup>
  - the right to be employed and enjoy certain labour rights and protections;<sup>94</sup> and
  - limited rights concerning land ownership.<sup>95</sup>
- 2.2.2.4 Despite these positive aspects of the Sub-decree on RSD, critical gaps and deficiencies in the legal framework governing RSD in Cambodia include:
- the broad and numerous grounds for rejecting a claim for refugee status or expelling a refugee or asylum seeker which go beyond the more limited grounds contained in the Refugee Convention;
  - a general lack of transparency in the legal framework governing RSD. For example, two guidelines have been issued concerning the implementation of the RSD process and the management of persons who apply for and are granted refugee status but these guidelines have not been made publicly available to asylum seekers, refugees or their legal representatives;
  - the fact that the decision to allow asylum seekers to enter Cambodia temporarily under article 6 of the Sub-decree on RSD is discretionary, which creates a risk that some asylum seekers may be rejected and *refouled* at the border;
  - the fact that asylum seekers have neither a right to have a legal representative present during the RSD interview and at the handing down of decisions nor a right to receive a copy of the record of their RSD interview;
  - the fact that RSD decisions are appealed to the same body which makes the first decision and that there is no avenue for judicial review; and
  - the fact that a number of rights afforded to refugees under the Refugee Convention are not expressly reaffirmed in the Sub-decree on RSD or in other domestic law, including the rights to freedom of religion, housing and public education.<sup>96</sup>

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<sup>92</sup> *ibid.*, article 15.

<sup>93</sup> Law on Nationality, chapter IV.

<sup>94</sup> Labour Law, see in particular chapter X (section II).

<sup>95</sup> *Law on Providing Foreigners with Ownership Rights in Private Units of Co-Owned Buildings 2010 (Law on Foreign Property Ownership)*.

<sup>96</sup> For a more comprehensive analysis of the Sub-decree on RSD see: Human Rights Watch (HRW), *Open Letter to Prime Minister Hun Sen attaching Preliminary Analysis of the Refugee Sub-Decree on Procedures for Examination, Recognition and Provision of Refugee or Asylum Status for Aliens in the Kingdom of Cambodia dated 19 March 2010*, 25 March 2010, < <http://www.hrw.org/news/2010/03/24/letter-cambodia-sub-decree> > and < <http://www.hrw.org/news/2010/03/24/preliminary-analysis-sub-decree> > last accessed 30 June 2012.

#### 2.2.3 Regional law

##### *Association of South-East Asian Nations*

2.2.3.1 The Association of South East Asian Nations (**ASEAN**) is an intergovernmental regional organisation comprising 10 Member States: Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam. ASEAN adopts a distinct approach to interstate relations and cooperation – the ‘ASEAN Way’ – which is based on the principles of non-interference in the domestic affairs of Member States, decision by consensus-building, a preference for flexibility and informal, *ad hoc* agreements and an avoidance of rigid, legally-binding structures, instruments and institutions.

2.2.3.2 The ASEAN Intergovernmental Commission on Human Rights (**AICHR**) is the overarching human rights institution in ASEAN. The AICHR is in the process of drafting an *ASEAN Declaration of Human Rights (ADHR)* which is expected to address the issue of refugees and asylum seekers.

##### *Emergency Transit Agreement*

2.2.3.3 In August 2009 the Philippines, the IOM and the UNHCR signed a *Memorandum of Agreement Concerning the Emergency Transit of Refugees* (an Emergency Transit Agreement or **ETA**). The ETA, the first agreement of its kind in the region, has been hailed as “*the protection benchmark in Asia.*”<sup>97</sup> It provides for the transport to and processing in the Philippines of refugees who are at risk of *refoulement* or who need to transit through another country pending the processing of their cases and subsequent resettlement in a third country.

2.2.3.4 The procedure for implementing the ETA is outlined by the UNHCR in a *Guidance Note on Emergency Transit Facilities*.<sup>98</sup> UNHCR field officers identify refugees, assess their suitability for transfer and submit transfer requests to the Philippines. Before a refugee can be considered for transit, a resettlement country must have agreed to accept them or to conduct further resettlement processing. Refugees who may be considered for transit from Cambodia to the Philippines under the ETA include:

- refugees at immediate risk of *refoulement* or facing other acute, life-threatening situations;
- refugees in detention conditions who warrant resettlement as the most appropriate form of protection, and for whom a swift release from detention requires a transfer out of Cambodia;
- refugees whose cases are particularly sensitive or high profile and who face imminent or serious protection problems; and
- refugees in need of resettlement for whom a resettlement country and/or the UNHCR requires that the refugee’s final destination not be disclosed to the RGC.<sup>99</sup>

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<sup>97</sup> Raymond Hall (former UNHCR Regional Coordinator for South-East Asia) quoted in ‘At-risk refugees gain temporary sanctuary in the Philippines under agreement with UN’, UN News, undated, < <http://www.un.org/apps/news/story.asp?NewsID=31909&Cr=unhcr&Cr1=resettle> > last accessed 30 June 2012.

<sup>98</sup> UNHCR, *Guidance Note on Emergency Transit Facilities*, 4 May 2011.

<sup>99</sup> *ibid.*, para 14.

2.2.3.5 A decision on the request for transit should usually be handed down within 24 hours, although for sensitive and high profile cases this time frame may be longer. UNHCR field officers in the Philippines coordinate with the relevant authorities for entry permits to be issued. Following confirmation that the refugee may be transferred, staff from the UNHCR, IOM and the International Committee of the Red Cross (**ICRC**) arrange for the preparation of travel documents, exit permits, transportation and travel escorts. The IOM is responsible for providing transport to and within the Philippines as well as onward transport to resettlement countries, medical screening and cultural orientations to prepare refugees for their new lives in resettlement countries.<sup>100</sup>

### ***The Bali Process***

2.2.3.6 The Bali Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime (**Bali Process**) is a regional inter-governmental framework for cooperation established in 2002 to combat trafficking in persons, people smuggling and related transnational crime in the Asia-Pacific region. As of July 2012, 46 source, transit and destination countries in the Asia-Pacific region are members of the Bali Process. The main focus of the Bali Process is to address issues arising in relation to border-control and transnational crime, however it also seeks to assist countries to adopt best practices in asylum management in accordance with the principles of the Refugee Convention and its Protocol.

2.2.3.7 In November 2010 the UNHCR proposed the adoption of an inclusive but non-binding Regional Cooperation Framework (**RCF**) which would:

- assist States to develop more coherent and predictable responses to refugees and irregular movements in the region;
- provide a reference point through which support from States outside the region could be engaged; and
- support the development of cooperative measures which would ensure a clear and fair distribution of responsibilities amongst States for refugees, asylum seekers and irregular movements in the region.<sup>101</sup>

2.2.3.8 In March 2011 the Fourth Regional Ministerial Conference of the Bali Process agreed to adopt the RCF as a means of providing a more effective way for interested parties to cooperate to reduce irregular movement through the region.<sup>102</sup> Two of the core principles underpinning the RCF are that:

- where appropriate and possible, asylum seekers should have access to consistent assessment processes and arrangements; and
- persons found to be refugees under these assessment processes should be provided with a durable solution, such as voluntary repatriation, resettlement within or outside the region and, where appropriate, 'in country solutions.'<sup>103</sup>

<sup>100</sup> *ibid.*, para 17.

<sup>101</sup> UNHCR, *Discussion Paper: Regional Cooperative Approach to address Refugees, Asylum Seekers and Irregular Movement*, November 2010, section 3; Regional Cooperation on Refugees and Irregular Movements Workshop, *Co-Hosts' Summary*, Manila, Philippines, 22-23 November 2010, paras 9-13.

<sup>102</sup> Fourth Regional Ministerial Conference of the Bali Process, *Co-Chairs' Statement*, Bali, Indonesia, 29-30 March 2011.

<sup>103</sup> *ibid.*, para 16.

- 2.2.3.9 In June 2011 the UNHCR presented a proposal for the establishment of a Regional Support Office (**RSO**) as a means of implementing the RCF. In October 2011 the Fifth Meeting of the Bali Process Ad Hoc Group of Senior Officials agreed to establish the RSO in Southeast Asia, under the direction of Australia and Indonesia and in consultation with UNCHR and the IOM.<sup>104</sup> The RSO is intended to support and strengthen practical cooperation regarding refugee protection and international migration through: 1) information sharing and data collection management; 2) capacity building and the exchange of best practices; 3) the pooling together of common technical resources and 4) logistical, administrative, coordination and operational support for joint pilot projects.<sup>105</sup>
- 2.2.3.10 The RSO is expected to be established in Bangkok, Thailand in mid-2012.

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## 2.3 Refugees and asylum seekers in Cambodia

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***“We are not Cambodian citizens so we cannot find a job. Lack of opportunity and language skills has made it very difficult for me to find work... I cannot get a job ahead of the local people. I’m young, I want to study and have a good life... We have very little income, no job, so how can we study? How can we have good lives?... I am also depressed because we stay at home all the time, we have no jobs or friends. Sometimes I think we have no identity.”***

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*– refugee from Myanmar (Burma) in Cambodia<sup>106</sup>*

### 2.3.1 Historical context

- 2.3.1.1 During the Khmer Rouge era approximately 600,000 Cambodians fled to seek asylum in Thailand, Vietnam and Indonesia. Many thousands more were resettled in the United States, Canada, France and Australia. Almost 90% of the entire population was internally displaced and many lived for more than 13 years in camps for displaced persons along the Thai-Cambodian border.

### 2.3.2 The situation today

- 2.3.2.1 In 2012 the issue of refugees and asylum seekers in Cambodia is very different from how it was in the 1970s and 1980s. Relatively small numbers of refugees and asylum seekers leave and come to Cambodia and there are no refugee camps. As of July 2012 the UNHCR estimates that there are 64 refugees and 49 asylum seekers in Cambodia. A form of internal displacement continues to occur as a result of land disputes (see Chapter 6), but not on a comparable scale to the displacement of the Khmer Rouge era.

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<sup>104</sup> Fifth Meeting of the Bali Process Ad Hoc Group of Senior Officials, *Co-Chairs’ Statement*, Sydney, 12 October 2011, para 14.

<sup>105</sup> Bali Process Steering Group, *Note on the Operationalisation of the Regional Cooperation Framework in the Asia-Pacific Region*, 28 September 2011, section 1.

<sup>106</sup> Yong, L., ‘Cambodia: without rights and opportunities, integration is an illusion for refugees’, JRS Asia Pacific, Phnom Penh, 23 July 2010, <[http://www.jrsap.org/Voices\\_Detail?TN=DTN-20100723081959](http://www.jrsap.org/Voices_Detail?TN=DTN-20100723081959)> last accessed 30 June 2012.

- 2.3.2.2 Asylum seekers have come to Cambodia from a range of countries in Asia, the Middle East and Africa including: Afghanistan, Algeria, Bangladesh, Burma, China, the Democratic Republic of Congo, Iran, Iraq, Lao PDR, Nepal, Nigeria, Pakistan, Palestine, Rwanda, Sierra Leone, Somalia, Sri Lanka, Sudan, Tibet and Vietnam.
- 2.3.2.3 Three particularly significant groups of refugees and asylum seekers have arrived in Cambodia in recent years:
- asylum seekers from Myanmar who currently comprise the largest population of asylum seekers and refugees in Cambodia and in the region more generally. Included within this group are significant numbers of stateless **Rohingya** who formerly resided in Myanmar but are deemed not to have Myanmar nationality nor the nationality of any other State (for more information on statelessness, see Chapter 3). Rohingya and non-Rohingya asylum seekers from Myanmar base their claims for refugee status on a number of forms of persecution, including persecution on the grounds of political opinion, religious belief and ethnicity;
  - approximately 22 **Uighur** men, women and children who arrived in Cambodia in a series of small groups between May and October 2009 and sought asylum from persecution in China. On 18 December 2009, prior to their claims for refugee status being heard, the asylum seekers were arrested at gun-point by Cambodian police at a jointly-managed UNHCR-RGC safe house and deported the next day to China. The deportation occurred only days after the RGC enacted the Sub-decree on RSD which purported to confer certain protections on asylum seekers and refugees, and coincided with the arrival in Cambodia of Chinese Vice President Xi Jinping who signed contracts for aid and loans worth approximately US\$1.2 billion. In February 2012 information was leaked out of China that at least three of these Uighurs are facing life sentences and others are serving sentences of at least 10 years imprisonment.<sup>107</sup> Groups of Uighur asylum seekers were also forcibly deported from Thailand and Malaysia during 2011; and
  - ethnic **Montagnard** asylum seekers who started arriving in Cambodia from the central-highlands region of Vietnam fleeing persecution in February 2001. In response to widespread reports of Cambodian officials deporting Montagnard asylum seekers back to Vietnam before they had a chance to register with the UNHCR, the UNHCR established camps in Mondolkiri and Ratanakiri provinces and safe-houses in Phnom Penh where Montagnards were confined for their own safety. In January 2005 the UNHCR negotiated a tripartite agreement with the Cambodian and Vietnamese governments under which Montagnard asylum seekers who were already in Cambodia were allowed to stay in the UNHCR safe-houses until their claims for asylum were heard. Upon determination of their claims, Montagnards who were granted asylum had the choice of voluntary repatriation to Vietnam or being resettled to a third country. After a new group of Montagnards arrived in late-2010, local newspapers reported that the RGC had ordered the one remaining UNHCR safe-house be shut down by 1 January 2011 and for all Montagnard asylum seekers and confirmed refugees to be sent back to Vietnam: an act which would have constituted *refoulement* in at least the confirmed refugee cases.<sup>108</sup> Ultimately this outcome was avoided when the UNHCR was granted an extension to keep the safe-house open until mid-February

<sup>107</sup> Errington and Hunt, *op. cit.* (note 63), p 21; Wills, K., and Hua, J., 'Two Uighurs deported from Cambodia to China get life', *Reuters*, 27 January 2012, <<http://www.reuters.com/article/2012/01/27/us-china-uighurs-idUSTRE80Q0AW20120127>> last accessed 30 June 2012.

<sup>108</sup> Strangio, S., and Sokha, C., 'Refugees face deportation', *The Phnom Penh Post*, 15 December 15 2010, pp 1-2.

2011, by which time most of the Montagnards had accepted an offer of resettlement from the Canadian government and had left Cambodia.

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## **2.4 Reasons for becoming a refugee or asylum seeker**

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*“Ethnic minorities, particularly those with different religious beliefs from the majority population, are particularly highly represented amongst groups of people seeking protection in the region...”*

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### **2.4.1 Reasons for seeking protection**

2.4.1.1 Refugees seek protection because they fear persecution on the grounds of their race, religion, nationality, membership of a particular social group or political opinion. Ethnic minorities, particularly those with different religious beliefs from the majority population, are particularly highly represented amongst groups of people seeking protection in the region.

### **2.4.2 Reasons for choosing Cambodia as a country of asylum**

2.4.2.1 Cambodia is not an asylum country of first choice for many refugees and asylum seekers. Resettlement from Cambodia to countries such as Australia, the United States and Canada is not available to most refugees and standards of living in Cambodia are relatively low due to poverty and underdevelopment.

2.4.2.2 For the small numbers of refugees who do come to Cambodia, the most common reason for their choice of country of asylum is incorrect information about resettlement options. Other less significant factors which may facilitate or encourage asylum seekers and refugees arriving in Cambodia include:

- the availability of a visa on arrival at the border or airport which allows a relatively easy entry into Cambodia;
- the fact that Cambodia is one of only three countries in the region which is a signatory to the Refugee Convention and its Protocol, which might suggest to asylum seekers that they will have a better chance of accessing a fair and transparent RSD process; and
- the fact that asylum seekers are not arrested and detained in immigration detention centres (**IDCs**) in Cambodia in the same way as they are in countries such as Thailand, Malaysia and Indonesia.

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## 2.5 The experience of refugees and asylum seekers

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***“It was difficult to find friends here because I would be treated differently. We could not get further training here. Mostly we stay in our rooms; we just think, get stressed and worry. We would get emotional.”***

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*– refugee from Somalia in Cambodia<sup>109</sup>*

### 2.5.1 Going through the RSD process in Cambodia

2.5.1.1 In 2009 the RGC took over responsibility for the RSD procedure from the UNHCR in accordance with the Sub-decree on RSD.

2.5.1.2 The Sub-decree on RSD sets out the following procedure for the determination of refugee claims:

- *registration*: when asylum seekers arrive in Cambodia they are required to present themselves to the Refugee Office in Phnom Penh to collect and fill out a registration form and have their photo taken. Asylum seekers must provide information on the form about the reason(s) for their flight from their country of origin and for applying for refugee status in Cambodia;
- *RSD interview*: after submitting their registration form, asylum seekers are required to attend a RSD interview. The interview should be within 15 days of registration, however in practice many have taken place several months after registration. The interview is conducted by officials from the MoI and the Ministry of Foreign Affairs and International Cooperation (**MoFAIC**). A member of UNHCR staff usually attends the interview but legal representatives are not permitted to be present. A qualified interpreter is provided to the asylum seeker and the length of time between registration and the interview can be delayed further if an appropriate interpreter cannot be found. Asylum seekers are not provided with a copy of the record of their interview;
- *receipt of Preliminary Stay Permission document (PSP document)*: approximately one month after the registration interview the Refugee Office will issue asylum seekers with a PSP document which allows the holder to stay temporarily within Cambodia. PSP documents usually need to be renewed monthly until a first-instance decision is made about the asylum seeker’s claim;
- *decision*: according to the Sub-decree on RSD a decision should be handed down by the MoI within 45 days of the RSD interview or, where a decision cannot be made within this time frame, the relevant officials are required to provide reasons for the delay in writing to the asylum seeker and to hand down a decision within 90 days of the RSD interview. In practice no applicants have had their decision handed down within 45 days, many cases are left pending for more than two years and no applicants have received written reasons for the delay in the decision-making process;

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<sup>109</sup> Yong, L., ‘Cambodia: Somali refugee resettled in the US’, JRS Asia Pacific, Phnom Penh, 23 July 2010, <[http://www.jrsap.org/Voices\\_Detail?TN=DTN-20100723074002](http://www.jrsap.org/Voices_Detail?TN=DTN-20100723074002)> last accessed 30 June 2012.

## State of Migration

### An overview of forced displacement in Cambodia

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- in the event of a positive decision:
  - a Refugee Certificate will be issued in the form of a *prakas* which recognises the person as a refugee. The Refugee Certificate will contain the refugee's photo, have no expiry date and will not need to be renewed; and
  - the refugee will be allowed to continue living in the community. If a refugee wishes to be resettled they will need to approach the UNHCR themselves and raise this possibility, however in practice resettlement from Cambodia is closed to refugees except in exceptional cases for applicants with "special needs";<sup>110</sup>
  
- in the event of a negative decision:
  - the asylum seeker should be provided with written reasons for the decision. In practice asylum seekers receive a double-sided piece of paper in English and Khmer entitled '*The Negative Refugee Status Determination*' containing three possible reasons why the application was rejected and a tick next to the relevant reason or reasons. The grounds for rejection are general and vague, offering no real insight into the specific reasons why the application was rejected;
  - *appeal*: the asylum seeker has a 30-day period in which to file an appeal. Asylum seekers are required to specify the reasons for their appeal but there is no standard form to complete for this purpose. Three new officials from the Department of Immigration hear the appeal and should hand down a decision within 15 days. In practice appeals may be pending for up to 11 months; and
  - if the appeal is unsuccessful or the asylum seeker chooses not to file an appeal there is no official process for the removal of the asylum seeker from Cambodia. Most asylum seekers must remove themselves, usually without arrest or force by the RGC. Vietnamese asylum seekers whose applications for refugee status have been rejected may be escorted to the border by government or law-enforcement officers.

2.5.1.3 The RGC has been reluctant to acknowledge the right of an asylum seeker to be assisted by a lawyer and legal representatives are denied permission to be present during interviews and at the handing down of first-instance and appeal decisions. Nevertheless, asylum seekers and refugees receive legal assistance from organisations such as JRS Cambodia which provides free guidance and advice on issues such as the RSD interview, procedure and timeline, the need to tell stories chronologically and accurately, the substance of claims and the preparation and filing of appeals. Legal representatives also gather relevant country of origin information and provide legal briefs to decision-makers.

## 2.5.2 Life as an asylum seeker or refugee in Cambodia

### *Documentation*

2.5.2.1 Asylum seekers in Cambodia are issued with a PSP document and refugees are issued with a Refugee Certificate. JRS Cambodia is not aware of any case in which a refugee has been issued a resident card in accordance with article 15 of the Sub-decree on RSD.

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<sup>110</sup> Hunt, T., 'Cambodia: resettlement no longer an option for urban refugees', JRS Asia Pacific, Phnom Penh, 15 September 2010, < [http://www.jrsap.org/campaign\\_detail?PTN=PROMO-20110124104905&TN=PROJECT-20110201034647](http://www.jrsap.org/campaign_detail?PTN=PROMO-20110124104905&TN=PROJECT-20110201034647) > last accessed 30 June 2012; UNHCR, *Frequently Asked Questions on the Exchange of Documents*, 2012, question 11.

- 2.5.2.2 The Sub-decree on RSD recognises the right of refugees to receive travel documents in accordance with article 28 of the Refugee Convention.<sup>111</sup> In practice, however, refugees have been required to provide compelling reasons and a detailed explanation of the purpose of their travel in order to be issued with these documents. Travel documents have been issued to refugees wishing to study outside of Cambodia but not to refugees wishing to travel outside of Cambodia in order to find employment.
- 2.5.2.3 In 2011 the first child born in Cambodia to a refugee family since the RGC assumed responsibility for the RSD process was issued with a birth certificate which lists his nationality as his country of origin. JRS Cambodia looks forward to future children born to refugee and asylum seeker families in Cambodia receiving similar documentation.

### ***Legal status***

- 2.5.2.4 The RSD process in Cambodia can take up to 3.5 years. Whilst the legal status of asylum seekers remains uncertain during this time, most asylum seekers in possession of a PSP document are not subjected to arbitrary arrest, detention and harassment of the kind which is reported in other countries in the region such as Thailand, Indonesia and Malaysia.
- 2.5.2.5 Under the Sub-decree on RSD refugees in Cambodia are entitled to *“the same rights and have the same responsibilities as legal foreign immigrants”* and certain additional rights.<sup>112</sup> In practice refugees are prevented from enjoying many of these rights due to discrimination, language barriers and the fact that the bulk of the law relating to foreign legal immigrants is not appropriate for application to persons with refugee status.
- 2.5.2.6 In theory the entitlement to the same rights as legal foreign immigrants includes a right to apply for naturalisation and Cambodian citizenship. JRS Cambodia is not aware of any refugee who has completed this process. Naturalisation is only available to persons who have held a residency card for at least seven years<sup>113</sup> and since refugees have not been issued with residency cards they are effectively excluded from this process.

### ***Employment***

- 2.5.2.7 Asylum seekers are not permitted to work whilst their cases are being processed. Given the length of the RSD process, this restriction can place asylum seekers in a precarious economic position. In practice asylum seekers are often able to run businesses with minimal interference from local authorities but finding employment, making a living and financial security remain very difficult for most asylum seekers.
- 2.5.2.8 Refugees are legally entitled to work and operate a business in Cambodia, however the legal framework governing this employment is inappropriate for application to most refugees who are unable to meet the requirements for becoming a documented worker (such as possession of a valid passport and residency card). The Refugee Office claims that employers can call it for confirmation of the legal status and right to work of refugees. In practice, however, a failure by employers to recognise Refugee Certificates acts as an obstacle to gaining employment. Other obstacles include language barriers, a lack of technical skills and discrimination against non-Cambodian workers.

<sup>111</sup> Sub-decree on RSD, article 18.

<sup>112</sup> Sub-decree on RSD, article 15. The additional rights include the right to receive a resident card (article 15), to work or operate a business (article 16) and to sponsor dependent family members for migration to Cambodia (article 17).

<sup>113</sup> Law on Nationality, article 8(3).

#### *Access to housing, education and basic health care*

- 2.5.2.9 Most asylum seekers in possession of a PSP document and refugees in possession of a Refugee Certificate as proof of identity and legal status do not have problems renting accommodation within Cambodia, although if landlords do not register their foreign tenants with local authorities (as is required by law) the authorities may question landlords, asylum seekers and refugees about their legal status.
- 2.5.2.10 Refugees and asylum seekers in Cambodia have access to basic education, health care (including mental health care) and health insurance, however due to a lack of services and infrastructure in the country in general their access to quality education and health services may be very limited.

#### *Freedom of thought, expression and association*

- 2.5.2.11 Under international law refugees and asylum seekers have rights to freedom of thought, conscience, religion, opinion, expression and peaceful assembly and association.<sup>114</sup> In certain situations these freedoms have been restricted in Cambodia.<sup>115</sup> A recent example of such restriction occurred in 2012 when refugees were firmly warned not to attend an ASEAN event in Phnom Penh by local police. As a result of these restrictions, most refugees tend to keep a low profile in order to avoid unwanted attention from law-enforcement and local authorities and ensure that their refugee status is not revoked.

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## 2.6 Particular issues affecting women and children

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***“I have lived in Cambodia for 15 years. When I first moved here, I was very scared all the time that I would be sent back to Vietnam. I still think about it sometimes. I have never had a real job here, and it has always been hard to get by. Things are getting more and more expensive. My grandson lives with me, and I worry about his future. He goes to Khmer school, but he is different. People are always talking about the different colour of our skin.”***

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*– female refugee from Vietnam in Cambodia<sup>116</sup>*

### 2.6.1 Women

- 2.6.1.1 Most women who arrive in Cambodia as asylum seekers or refugees come with their husbands and/or families and share the same experiences as they do. However, on average women in Cambodia – including refugee and asylum seeker women – have lower levels of education, less skills and vocational training and fewer resources than men which may increase their vulnerability to exploitative labour practices and trafficking in persons (see Chapters 4 and 5).

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<sup>114</sup> UDHR articles 18, 19 and 20; ICCPR, articles 18, 19, 21 and 22; ICESCR, article 8; CRC, articles 12-15; ICERD, article 5(d)(vii)-(ix).

<sup>115</sup> For more information see: Cambodian Center for Human Rights (CCHR), *Cambodia Gagged: Democracy at Risk?*, September 2010.

<sup>116</sup> Errington and Hunt, *op. cit.* (note 63), p 47.

## 2.6.2 Children

- 2.6.2.1 Children who are refugees and asylum seekers are especially vulnerable to the effects of trauma, inadequate health care, a lack of access to appropriate education and the uncertainty which accompanies the refugee and asylum seeker experiences. Children may experience psychological, physical and developmental problems, difficulty accessing education in their language, cultural barriers and other obstacles to inclusion as a result of their experience and status as a refugee or asylum seeker.
- 2.6.2.2 Given their particular vulnerability, refugee and asylum seeker children require special protection and care to ensure that the physical and/or psychological harm which they or their families suffered in their country of origin is not compounded by further mistreatment in countries of transit, asylum and resettlement.
- 2.6.2.3 As a State Party to the CRC, Cambodia is legally bound to take appropriate measures to ensure that accompanied and unaccompanied children who are refugees or asylum seekers receive appropriate protection and humanitarian assistance in the enjoyment of their rights under the international human rights and humanitarian instruments to which Cambodia is a State Party.<sup>117</sup> Asylum seeker and refugee children enjoy no special rights or protections under Cambodian law apart from one provision in the Sub-decree on RSD which states that asylum seekers who are **minors** are to be provided with a representative or legal guardian who will work on behalf of and for the best interests of the child.<sup>118</sup> The issuance of birth certificates for refugee children may also confer some limited protection by providing proof of birthplace and identity (see paragraph 2.5.2.3).

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## 2.7 Compliance with international standards and implementation of domestic law

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*“States are responsible for protecting the fundamental human rights of their citizens... Since, by definition, refugees are not protected by their own governments, the international community steps in to ensure they are safe and protected.”*

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– UNHCR<sup>119</sup>

### 2.7.1 Cambodia’s protection obligations

- 2.7.1.1 Cambodia is one of only a handful of countries who have made a commitment to refugee rights in the region. There is a RSD procedure through which asylum seekers can apply for refugee status and most asylum seekers are granted entry to Cambodia at border check-points and airports on a tourist visa.

<sup>117</sup> CRC, article 22.

<sup>118</sup> Sub-decree on RSD, article 13.

<sup>119</sup> UNHCR, *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, Geneva, September 2011, p 4.

## State of Migration

### An overview of forced displacement in Cambodia

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2.7.1.2 Despite these positive developments, protection from *refoulement* may not be guaranteed to all groups of refugees and asylum seekers and the RGC has received strong criticism for its treatment of groups such as the Uighurs and the Montagnards (see paragraph 2.3.2.3). Further, there are contradictory reports as to whether asylum seekers and border officials properly understand the nature of article 6 of the Sub-decree on RSD which provides for the temporary entry and stay of asylum seekers in Cambodia. The UNHCR has informed JRS Cambodia that people at the borders are well-briefed on the legal framework for seeking asylum, however JRS Cambodia is not aware of any asylum seeker without a valid visa being granted permission at the border to enter Cambodia under article 6 of the Sub-decree on RSD.

2.7.1.3 Due to a lack of independent monitoring of IDCs in Cambodia there is no way to assess whether detainees are seeking asylum or are able to access the RSD procedure.

## 2.7.2 Cambodia's general human rights obligations

2.7.2.1 In several important respects the RGC generally complies with its protection obligations to refugees and asylum seekers. In particular, many refugees in Cambodia enjoy freedom of movement, freedom from arbitrary arrest and detention, access to family unity procedures and access to basic housing, education and health services. The protection of these rights could be better ensured if they were enshrined in domestic law.

2.7.2.2 Despite compliance with international human rights law in these respects, the procedure established by the Sub-decree on RSD falls short of complying with Cambodia's obligation to respect and uphold the right of refugees and asylum seekers to access to justice. Of particular concern in this regard are the facts that:

- the Sub-decree on RSD does not confer on asylum seekers and refugees a right to have legal representatives present during their RSD interview or at the handing down of first-instance and appeal decisions (and in practice legal representatives are excluded from these events);
- the appeal of a negative decision in the RSD process is determined by a panel comprised of members of the same government department which made the decision at first-instance, with no possibility of judicial review of any decisions;
- asylum seekers who receive a negative decision at first-instance are not given detailed written reasons for the refusal and are therefore not in an appropriate position to prepare their appeal; and
- in certain circumstances a refugee or asylum seeker may be denied entry into Cambodia, have their claim for refugee status rejected or cancelled or be expelled from Cambodia without access to due process, appeal or legal representation.

2.7.2.3 Despite express recognition under international and domestic law of the rights of refugees to work, receive a residence card and travel documents, access the full range of rights available to legal foreign immigrants and enjoy freedom of expression and association, in practice many refugees struggle to enjoy these rights in full (see section 2.5.2).

### 2.7.3 Timelines set out in the Sub-decree on RSD

- 2.7.3.1 The various stages of the RSD process are usually carried out in time frames which greatly exceed those set out in the Sub-decree on RSD. Whereas the Sub-decree on RSD envisions that the RSD process will take a total of 9 months, in practice it can take up to three and a half years.<sup>120</sup>

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## 2.8 Avenues for future action

***“The purpose of this Sub-decree is to contribute to ensuring the respect of human rights and rights of refugees so that refugees can enjoy their fundamental rights and freedoms in accordance with the spirit of the 1951 Convention and its 1967 Protocol Relating to the Status of Refugees.”***

– Sub-decree on RSD, article 2

### 2.8.1 Avenues for action concerning the treatment of refugees and asylum seekers

- 2.8.1.1 Refugees and asylum seekers would greatly benefit from an enhanced protection framework which:

- clearly sets out the rights to which refugees and asylum seekers are entitled and polices for the implementation of those rights (which are adapted and appropriate to the specific circumstances of refugees and asylum seekers);
- ensures that refugees are issued resident and/or national identity cards in accordance with article 15 of the Sub-decree on RSD;
- establishes a clear and simple procedure whereby refugees can access the naturalisation process and obtain Cambodian citizenship;
- ensures that the right of refugees to operate a business is respected in practice and does not entail bribes to local police; and
- keeps resettlement open as an option for those refugees who seek it.

- 2.8.1.2 Steps to ensure that the principle of *non-refoulement* is not violated could include:

- amending the Sub-decree on RSD to ensure that the powers to expel and reject asylum seekers and refugees are only exercised in accordance with adequate safeguards and due process; and
- extending the protection for refugees against *refoulement* in article 23 of the Sub-decree on RSD to cover asylum seekers as well.

<sup>120</sup> For more information see: Errington and Hunt, *op. cit.* (note 63), chapter 3.

## **2.8.2 Avenues for action concerning the RSD process**

- 2.8.2.1 The RSD process could be made more effective if steps were taken to ensure that the time frames stipulated by the Sub-decree on RSD are adhered to in practice (especially the time frame for decisions to be handed down with 45 days).
- 2.8.2.2 Transparency and due process in the RSD procedure could be improved by:
- introducing a legally-enforceable right of all asylum seekers to have legal representatives present at all stages of the RSD process, including during their registration interview and at the handing down of decisions at first-instance and on appeal; and
  - the creation of a procedure for appeal of RSD decisions to a different body from that which made the decision at first-instance and a mechanism for appeal of RSD decisions to an independent court of law for judicial review.

\* \* \*

## **2.9 Partners in Action**

### **2.9.1 Royal Government of Cambodia**

- 2.9.1.1 The relevant authority within the RGC to manage the RSD process is the Refugee Office within the Department of Immigration within the MoI. Local authorities and police officials at border check-points also have a role to play in granting asylum seekers access to Cambodian territory so that they can make a claim for refugee status.

### **2.9.2 United Nations agencies**

- 2.9.2.1 The UNHCR is the main United Nations agency with a mandate to protect refugees and asylum seekers in Cambodia. The UNHCR's role in Cambodia is to assist the RGC to implement the RSD procedure established by the Sub-decree on RSD, provide protection to refugees and support the local integration of refugees.
- 2.9.2.2 The Office of the High Commissioner of Human Rights (**OHCHR**) plays a role in monitoring Cambodia's compliance with the prohibition on *refoulement* and its international human rights obligations to refugees and asylum seekers.

### **2.9.3 International and local organisations**

- 2.9.3.1 JRS Cambodia provides free legal aid and social support to asylum seekers and refugees. When an asylum seeker arrives at JRS Cambodia they are met by the Legal Officer and a social worker to obtain information on the situation of the asylum seeker (including the nature of their claims and whether they are in need of shelter, food, medical care or other assistance). Asylum seekers receive legal advice on the RSD process and the relationship between the UNHCR and the Refugee Office. JRS Cambodia also assists some refugees and asylum seekers with income-generating and economic empowerment projects.
- 2.9.3.2 Local human rights organisations and local media sources have been strongly involved in monitoring the human rights situation of asylum seekers and refugees in Cambodia.



## Chapter Three

# Statelessness

*“I just had one simple hope: that when I died I could get a death certificate, to prove that I ever existed.”*

- former Cambodian refugee who received Vietnamese citizenship in July 2010 after 35 years of statelessness<sup>121</sup>

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<sup>121</sup> Regional Expert Roundtable on Good Practices for the Identification, Prevention and Reduction of Statelessness and the Protection of Stateless Persons in South East Asia (**Regional Roundtable on Statelessness**), *Good Practices – Addressing Statelessness in South East Asia*, Bangkok, 28-29 October 2010, p 3.

## 3.1 What is statelessness?

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***“Statelessness is one of the most forgotten areas of the global human rights agenda.”***

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– António Guterres, UN High Commissioner for Refugees<sup>122</sup>

### 3.1.1 The link between statelessness and nationality

3.1.1.1 **Statelessness** is a legal term describing a person’s lack of **nationality**. Nationality (or citizenship) is the legal relationship through which a person is connected to a particular State. States confer rights on their citizens and in return citizens owe certain duties to their State. For example, a State may grant to its citizens the rights to enter and reside in the territory of the State, vote and access services provided by the government and in return citizens may be required to pay taxes or perform military service.

3.1.1.2 Nationality is conferred on a person by a State according to the State’s domestic nationality laws. Nationality laws may confer nationality on the basis of:

- a person’s connection to another person who has the nationality of the State, for example:
  - a person may be entitled to the nationality of one or both of his or her parents (*jus sanguinis*); or
  - a person may be entitled to acquire the nationality of his or her spouse; and/or
- a person’s link to the territory of the State, for example:
  - if a person was born in a State’s territory they may be entitled to that State’s nationality on the basis of their place of birth (*jus soli*); or
  - if a person has resided in a State’s territory for a certain period of time they may acquire a right to apply for nationality through a process of naturalisation.

3.1.1.3 The acquisition of nationality can be either:

- automatic, meaning a person acquires the nationality of a State from the moment they satisfy the criteria for nationality as determined by that State’s domestic nationality laws (for example, a person will automatically acquire the nationality of a State which grants nationality on the basis of *jus sanguinis* at the moment they are born to a parent with the nationality of that State); or
- non-automatic, meaning a person must go through a process in order to acquire the nationality of a State. Where the acquisition of nationality is non-automatic it can be either:
  - discretionary, meaning the State can choose whether to accept or reject an application for nationality (for example, when a person applies for nationality through a process of naturalisation); or

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<sup>122</sup> António Guterres (UN High Commissioner for Refugees) quoted in ‘UNHCR chief hails landmark conference for making ‘quantum leap’ on statelessness’, UNHCR News, Geneva, 8 December 2011 < <http://www.unhcr.org/4ee0ba009.html> > last accessed 30 June 2012.

- non-discretionary, meaning the State must grant nationality to all persons who apply for and are entitled to it under the relevant domestic nationality legislation (for example, when a person is entitled to a nationality but first must have their birth registered or make a declaration).

### 3.1.2 Stateless people

3.1.2.1 A **stateless person** (or ***de jure* stateless person**) is a person who is not considered as a national by any State under the operation of its law.<sup>123</sup> Stateless people do not need to have crossed an international border – they may have lived in the same State for their entire lives without acquiring a nationality or a right to a nationality. An international treaty regime exists for the protection of stateless persons who fall within this definition (see paragraph 3.2.1.6).

3.1.2.2 The term ***de facto* stateless person** is used to describe a person who has a nationality but is unable or, for valid reasons, unwilling to avail him or herself of the protection of the State of nationality.<sup>124</sup> The prevalent view is that in order to be *de facto* stateless a person must also be outside the State of his or her nationality. There is no treaty regime to cover *de facto* stateless persons in the same way as there is for *de jure* stateless persons, and thus whilst the experiences of *de jure* and *de facto* stateless persons may be similar their positions under international law (and the legal protections to which they may be entitled) are distinct.

3.1.2.3 Some stateless persons are also refugees or asylum seekers (see Chapter 2). If a person is both stateless and a refugee, he or she should be afforded the higher standard of protection which is usually provided under the Refugee Convention.

3.1.2.4 **Protracted stateless situations** occur when situations of statelessness continue unresolved for decades or generations. These situations can occur when children born to stateless parents are neither eligible to acquire the nationality of the State in which they are born nor the nationality of any other State.

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## 3.2 International, domestic and regional law

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***“The easiest and most effective way to deal with statelessness is to prevent it from occurring in the first place. One of the surest methods is to guarantee that individuals born on a State’s territory have the right to that State’s nationality if they would not obtain any other.”***

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– António Guterres, UN High Commissioner for Refugees, and Louise Arbour, former UN High Commissioner for Human Rights<sup>125</sup>

<sup>123</sup> Statelessness Convention 1954 (see paragraph 3.2.1.2), article 1. This definition is now part of customary international law and applies to all States regardless of whether or not they are a State Party to the 1954 Statelessness Convention: see International Law Commission, *Draft Articles on Diplomatic Protection with Commentaries*, 2006, page 49.

<sup>124</sup> UNHCR, *Expert Meeting on the Concept of Stateless Persons under International Law (Summary Conclusions)*, 2010, section II.

<sup>125</sup> Guterres, A. and Arbour, L., *The Hidden World of Stateless People*, Joint Statement of the UN High Commissioner for Refugees and the UN High Commissioner for Human Rights, 28 November 2007.

#### 3.2.1 International law

##### *Introduction*

3.2.1.1 Each State has the power to determine by operation of its domestic law to whom it will grant its nationality, however international law imposes certain limits on:

- the power of States to make decisions as to nationality which may create or perpetuate situations of statelessness; and
- the way in which States treat stateless persons within their territory or subject to their jurisdiction.

3.2.1.2 These limits are contained in the *United Nations Convention Relating to the Status of Stateless Persons 1954 (Statelessness Convention 1954)*, the *United Nations Convention on the Reduction of Statelessness 1961 (Statelessness Convention 1961)* and various international human rights law instruments.

##### *International law and limits on domestic nationality laws*

3.2.1.3 The most significant limits on the power of a State to make decisions regarding nationality are contained in the Statelessness Convention 1961 which seeks to prevent new cases of statelessness from arising by providing for:

- the acquisition of nationality by those who would otherwise be stateless and who have an appropriate link with the State through birth on the territory or through descent from nationals;<sup>126</sup> and
- the retention of nationality by those who would be made stateless should they inadvertently lose their State's nationality.<sup>127</sup>

3.2.1.4 The status of ratification of the Statelessness Convention 1961 is relatively low. As of July 2012 only 45 countries are States Parties (compared to 145 States Parties to the Refugee Convention) and neither Cambodia nor any other State in the region is a **signatory** or a State Party.

3.2.1.5 Nevertheless, certain basic rights relating to nationality are guaranteed under other international human rights law instruments and are binding on Cambodia, including:

- the right of every person to a nationality and the right not to be arbitrarily deprived of a nationality or denied the right to change a nationality;<sup>128</sup>
- the right of all persons to enjoy equality before the law in the enjoyment of the right to a nationality without distinction as to race, colour, or national or ethnic origin;<sup>129</sup>

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<sup>126</sup> Statelessness Convention 1961, articles 1, 2 and 4.

<sup>127</sup> *ibid.*, articles 5-8.

<sup>128</sup> UDHR, article 15.

<sup>129</sup> ICERD, article 5(d)(iii).

- the right of every child to acquire a nationality and to be registered immediately after birth;<sup>130</sup> and
- the right of all women: 1) to enjoy equal rights as men to acquire, change or retain their nationality; 2) not to have their nationality changed, be rendered stateless or be forced to take the nationality of their husband as a result of marriage to a non-citizen or change of nationality by their husband and 3) to enjoy equal rights as men with respect to the nationality of their children.<sup>131</sup>

### ***International law and the treatment of stateless persons***

- 3.2.1.6 The most comprehensive international regime governing the treatment of stateless persons is the Statelessness Convention 1954 which seeks to regulate the legal status of stateless persons and ensure that their fundamental rights and freedoms are guaranteed without discrimination.
- 3.2.1.7 As with the Statelessness Convention 1961, the status of ratification of the Statelessness Convention 1954 remains relatively low. As of July 2012 only 74 States are States Parties and Cambodia is neither a signatory nor a State Party. The Philippines is the only State in the region to sign or become a State Party to the Statelessness Convention 1954.
- 3.2.1.8 Nevertheless, international human rights law establishes certain limits on the way in which a State may treat persons under its control and within its territory which are not dependent upon possession of a nationality. As a State Party to the UDHR, ICCPR, ICESCR, ICERD, CEDAW and CRC, Cambodia is legally bound to guarantee the basic rights and freedoms set out in those instruments to all persons in its territory without discrimination as to their legal status or nationality.

## **3.2.2 Domestic law**

### ***Law on Nationality***

- 3.2.2.1 The Law on Nationality sets out the circumstances in which a person may acquire Cambodian nationality and contains several provisions which can act as safeguards against statelessness. Despite these safeguards, this law does not recognise statelessness as a legal concept and is inadequate to prevent new cases of statelessness from arising in certain situations or to resolve existing cases of statelessness.
- 3.2.2.2 The Law on Nationality protects against:
- statelessness as a result of loss or renunciation of nationality by only providing for the withdrawal of Cambodian nationality by mutual agreement, preserving the Cambodian nationality of citizens living in foreign countries and preventing citizens from renouncing their Cambodian nationality unless they already have another nationality;<sup>132</sup>

<sup>130</sup> ICCPR, article 24(3); CRC, article 7(1).

<sup>131</sup> CEDAW, article 9.

<sup>132</sup> Law on Nationality, articles 2, 3 and 18.

## State of Migration

### An overview of forced displacement in Cambodia

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- statelessness as a result of discriminatory laws relating to marriage and families by providing that both men and women can pass their Cambodian nationality to their children and that citizens do not lose their Cambodian nationality by reason of marriage to a foreigner;<sup>133</sup> and
- statelessness of children in limited circumstances by providing that:
  - any child who is born in Cambodia to foreign parents who were born and living legally in Cambodia shall obtain Cambodian nationality; and
  - any child who is born or found in Cambodia and whose parents are unknown shall obtain Cambodian nationality.<sup>134</sup>

3.2.2.3 Neither the Law on Nationality nor any other domestic law provides safeguards against statelessness or the risk of statelessness arising in circumstances where:

- a child is born in Cambodia to stateless parents;
- a foreigner residing in Cambodia loses or renounces their foreign nationality and is denied Cambodian nationality through the process of naturalisation; or
- a person who would otherwise be entitled to Cambodian nationality is unable to produce the necessary documents and evidence to prove their nationality.

3.2.2.4 Domestic law provides no mechanism for officially identifying and formally resolving existing cases of statelessness. Administrative requirements for obtaining Cambodian nationality through the process of naturalisation effectively exclude stateless persons from that process by requiring possession of a residency card.<sup>135</sup>

#### ***Sub-Decree no. 36 on Khmer Nationality Identity Cards 1996***

3.2.2.5 National identity cards can provide evidence of nationality. *Sub-decree no. 36 on Khmer Nationality Identity Cards 1996 (Sub-decree on ID Cards)* provides for the issuance of Cambodian identity documents to persons with Cambodian nationality by the governor of each province. The Sub-decree on ID Cards lists certain documents which may be taken as evidence that the applicant has Cambodian nationality but it does not set out the details of any formal procedure by which a decision as to the issuance of identity cards should be made.<sup>136</sup>

#### ***Sub-Decree no. 103 on Civil Status (Civil Registration) 2000***

3.2.2.6 Birth registration plays a critical role in preventing statelessness. *Sub-Decree no. 103 on Civil Status (Civil Registration) 2000 (Sub-decree on Civil Registration)* creates a uniform legal framework for the registration of births, marriages and deaths in Cambodia and was enacted to give effect to the RGC's policy of bringing the entire population within the civil registration system by August 2005.<sup>137</sup>

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<sup>133</sup> *ibid.*, articles 4(1) and 6.

<sup>134</sup> *ibid.*, article 4(2).

<sup>135</sup> *ibid.*, article 8(3).

<sup>136</sup> In addition to these national identity cards Cambodian citizens and other groups hold a range of identity documents which may be relevant to citizenship and nationality, including birth certificates, family books and resident books. For more information see paragraph 3.4.3.1 (first point).

<sup>137</sup> Despite the enactment of this law in 2000 and its enforcement from 2002, by 2004 less than 5% of the population had been registered. To address this situation a mass mobile campaign for universal birth registration was launched by the RGC and Plan Cambodia with the support of the Asian Development Bank. The campaign was a success with

- 3.2.2.7 Key provisions of the Sub-decree on Civil Registration include:
- a requirement that the mother and/or father of a newborn baby register the child's birth within 30 days of birth, and a procedure for the registration of births outside of this period;<sup>138</sup>
  - provisions which provide for the registration of:
    - babies and children who are abandoned or in an orphanage;
    - babies born to unmarried parents;
    - babies born to parents living abroad if at least one of the parents is Cambodian; and
    - babies born in Cambodia to immigrants or foreigners who legally live in Cambodia;<sup>139</sup> and
  - a provision that the parent (or other relevant person) who reports the birth of a child shall be provided with a copy of the original birth certificate as evidence of the child's identity and nationality status.<sup>140</sup>

### 3.2.3 Regional law

- 3.2.3.1 The issue of statelessness is expected to be included in the ADHR which is in the process of being drafted by the AICHR (see paragraph 2.2.3.2).
- 3.2.3.2 In October 2010 representatives from the RGC and Cambodian human rights groups participated in the Regional Roundtable on Statelessness co-hosted by UNHCR and the National Human Rights Commission of Thailand in Bangkok. The report of the Regional Roundtable on Statelessness proposes good practices for addressing statelessness and recommendations for further action. In particular, the report recommends renewing efforts to identify stateless populations, continuing to share good practices on civil registration and addressing statelessness, issuing identity documentation to stateless populations and encouraging the AICHR to take up the issue of statelessness.<sup>141</sup>
- 3.2.3.3 Cambodia's regional efforts to address the problems of undocumented migrant workers and trafficking in persons may also play a role in preventing future cases of statelessness from arising in the region (see Chapters 4 and 5). These efforts are particularly important to cases involving persons who migrate to work (including children who migrate with their families) and subsequently lose their ability to prove a connection to their State of origin (for example, due to a loss of identity papers).

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over 9,500,000 Cambodian adults and children registered within the first 18 months and more than 90% of the population registered by June 2008. For more information see: Plan International, *Mass Mobile Registration in Cambodia*, undated, < <http://plan-international.org/birthregistration/resources/stories/mass-mobile-registration-in-cambodia> > last accessed 30 June 2012; Plan International, *Birth Registration*, undated, < <http://plan-international.org/where-we-work/asia/cambodia/what-we-do/birth-registration> > last accessed 30 June 2012.

<sup>138</sup> Sub-decree on Civil Registration, articles 17 and 25;

<sup>139</sup> *ibid.*, articles 19-20, 23 and 26-27.

<sup>140</sup> *ibid.*, article 24.

<sup>141</sup> For more information see: Regional Roundtable on Statelessness, *op. cit.* (note 121).

### 3.3 Statelessness in Cambodia

*“The issue of statelessness is under-researched and underdeveloped as a concept in Cambodia. Statelessness is not recognised under Cambodian law, no procedures exist for determining or resolving the status of potentially stateless persons and there is no reliable data to show the size or nature of the statelessness problem...”*

#### 3.3.1 Statelessness as an unrecognized problem

- 3.3.1.1 The issue of statelessness is under-researched and underdeveloped as a concept in Cambodia. Statelessness is not recognised under Cambodian law, no procedures exist for determining or resolving the status of potentially stateless persons and there is no reliable data to show the size or nature of the statelessness problem.
- 3.3.1.2 One local human rights organisation estimates that *“hundreds of thousands of individuals residing in Cambodia are currently stateless, without effective citizenship or in danger of becoming stateless in the future.”*<sup>142</sup> The U.S. Department of State reports that a study commissioned by the UNHCR in 2007 estimated that several thousand potentially stateless persons were living in Cambodia at that time – most of whom were of ethnic-Vietnamese origin.<sup>143</sup>
- 3.3.1.3 It appears highly likely that there are at least several thousand potentially stateless people in Cambodia, but no accurate statistical or demographic data is available on this point because the UNHCR report was not published and no other reliable mapping of the issue has been carried out.

#### 3.3.2 Who is potentially stateless or at risk of statelessness in Cambodia?

- 3.3.2.1 Several broad categories of persons have been identified as being potentially stateless or at risk of statelessness in Cambodia: the Rohingya from Myanmar, the **Khmer Krom**, persons of ethnic-Vietnamese origin living in Cambodia and other groups.

##### *Rohingya*

- 3.3.2.2 The Rohingya are a Muslim ethnic minority from Arakan (or Rakhine) State in Myanmar. The law of Myanmar does not recognise the Rohingya as citizens, nor are they considered to be nationals of any other State under the operation of their laws. Rohingya who arrive in Cambodia may be both stateless and refugees, in which case they should be afforded the protection of the Refugee Convention and the Sub-decree on RSD (see Chapter 2).

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<sup>142</sup> Chab Dai Coalition, *Statelessness*, undated, < <http://www.chabdai.org/statelessness.html> > last accessed 30 June 2012.

<sup>143</sup> U.S. Department of State, *Country Reports on Human Rights Practices 2010 – Cambodia*, 4 August 2011, < <http://www.state.gov/documents/organization/160086.pdf> > last accessed 30 June 2012.



**Khmer Krom**

- 3.3.2.3 The Khmer Krom are an ethnic-Khmer minority group of more than one million people living in the Mekong Delta region in Southern Vietnam – an area which the Khmer Krom continue to call ‘Kampuchea Krom’ (‘Lower Cambodia’) and claim as their ancestral homeland. Since the 1950s a series of repressive assimilation campaigns and ‘Vietnamisation’ efforts have led to persecution, cultural oppression and racial discrimination against some Khmer Krom persons in Vietnam. In light of this discrimination the RGC has repeatedly and publicly declared that the Khmer Krom have Cambodian nationality.<sup>144</sup>
- 3.3.2.4 As a result of these affirmations of Cambodian nationality, Khmer Krom persons who flee Vietnam are not eligible for refugee status in Cambodia, nor will they be eligible for refugee status in a third country unless they can prove that they hold a well-founded fear of persecution in both Vietnam and Cambodia. The only option available to most Khmer Krom who cross into Cambodia is to apply for Cambodian identity documents in order to formalise their nationality and secure access to rights associated with citizenship. The United Nations Committee on the Elimination of Racial Discrimination (CERD) reports that this process is more burdensome for Khmer Krom than it is for other Cambodian citizens.<sup>145</sup> In some cases Khmer Krom are unable to satisfy the administrative criteria necessary to apply for an identity card (such as the need to have a permanent address in Cambodia). There are reports that Khmer Krom applicants are required or feel compelled to change information such as their name or place of birth in their application.<sup>146</sup>
- 3.3.2.5 There are reports that Khmer Krom who cross the border into Cambodia are “forced to live in stateless circumstances with neither the protection afforded to refugees, nor [those afforded] to Cambodian citizens.”<sup>147</sup> The question of whether or not the Khmer Krom in Cambodia are in fact stateless is difficult to determine and complicated by the divergence between RGC rhetoric and the actions of local authorities. It is also possible that the Khmer Krom may be neither refugees nor stateless people but rather a minority group within Cambodia subject to discrimination and violations of their rights which prevent them from effectively exercising their citizenship.<sup>148</sup>

<sup>144</sup> For examples of declarations to this effect in 1992, 2005, 2006, 2007 and 2010 see: CCHR, *False Promises: Exploring the Citizenship Rights of the Khmer Krom in Cambodia*, July 2011, pp 18-19.

<sup>145</sup> CERD, ‘Concluding observations of the Committee on the Elimination of Racial Discrimination: Cambodia’, *Consideration of Reports Submitted by States Parties under Article 9 of the Convention*, UN Doc. CERD/C/KHM/CO/8-13, 1 April 2010, paras 18-19.

<sup>146</sup> *ibid.*, para 19.

<sup>147</sup> Khmers Kampuchea Krom Federation, *Briefing Paper Concerning the Eighth to Thirteenth Periodic Reports of Cambodia (CERD/C/KHM/8-13) Under the Convention on the Elimination of All Forms of Racial Discrimination*, January 2010, p 1.

<sup>148</sup> For more information about the situation of the Khmer Krom in Cambodia see: CCHR (July 2011), *op. cit.* (note 144); HRW, *On the Margins: Rights Abuses of Ethnic Khmer in Vietnam’s Mekong Delta*, New York, 2009; Cambodian League for the Promotion and Defence of Human Rights (LICADHO), *Stateless Ethnic Minority Khmer Krom Face Difficult Future in Cambodia*, 23 February 2010, < <http://www.licadho-cambodia.org/articles/2010022300:00:00/108/index.html> > last accessed 30 June 2012.

#### *Ethnic-Vietnamese*

- 3.3.2.6 Persons of ethnic-Vietnamese origin living in Cambodia may also be at risk of statelessness, however their nationality status is difficult to assess at a general level because they do not comprise a single homogenous group. Instead, several broad groups of ethnic-Vietnamese persons are identifiable, including:
- persons and descendants of persons who were born in Cambodia decades ago, many of whom fled the anti-Vietnamese campaigns of the Khmer Rouge from 1975 to 1979 and later returned to Cambodia;
  - other persons who migrated to Cambodia during the post-Khmer Rouge era; and
  - long-term migrants who have arrived in Cambodia from Vietnam since the 1990s, many of whom were attracted by the economic and professional opportunities in sectors left vacant by unqualified Cambodians.
- 3.3.2.7 Each group has different historical and familial ties to Cambodia, some of which may give rise to a claim for nationality. The nationality status of each group will probably need to be considered separately in light of these distinct ties and with reference to the relevant successive nationality laws which have been in force in different periods of Cambodia's history. This consideration may be difficult in cases where forced displacement and the breakdown of government and administrative structures caused the relevant documentation and records to be lost or destroyed.
- 3.3.2.8 The question of statelessness in relation to one group of ethnic-Vietnamese persons living in Cambodia recently arose during the consultations regarding the requests for moral and collective reparations by the civil parties at the ECCC.<sup>149</sup> The ethnic-Vietnamese survivors of genocide, persecution and forced expulsion who lost their documents and thereby the means to prove their connection with Cambodia during the time of the Khmer Rouge claim to be at high risk of being stateless and seek the facilitation of their acquisition of Cambodian nationality. The ECCC is yet to consider this claim.
- 3.3.2.9 The issue of Cambodian nationality for ethnic-Vietnamese persons is complicated by the long history of conflict between Vietnam and Cambodia. A pervasive anti-Vietnamese hostility is engrained in many parts of Cambodian society. Whilst it is recognised that the support of the Vietnamese was essential to the overthrow of the Khmer Rouge, there is ongoing resentment about Vietnamese influence over policy between 1979 and 1991 and the economic advantage enjoyed by the Vietnamese during this period. Anti-Vietnamese rhetoric fueled resistance movements in the border camps in the 1980s and continues in some sectors today. These preoccupations render the question of ethnic-Vietnamese statelessness particularly contentious for the RGC and the Cambodian public.

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<sup>149</sup> See for example: *Initial Specification of the Substance of the Awards that the Civil Party Lead Co-Lawyers Intend to Seek*, filed in the Trial Chamber of the ECCC by the Civil Party Lead Co-Lawyers, Case no. 002/19-09-2007-ECCC/TC, 12 March 2012, para 88-93.

### ***Other potentially at-risk groups in Cambodia***

3.3.2.10 In some cases an inability to establish nationality has the same effect as not having a nationality at all. As a result, certain other groups in Cambodia may be at risk of statelessness by reason of not being registered and therefore not having the necessary documentation to substantiate their claims to Cambodian nationality. These groups may include:

- certain ethnic minority and Indigenous groups;
- children and other persons who have not been registered;
- irregular migrants, trafficked persons and refugees whose identity papers have been lost or destroyed; and
- foreign women who give up their nationality to marry a Cambodian man but do not satisfy the criteria for obtaining Cambodian nationality.

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## **3.4 Reasons for statelessness in Cambodia**

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***Cambodian domestic law contains “ambiguity as to the administrative criteria for proving possession of Cambodian nationality and [fails] to establish a mechanism by which individuals can seek confirmation of their nationality status. Most Cambodians do not have a passport and it is unclear whether possession of a Cambodian identity card, a certificate of birth registration or some other document will provide determinative proof of nationality...”***

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### **3.4.1 Difficulties in identifying the reasons for statelessness in Cambodia**

3.4.1.1 Due to the lack of a domestic statelessness determination procedure, no groups have been formally identified as stateless within Cambodia. This lack of formal identification makes it difficult to accurately survey the root causes for statelessness. Nevertheless, it is possible to identify certain features of Cambodian law and practice which cause uncertainty as to the nationality of various groups and potentially create a risk of statelessness.

### **3.4.2 Statelessness arising from gaps or flaws in domestic nationality law**

3.4.2.1 The following gaps or flaws in Cambodia’s domestic nationality law framework may create a risk of statelessness:

- the fact that children born to stateless parents in Cambodia are not entitled to Cambodian nationality which perpetuates situations of statelessness;

- ambiguity as to the administrative criteria for proving possession of Cambodian nationality and the lack of a mechanism by which individuals can seek confirmation of their nationality status. Most Cambodians do not have a passport and it is unclear whether possession of a Cambodian identity card, a certificate of birth registration or some other document will provide determinative proof of nationality;
- the failure to recognise the legal concept of statelessness and, as a result, the lack of procedures for determining whether a person is stateless, formalising or resolving that status and granting Cambodian nationality to stateless persons;
- the lack of a clear, uniform procedure by which applications for Cambodian identity documents are to be processed under the Sub-decree on ID Cards and a mechanism for review of these decisions. The lack of regulation leaves these processes susceptible to arbitrary and inconsistent decision-making; and
- the lack of a single, continuous and uniformly implemented civil registration system prior to 2002 which has resulted in certain groups not being registered and the record of other registrations being lost or destroyed. The effect of this dislocated history of registration is that some groups may not be able to prove their historical link to Cambodia and others who are not registered may in turn not perceive the need to register their own children.

### 3.4.3 Statelessness arising from gaps or flaws in domestic nationality practice

3.4.3.1 The following gaps or flaws in the practice of implementing the Law on Nationality may also create a risk of statelessness:

- the existence of multiple forms of identity documentation including national identity cards, temporary residence cards, household registration books or 'family books', passports and birth certificates. Some ethnic-Vietnamese communities hold identity documents which no other group holds. The legal effect of each document and the extent to which they provide evidence of nationality is unclear;
- a lack of awareness, especially amongst people in more remote areas, about the importance of identification documents and birth registration;
- overly-burdensome criteria for applying for Cambodian identity documents for groups such as the Khmer Krom; and
- exclusionary practices and discrimination against ethnic minorities by some local authorities who may not consider certain groups of people to be eligible for Cambodian nationality. There are reports of applications for identity documents being delayed or denied for particular groups and some children of ethnic-minorities being excluded from the birth registration process.<sup>150</sup>

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<sup>150</sup> See for example: HRW (2009), *op. cit.* (note 148), p 58; CERD (1 April 2010), *op. cit.* (note 145), para 18.

## 3.5 The experience of statelessness in Cambodia

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*“The UN Charter binds States to respect the fundamental rights of all human beings, without discrimination. Stateless persons are as entitled to enjoy these rights as anyone else.”*

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– Homayoun Alizedeh, former OHCHR Regional Representative for Southeast Asia<sup>151</sup>

### 3.5.1 The stateless experience generally

- 3.5.1.1 Under international law all persons are entitled to fundamental human rights regardless of their legal status or nationality. In practice this entitlement is often not realised. Since nationality provides the framework through which a person is able to exercise rights (see paragraph 3.1.1.1), stateless persons often struggle to enjoy the full range of rights and freedoms afforded to those with a nationality.
- 3.5.1.2 Potentially stateless people in Cambodia experience difficulties with land tenure security and land rights. Whilst land disputes and forced evictions affect many groups within Cambodia (see Chapter 6), persons who are unable to provide evidence of Cambodian nationality or who are deemed by local authorities to be foreigners are particularly vulnerable to dispossession of land without adequate compensation. In a recent example of this experience, ethnic-Vietnamese families amongst those who were evicted from the Siem Reap riverside in April 2012 as part of a river widening and beautification project were discriminatorily denied plots of land at the relocation site. Local authorities alleged that as ‘foreigners’ these families were not entitled to land.
- 3.5.1.3 Groups who are potentially stateless or at risk of statelessness in Cambodia may also experience difficulty in exercising other rights which are afforded to Cambodian citizens, including the rights to vote, participate in political and public life, obtain identity and travel documents, register births, deaths and marriages, work and access justice through the domestic legal system (which in turn makes stateless persons particularly vulnerable to exploitation, crime, abuse and detention).
- 3.5.1.4 The experience of potentially stateless persons and persons at risk of stateless in Cambodia is often characterised by uncertainty. Some of these groups believe that they hold Cambodian citizenship until local authorities assert otherwise in situations such as the land eviction described in paragraph 3.5.1.2. Others are unsure of their nationality status and may be unwilling to seek clarification for fear of being told that they are unable to stay in Cambodia.

### 3.5.2 Particular issues affecting Khmer Krom persons

- 3.5.2.1 There are reports that Khmer Krom persons who flee Vietnam and are at risk of statelessness in Cambodia experience the following additional problems:
- they may be required to bribe corrupt local officials in order to be granted Cambodian identity documents, however few have the financial means to do so;

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<sup>151</sup> Homayoun Alizedeh (OHCHR Regional Representative for Southeast Asia) quoted in Regional Roundtable on Statelessness, *op. cit.* (note 121), p 21.

## State of Migration

### An overview of forced displacement in Cambodia

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- they may be required to change their name and birth place in order to receive Cambodian identity documents, and as such to deny a fundamental aspect of their cultural and personal identity;
- they experience discrimination and hostility from local populations and authorities who perceive them to be Vietnamese;
- they are at risk of arrest and deportation to Vietnam and experience particular restrictions on their freedom of movement and expression; and
- their claims for refugee status in Cambodia and abroad are frustrated due to public assertions by the RGC that they are entitled to Cambodian nationality.

### 3.5.3 Particular issues affecting ethnic-Vietnamese persons

3.5.3.1 There are reports that persons of ethnic-Vietnamese origin living in Cambodia who are at risk of statelessness experience the following additional problems:

- difficulty working legally, buying property and obtaining bank loans, which renders them particularly vulnerable to debt and unscrupulous lending practices in the informal credit sector (which can in turn be a cause of increased vulnerability to trafficking in persons: see Chapter 5);
- difficulty obtaining certificates of birth, marriage or death and permits for driving, construction and other qualifications;
- discrimination in the context of land development projects; and
- difficulty developing a sense of security and national belonging as a result of the abovementioned difficulties.

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## 3.6 Particular issues affecting women and children

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***“An unregistered child is an invisible child in many respects. Without proof of age or identity, children are not granted their civil rights or access to essential social services, such as education and health care.”***

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– Plan International<sup>152</sup>

### 3.6.1 Women

3.6.1.1 Under the Law on Nationality women in Cambodia enjoy equal rights to acquire, change and retain their nationality and equal rights to pass their nationality on to their children (see paragraph 3.2.2.2).

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<sup>152</sup> Plan International, *Universal Birth Registration*, undated, < <http://plan-international.org/where-we-work/asia/campaigns/campaigns> > last accessed 30 June 2012.

3.6.1.2 Despite this legal equality, certain groups of women may be particularly at risk of statelessness as a result of trafficking in persons and exploitation as migrant domestic workers. Women in these situations may be made vulnerable to statelessness when traffickers or employers steal, withhold or destroy their identity documents and leave them unable to prove their nationality for the purpose of seeking diplomatic protection or re-entering their country of origin (see Chapters 4 and 5).

### 3.6.2 Children

3.6.2.1 The clearest ways to protect children against statelessness are to ensure that all children are registered at birth and for domestic nationality laws to confer on children the right to attain the nationality of their State of birth if they are not entitled to the nationality of any other State.

3.6.2.2 The Law on Nationality and the Sub-decree on Civil Registration contain some important protections against statelessness for children (see paragraphs 3.2.2.2 and 3.2.2.7). Despite these protections, Cambodia's domestic nationality legislation is inadequate to protect all children from statelessness. Of most serious concern is the fact that children born to stateless parents are condemned to inherit the statelessness of their family as a result of Cambodian domestic law which perpetuates cycles of statelessness.

3.6.2.3 Statelessness affects children in very particular ways. Children are vulnerable to the decisions and experiences of their family members; whether statelessness arises as a result of migration, a failure to be registered at birth, a failed marriage to a foreigner or a protracted stateless situation, children have little or no control over the circumstances which affect their nationality status. Further, children are more likely than adults to experience problems with their health, education, development and well-being as a result of the uncertainty, lack of legal and social protection and higher risks of poverty which accompany the stateless experience.

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## 3.7 Compliance with international standards and implementation of domestic law

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*“Issues of one’s ethnicity, skin colour, fiscal situation, language ability, length of stay, relationship with local enforcement officials, the political affiliation of local officials and proximity to elections all play a role in [the] granting or denial of Cambodian citizenship. Issues of discrimination are particularly acute when directed toward the ethnic-Vietnamese community, who [comprise] the greatest number of individuals at risk of statelessness in the country.”*

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– Chab Dai Coalition<sup>153</sup>

<sup>153</sup> Chab Dai Coalition, *loc. cit.* (note 142).

#### 3.7.1 Compliance with international standards

- 3.7.1.1 Cambodia has obligations under international law to protect the right of all persons to a nationality and ensure that all children have the right to acquire a nationality. The Law on Nationality establishes a legal framework for the acquisition of Cambodian nationality which complies with these obligations to a certain extent, however it does not uphold these rights in all cases. Further, the implementation of this law by local authorities has left certain segments of the population at high risk of statelessness.
- 3.7.1.2 There are reports that Cambodia does not ensure the non-discriminatory protection of human rights for all groups within the country. Groups which are potentially stateless or at risk of statelessness have experienced violations of a number of their basic rights. Of particular concern is the discriminatory treatment of potentially stateless groups in the context of land disputes and forced evictions.

#### 3.7.2 Enforcement of domestic law

- 3.7.2.1 Local authorities play a key role in the implementation of the Law on Nationality, the Sub-decree on ID Cards and the Sub-decree on Civil Registration. There are reports that in some cases the processing of applications for identity documents and the registration of births is *ad hoc*, arbitrary and inconsistent. Without adequate regulation at the national level or an appeal procedure, the decision-making process on nationality issues at a local level may be particularly vulnerable to corruption, bribery and discrimination.
- 3.7.2.2 A number of reports suggest that the failure to achieve fair and consistent enforcement of domestic nationality laws is concentrated at the sub-national level. According to one report, a spokesperson for the MoI stated in 2006 that local authorities who refused to issue identification documents to the Khmer Krom who were eligible for them were “*not acting according to the laws.*”<sup>154</sup> In another particularly strong statement the UNHCR stated that “*citizenship processes operate completely outside the parameters of the [Law on Nationality]*” and that applications “*often [depend] on ethnicity, electoral advantages and relationships with local enforcement officials.*”<sup>155</sup> No significant steps have been taken at a national level to address these issues.

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### 3.8 Avenues for future action

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***“The issue of statelessness has been left to fester in the shadows for far too long. It is time to take the necessary steps to rid the world of a bureaucratic malaise that is, in reality, not so difficult to resolve. It is simply a question of political will and legislative energy.”***

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– António Guterres, UN High Commissioner for Refugees, and Louise Arbour, former UN High Commissioner for Human Rights<sup>156</sup>

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<sup>154</sup> Unrepresented Nations and Peoples Organization, *Khmer-Krom: No ID Card in Cambodia*, 15 November 2006, < <http://www.unpo.org/article/5836> > last accessed 30 June 2012.

<sup>155</sup> UNHCR, *Statelessness in Cambodia*, undated, < [http://www.no-trafficking.org/content/pdf/statelessness\\_in\\_cambodia\\_unhcr.pdf](http://www.no-trafficking.org/content/pdf/statelessness_in_cambodia_unhcr.pdf) > last accessed 30 June 2012.

<sup>156</sup> Guterres and Arbour, *op. cit.* (note 125).



### 3.8.1 Four pillars of action

3.8.1.1 A comprehensive response to statelessness should involve four main pillars of action: 1) identification of stateless persons and groups at risk of statelessness; 2) prevention of new cases of statelessness; 3) resolution of existing cases of statelessness and 4) protection for stateless persons pending the resolution of their legal status.<sup>157</sup>

### 3.8.2 Action concerning the identification of stateless populations

3.8.2.1 Clarification is required from the RGC as to which document(s) provide conclusive evidence of Cambodian nationality.

3.8.2.2 This clarification could be accompanied by:

- the establishment of a procedure whereby individuals can verify their nationality status and request confirmation of Cambodian nationality;<sup>158</sup> and
- an amendment to the Law on Nationality to recognise and define the concept of statelessness.<sup>159</sup>

3.8.2.3 The RGC could take steps to gather data about groups who are stateless or at risk of statelessness through the framework of the 2018 national census or through sub-national efforts which seek to identify stateless populations province-by-province.

### 3.8.3 Action concerning the prevention of statelessness

3.8.3.1 The following actions could assist to prevent new cases of statelessness from arising in Cambodia:

- ratification of the Statelessness Convention 1961 and/or the introduction of domestic legislation to implement its provisions;
- an amendment to the Law on Nationality to provide for the grant of Cambodian nationality to any child born in Cambodia who is not entitled to obtain any other nationality;
- a continuation of efforts to achieve universal birth registration (especially for ethnic minorities and other persons living in rural and remote areas);
- the opening up of the naturalisation process to stateless persons who fulfill certain criteria (such as birth or residence for a minimum period of time in Cambodia); and

<sup>157</sup> The UNHCR structures its action on statelessness around these same four pillars. See for example: UNHCR, *How UNHCR Helps the Stateless*, undated, < <http://www.unhcr.org/pages/49c3646c16a.html> > last accessed 30 June 2012.

<sup>158</sup> This procedure could take the form of a statelessness determination procedure incorporated into the Sub-decree on RSD or be similar to procedures adopted in other States for this purpose, see for example: Australian Department of Immigration and Citizenship, undated, *Proof of citizenship*, < [http://www.citizenship.gov.au/current/proof\\_of\\_citizenship/](http://www.citizenship.gov.au/current/proof_of_citizenship/) > last accessed 30 June 2012.

<sup>159</sup> This definition could adopt the language of the Statelessness Convention 1954 or language similar to that used in article 3(2) of Vietnam's *Law on Vietnamese Nationality 2008* which defines a stateless person as "a person who has neither Vietnamese nationality nor foreign nationality."

- the issuance of clear guidelines by the RGC to local authorities and law-enforcement officers on the processing of claims for Cambodian identity documents by Khmer Krom persons and other groups which face discrimination.

#### **3.8.4 Action concerning resolution and protection**

- 3.8.4.1 The UNHCR and other human rights organisations promote collective naturalisation as the most effective way of resolving protracted stateless situations.<sup>160</sup>
- 3.8.4.2 In the absence of a collective naturalisation campaign, it would be desirable for stateless or potentially stateless persons to enjoy equal rights as Cambodian citizens. This could be achieved in part by ratifying the Statelessness Convention 1954 and/or introducing domestic legislation to give effect to its provisions in Cambodia.

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### **3.9 Partners in Action**

#### **3.9.1 Royal Government of Cambodia**

- 3.9.1.1 The RGC is yet to give any Ministry a mandate to take action in relation to statelessness.

#### **3.9.2 United Nations**

- 3.9.2.1 The UNHCR has a mandate to protect stateless persons and pursue targeted activities to support the identification, prevention and reduction of statelessness. The UNHCR participated in a training day on statelessness convened by JRS Cambodia/Open Society in April 2012 and encouraged participants to confer with the UNHCR about cases involving statelessness in Cambodia.
- 3.9.2.2 The OHCHR has a mandate to protect and promote human rights in Cambodia which includes the rights of groups who are potentially stateless or at risk of statelessness. The OHCHR participated in the training day on statelessness in April 2012.

#### **3.9.3 Local and international Organisations**

- 3.9.3.1 JRS Cambodia/Open Society convened a training day on statelessness for interested stakeholders in April 2012 and intends to follow-up on this initiative in future projects. JRS Cambodia advocates for and provides legal and social assistance to stateless people who are also asylum seekers or refugees.
- 3.9.3.2 Local and international human rights organisations have been involved in protecting and promoting the rights of groups who are potentially stateless or at risk of statelessness, including LICADHO, CCHR and HRW. Khmer Krom organisations are particularly vocal about the issue of equal rights for Khmer Krom persons seeking recognition as Cambodian citizens.

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<sup>160</sup> Best practices for a collective naturalisation campaign which is appropriate to this region could be drawn from the experiences of Indonesia and Bangladesh in 2001, Sri Lanka in 2003, Nepal in 2006 and Thailand in 2010.

## Chapter Four

# Labour Migration

*“When their rights are violated, when they are marginalized and excluded, migrants will be unable to contribute either economically or socially to the societies they have left behind or those they enter. However, when supported by the right policies and human rights protections, migration can be a force for good for individuals as well as for countries of origin, transit and destination.”*

– Ban Ki-moon, Secretary General of the United Nations<sup>161</sup>

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<sup>161</sup> Ki-moon, B., *United Nations Secretary-General’s Message for International Migrants Day*, 18 December 2011.

## 4.1 What is labour migration?

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*“Migrant workers have played a central part in the economic success story of many South-East Asian countries in recent years... migrant workers have provided a regular source of cheap labour that has allowed their manufacturing industries to compete successfully on world markets. Women migrants, in particular, have taken on jobs considered too arduous or unpleasant by local workers.”*

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– War on Want, ‘Restricted Rights’<sup>162</sup>

### 4.1.1 Labour migration

4.1.1.1 Labour migration can be divided into two categories:

- **internal labour migration** which involves the movement of people within a country for the purpose of employment; and
- **international labour migration** which involves the cross-border movement of people to a foreign country for the purpose of employment. International labour migration can in turn be divided into:
  - **regular migration** which occurs through formal immigration channels and complies with the laws established by States to manage the orderly flow of migrants; and
  - **irregular migration** which occurs outside formal immigration channels and involves the illegal cross-border movement of persons without the necessary travel documents. Irregular migration often occurs as a result of the cost, time and restrictions associated with regular migration. Whilst irregular migration may appear to be an attractive option to migrants who wish to minimise the cost and have greater control over the time of their move, it can expose migrants to greater risks of arrest, detention, exploitation and trafficking in persons than regular migration.

4.1.1.2 Countries which send workers abroad for labour migration are called source countries, countries of origin or sending countries. Countries which receive workers from abroad are called receiving countries, destination countries or host countries.

### 4.1.2 Migrant workers and legal status

4.1.2.1 A **migrant worker** is a person who is engaged in a remunerated activity in a State of which he or she is not a national.<sup>163</sup> Migrant workers are distinct from refugees and asylum seekers in that they leave their country of origin for the purpose of employment rather than because they are fleeing persecution on the grounds of their race, religion, nationality, membership of a particular social group or political opinion (see Chapter 2).

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<sup>162</sup> War on Want, *Restricted Rights: Migrant Women Workers in Thailand, Cambodia and Malaysia*, May 2012, p 1.

<sup>163</sup> *United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families 1990 (ICRMW)*, article 2(1).

Persons who migrate within their own country to seek employment may be referred to as **internal migrant workers**. Migrant and internal migrant **domestic workers** are work within their employer's residence<sup>164</sup> and perform a variety of household tasks.

4.1.2.2 Workers who migrate to a foreign country can either be **documented migrant workers** (having valid residence and work permits) or **undocumented migrant workers** (without valid residence and work permits). Whether a migrant worker is documented or undocumented is not always determined by the way in which he or she entered the receiving country. Some workers enter a receiving country as a documented migrant worker but subsequently become undocumented as a result of the loss, confiscation or expiry of their documents. Certain sectors in destination countries thrive on the existence of undocumented migrant workers because they are cheaper and easier to exploit than documented workers who are recruited through regular channels.

### 4.1.3 Labour migration and trafficking in persons

4.1.3.1 Labour migration has the potential to be both a positive and a negative experience for the worker. When it is negative and involves an element of exploitation, labour migration may be difficult to distinguish from trafficking in persons (see Chapter 5). Whilst in the abstract the legal distinction between these two concepts is clear (compare sections 4.1 and 5.1), the process of applying this distinction to the reality of migration within a given country may be more complex. This complexity is particularly acute in Cambodia where many practices which might be an indicator of trafficking in persons in a different context are inherent features of the recruitment and employment of Cambodian workers. For more information on the distinction between labour migration and trafficking in persons in Cambodia see section 4.3.4.

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## 4.2 International, domestic and regional law

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*“International law is loud and clear.  
It prohibits discriminatory treatment against migrants,  
whether they are in regular or irregular situations,  
and protects their rights and freedoms.”*

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– Navi Pillay, United Nations High Commissioner for Human Rights<sup>165</sup>

### 4.2.1 International law

#### *ILO Conventions and Recommendations*

4.2.1.1 The International Labour Organisation (**ILO**), a specialised labour agency of the United Nations, draws up conventions (legally-binding treaties) and recommendations (non-binding guidelines) containing international labour standards.

<sup>164</sup> Domestic workers may also be required to perform domestic tasks (such as cleaning) in their employer's workplace and/or the residences of other members of the employer's family.

<sup>165</sup> Pillay, N., *Address to Fourth Global Forum on Migration and Development*, Puerto Vallarta, Mexico, 10 November 2010.

#### ILO Conventions

- 4.2.1.2 ILO Member States<sup>166</sup> which ratify ILO Conventions are legally bound to uphold and give effect to the standards set out in those instruments for all the workers within their territory to whom the standards apply, including migrant workers.
- 4.2.1.3 ILO Conventions are divided into three categories:
- eight fundamental conventions (**Fundamental ILO Conventions**) which the ILO Governing Body has identified as containing the most fundamental rights at work. The Fundamental ILO Conventions relate to:
    - freedom of association and collective bargaining;
    - the elimination of forced and compulsory labour;
    - the abolition of child labour; and
    - the elimination of discrimination in respect of employment and occupation;<sup>167</sup>
  - four governance conventions which the ILO Governing Body has identified as priority instruments because of their importance to the functioning of the international labour standards system;<sup>168</sup> and
  - numerous technical conventions which contain labour standards, principles and rights at work relevant to a range of subjects, including wages, hours of work, weekly rest and paid leave, occupational health and safety (OHS), social security, maternity protection and specific types of workers, including migrant workers, domestic workers and fishermen.
- 4.2.1.4 Of particular note amongst these conventions is the *ILO Domestic Workers Convention 2011* (No. 189) (**Domestic Workers Convention**) which was adopted by the ILO in June 2011. The Domestic Workers Convention has been hailed as one of the most significant milestones in the recent history of international labour standards. Not only does it contain the first international legal recognition of the fact that domestic workers are entitled to the same rights and status as other workers, it also marks a shift towards implementing labour standards in the informal economy sector more generally.<sup>169</sup> The Domestic Workers Convention will enter into force one year after the date on which it is ratified by two ILO Member States.<sup>170</sup> As of July 2012 only one ILO Member State has ratified the Domestic Workers Convention.<sup>171</sup>

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<sup>166</sup> All the States in the region are ILO Member States.

<sup>167</sup> *Freedom of Association and Protection of the Right to Organise Convention 1948* (No. 87); *Right to Organise and Collective Bargaining Convention 1949* (No. 98); *Forced Labour Convention 1930* (No. 29); *Abolition of Forced Labour Convention 1957* (No. 105); *Minimum Age Convention 1973* (No. 138); *Worst Forms of Child Labour Convention 1999* (No. 182); *Equal Remuneration Convention 1951* (No. 100); *Discrimination (Employment and Occupation) Convention 1958* (No. 111).

<sup>168</sup> *Labour Inspection Convention 1947* (No. 81); *Employment Policy Convention 1964* (No. 122); *Labour Inspection (Agriculture) Convention 1969* (No. 129); *Tripartite Consultation (International Labour Standards) Convention 1976* (No. 144).

<sup>169</sup> '100<sup>th</sup> ILO annual conference decides to bring an estimated 53 to 100 million domestic workers worldwide under the realm of labour standards', ILO Press Release, Geneva, 16 June 2011, < [http://www.ilo.org/ilc/ILCSessions/100thSession/media-centre/press-releases/WCMS\\_157891/lang-en/index.htm](http://www.ilo.org/ilc/ILCSessions/100thSession/media-centre/press-releases/WCMS_157891/lang-en/index.htm) > last accessed 30 June 2012.

<sup>170</sup> Domestic Workers Convention, article 21(2).

<sup>171</sup> Uruguay ratified the Domestic Workers Convention on 14 June 2012.

- 4.2.1.5 Cambodia is one of only three States in the region to have ratified all eight Fundamental ILO Conventions (see Table 6).<sup>172</sup> As of March 2012, of the three countries which receive the greatest numbers of Cambodian migrant workers:<sup>173</sup>
- Thailand has been considering the ratification of ILO Conventions no. 87 and 98 on freedom of association since 2001 and ILO Convention no. 111 concerning discrimination in respect of employment since 2009;
  - Malaysia has no intention of ratifying ILO Convention no. 87 on freedom of association, has been reconsidering ratification of ILO Convention no. 105 on the abolition of forced labour since 2009<sup>174</sup> and is considering the ratification of ILO Convention no. 111 concerning discrimination in respect of employment; and
  - the Republic of Korea has been considering the ratification of ILO Conventions no. 87 and 98 on freedom of association since 2006 and reports that it is “unable” to ratify ILO Conventions no. 29 and 105 concerning the abolition of forced labour “as long as the confrontation on the Korean peninsula continues.”<sup>175</sup>
- 4.2.1.6 Ratification of other ILO Conventions concerning the rights of workers remains low for Cambodia and for Thailand, Malaysia and the Republic of Korea (see Table 7).
- 4.2.1.7 As States Parties to the CEDAW, these four countries have been encouraged to ratify all instruments relevant to the protection of the human rights of migrant women workers.<sup>176</sup> These instruments include, at a minimum, ILO Conventions concerning migrant and domestic workers and maternity protection.

**Table 6**  
**Ratification of the Fundamental ILO Conventions by Cambodia and the countries which receive the greatest numbers of Cambodian migrant workers**

ILO Conventions		Cambodia	Thailand	Malaysia	Republic of Korea
Subject	No.				
Freedom of Association and Collective Bargaining	87	✓	✗	✗	✗
	98	✓	✗	✓	✗
Elimination of Forced and Compulsory Labour	29	✓	✓	✓	✗
	105	✓	✓	✗	✗
Abolition of Child Labour	138	✓	✓	✓	✓
	182	✓	✓	✓	✓
Elimination of Discrimination in Respect of Employment and Occupation	100	✓	✓	✓	✓
	111	✓	✗	✗	✓

<sup>172</sup> In addition to Cambodia, Indonesia and the Philippines have ratified all eight Fundamental ILO Conventions.

<sup>173</sup> ILO, *Current Compilation of Baseline Tables*, 2012, < <http://www.ilo.org/declaration/follow-up/annualreview/countrybaselines/lang--en/index.htm> > last accessed 30 June 2012.

<sup>174</sup> Malaysia originally ratified the *Abolition of Forced Labour Convention 1957* (No. 105) in 1958, but denounced it in 1990 “due to divergences with the ILO in the interpretation of national legislation with regard to this Convention”: ILO, ‘Country baseline under the ILO Declaration annual review (2000 – 2012): Malaysia’, *Country Baselines Under the ILO Declaration Annual Review (2000 – 2012): The Elimination of All Forms of Forced or Compulsory Labour (FL)*, 8 March 2012, < [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/publication/wcms\\_091264.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_091264.pdf) > last accessed 30 June 2012.

<sup>175</sup> *ibid.*, ‘Country baseline under the ILO Declaration annual review (2000 – 2012): Republic of Korea’.

<sup>176</sup> Committee on the Elimination of Discrimination Against Women (CEDAW Committee), *Women Migrant Workers*, General Recommendation no. 26, UN Doc CEDAW/C/2009/WP.1/R, 5 December 2008, para 29.

## State of Migration

An overview of forced displacement in Cambodia

**Table 7**  
**Ratification of other ILO Conventions concerning the rights of workers by Cambodia and the countries which receive the greatest numbers of Cambodian migrant workers**

Subject	ILO Convention	Cambodia	Thailand	Malaysia	Republic of Korea
Migrant workers	<i>Migration for Employment Convention (Revised) 1949 (No. 97)</i>	x	x	x	x
	<i>Migrant Workers (Supplementary Provisions) Convention 1975 (No. 143)</i>	x	x	x	x
Domestic workers	<i>Domestic Workers Convention 2011 (No. 189) – not yet in force</i>	x	x	x	x
Fishing industry	<i>Work in Fishing Convention 2007 (No. 188) – not yet in force</i>	x	x	x	x
Conditions of work	<i>Termination of Employment Convention 1982 (No. 158)</i>	x	x	x	x
	<i>Protection of Wages Convention 1949 (No. 95)</i>	x	x	✓	x
	<i>Minimum Wage Fixing Convention 1970 (No. 131)</i>	x	x	x	✓
	<i>Weekly Rest (Industry) Convention 1921 (No. 14)</i>	x	✓	x	x
	<i>Weekly Rest (Commerce and Offices) Convention 1957 (No. 106)</i>	x	x	x	x
	<i>Working Conditions (Hotels and Restaurants) Convention 1991 (No. 172)</i>	x	x	x	x
OHS	<i>Plantations Convention 1958 (No. 110)</i>	x	x	x	x
	<i>Occupational Safety and Health Convention 1981 (No. 155)</i>	x	x	x	✓
	<i>Safety and Health in Construction Convention 1988 (No. 167)</i>	x	x	x	x
	<i>Safety and Health in Agriculture Convention 2001 (No. 184)</i>	x	x	x	x
Social security	<i>Occupational Safety and Health (Dock Work) Convention 1979 (No. 152)</i>	x	x	x	x
	<i>Social Security (Minimum Standards) Convention 1952 (No. 102)</i>	x	x	x	x
Maternity Protection	<i>Equality of Treatment (Social Security) Convention 1962 (No. 118)</i>	x	x	x	x
	<i>Maternity Protection Convention 2000 (No. 183)</i>	x	x	x	x
Other	<i>Private Employment Agencies Convention 1997 (No. 181)</i>	x	x	x	x



ILO Recommendations

4.2.1.8 ILO Recommendations set out general principles and guidelines which ILO Member States should take into consideration in relation to labour law and policy. ILO Recommendations may be associated with a particular ILO Convention or stand alone as an independent recommendation. A number of ILO Recommendations relate to the living and working conditions of Cambodian migrant workers and internal migrant workers, including the ILO Recommendations associated with the ILO Conventions set out in Tables 6 and 7.<sup>177</sup>

***ILO Declaration on Fundamental Principles and Rights at Work 1998***

4.2.1.9 The *ILO Declaration on Fundamental Principles and Rights at Work 1998 (ILO Declaration)* is a non-binding instrument which affirms that certain labour rights are universal and apply to all people in all States, regardless of their country of origin and immigration status. In particular, the ILO Declaration commits ILO Member States to respect, promote and realise the following four principles regardless of whether or not they have ratified the Fundamental ILO Conventions:

- freedom of association and the effective recognition of the right to collective bargaining;
- the elimination of forced or compulsory labour;
- the abolition of child labour; and
- the elimination of discrimination in respect of employment and occupation.<sup>178</sup>

4.2.1.10 The ILO Declaration is supported by a follow-up procedure whereby ILO Member States which have not ratified one or more of the Fundamental ILO Conventions are asked to report each year on the status of the abovementioned fundamental rights within their borders, including impediments to ratification and areas where assistance may be required. For the results of these reports as of 2012 see paragraph 4.2.1.5.<sup>179</sup>

***International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families 1990***

4.2.1.11 The purpose of the ICRMW is to protect the rights of both documented and undocumented migrant workers and the members of their families. Part III of the ICRMW sets out a range of rights which States Parties are required to uphold within their territories for all migrant workers and their families. Many of these rights are also contained in other international human rights law instruments (see paragraph 4.2.1.14). Of particular relevance to migrant workers are:

- the right to freedom from slavery or servitude and from forced or compulsory labour;
- the right to effective protection by the State against violence, physical injury, threats and intimidation by public officials or private individuals, groups or institutions;

<sup>177</sup> A full list of ILO Conventions and Recommendations is available on the ILO website at <http://www.ilo.org>.

<sup>178</sup> ILO Declaration, article 2.

<sup>179</sup> *ibid.*, article 4 and annex (revised).

## State of Migration

### An overview of forced displacement in Cambodia

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- the right to freedom from arbitrary arrest, detention and expulsion from the receiving country;
- the right to enjoy treatment not less favourable than that which applies to nationals of the receiving country in respect of remuneration, other conditions of work and terms of employment;
- the right to take part in meetings and activities of trade unions and other associations; and
- the right to transfer earnings, savings, personal effects and belongings to their country of origin upon the termination of their stay in the receiving country.<sup>180</sup>

4.2.1.12 Part IV of the ICRMW sets out additional rights which States Parties are required to uphold for all documented migrant workers and members of their families within their territories, including:

- the right to choose freely their remunerated activity, subject to certain conditions;
- the right to enjoy equality of treatment with nationals of the receiving country in respect of:
  - protection against dismissal;
  - unemployment benefits;
  - access to public work schemes intended to combat unemployment;
  - access to alternative employment in the event of loss of work or termination of other remunerated activity;
  - the exercise of their remunerated activity; and
- the right to further protections against expulsion from the receiving country.<sup>181</sup>

4.2.1.13 Cambodia became a signatory to the ICRMW on 27 September 2004 but is yet to ratify it and become a State Party. As a signatory, Cambodia is not legally bound by the provisions of the ICRMW however it has a general obligation under international law to refrain from acts which would defeat its object or purpose.<sup>182</sup> As of July 2012, Thailand, Malaysia and the Republic of Korea are neither signatories nor States Parties to the ICRMW. As States Parties to the CEDAW, Cambodia and these States have been expressly encouraged to ratify the ICRMW.<sup>183</sup>

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<sup>180</sup> ICRMW, articles 11, 16, 22, 25, 26 and 32.

<sup>181</sup> *ibid.*, articles 52 and 54-56.

<sup>182</sup> This obligation is set out in the *United Nations Vienna Convention on the Law of Treaties 1969 (VCLT)*, article 18(a). There is broad support for the view that this obligation is an element of customary international law and therefore applies to all States, regardless of whether or not they are a State Party to the VCLT, see for example: Corten, O. and Klein, P. (eds.), *The Vienna Conventions on the Law of Treaties: A Commentary*, vol. 1, Oxford University Press, Oxford, 2011, pp 381-382.

<sup>183</sup> CEDAW Committee (5 December 2008), *op. cit.* (note 176), para 29.

***Other international human rights law instruments***

4.2.1.14 Cambodia and the countries in the region which receive the greatest numbers of Cambodian migrant workers are also bound by other international human rights law instruments which confer rights on all persons, including migrant workers.<sup>184</sup> Of particular relevance are:

- the right to work and to free choice of employment;<sup>185</sup>
- the right to just and favourable conditions of work, including safe and healthy working conditions, and to just and favourable remuneration which provides at a minimum a decent living and an existence worthy of human dignity for the worker and his or her family;<sup>186</sup>
- the right to equal pay for equal work without discrimination on any grounds;<sup>187</sup>
- the right to rest and leisure, including reasonable limitations on working hours and periodic holidays with pay;<sup>188</sup>
- protection against slavery and forced or compulsory labour;<sup>189</sup>
- protection against torture and other forms of cruel, inhuman or degrading treatment or punishment;<sup>190</sup>
- freedom of association with others, including the right to form and join trade unions for the protection of the worker's interests and the right to strike;<sup>191</sup>
- the protection of children against economic and social exploitation and against employment in any work that is likely to be hazardous, to interfere with the child's education or to be harmful to the child's health or physical, mental, spiritual, moral or social development;<sup>192</sup> and
- the right to maternity leave and protection of women against discrimination on the grounds of pregnancy, marital status or maternity leave.<sup>193</sup>

4.2.1.15 Cambodia and the countries in the region which receive the greatest numbers of Cambodian migrant workers are also expected to respect the guiding principles and basic rights set out in the *United Nations Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live 1985*. These principles largely mirror those which are legally binding under the international human right law instruments referred to above.

<sup>184</sup> As of July 2012, Cambodia, Thailand and the Republic of Korea are States Parties to a range of international human rights law instruments including the UDHR, ICCPR, ICESCR, CEDAW, CRC, ICERD and CAT. Of these instruments, Malaysia is only a State Party to the UDHR, CEDAW and CRC.

<sup>185</sup> UDHR, article 23(1); ICESCR, article 6; ICERD article 5(e)(i).

<sup>186</sup> UDHR, articles 23(2) and 25(1); ICESCR, articles 7 and 9; ICERD, article 5(e)(i).

<sup>187</sup> UDHR, article 23(2); ICESCR, article 7(a)(i).

<sup>188</sup> UDHR, article 24; ICESCR, article 7(d).

<sup>189</sup> UDHR, article 4; ICCPR, article 8.

<sup>190</sup> UDHR, article 5; ICCPR, article 7; CAT, articles 2 and 16.

<sup>191</sup> UDHR, article 23(4); ICCPR, article 22; ICESCR, article 8; ICERD, article 5(e)(ii).

<sup>192</sup> UDHR, article 25(2); ICESCR, article 10(3); CRC, articles 32 and 34.

<sup>193</sup> UDHR, article 25(2); ICESCR article 10(2); CEDAW, article 11.

#### *Migrant Smuggling Protocol*

4.2.1.16 The *United Nations Protocol Against the Smuggling of Migrants by Land, Sea and Air 2000 (Migrant Smuggling Protocol)* which supplements the *United Nations Convention Against Transnational Organised Crime 2000 (CATOC)* was adopted in 2000. The Migrant Smuggling Protocol seeks to:

- prevent and combat the **smuggling of migrants** where it is **transnational in nature** and involves an **organised criminal group**;
- promote cooperation amongst States Parties; and
- protect the rights of smuggled migrants.<sup>194</sup>

States which intend to become a State Party to the Migrant Smuggling Protocol must also become a State Party to the CATOC.<sup>195</sup>

4.2.1.17 States Parties to the Migrant Smuggling Protocol are required to:

- criminalise offences relating to the smuggling of migrants;<sup>196</sup>
- establish as aggravating circumstances to the above offences any circumstances which endanger or are likely to endanger the lives or safety of migrants or that entail inhuman or degrading treatment of migrants;<sup>197</sup>
- take measures to strengthen border controls to prevent and detect the smuggling of migrants and to ensure the security and integrity of travel and identity documents;<sup>198</sup>
- exempt migrants who have been smuggled from criminal prosecution under the Migrant Smuggling Protocol for the fact of having been smuggled;<sup>199</sup> and
- take all appropriate measures to preserve and protect the rights and facilitate the return of migrants who have been smuggled.<sup>200</sup>

4.2.1.18 Cambodia ratified the Migrant Smuggling Protocol without reservation on 12 December 2005 and thus is legally bound to comply with its terms in full. Thailand and the Republic of Korea are signatories to the Migrant Smuggling Protocol,<sup>201</sup> and Malaysia is neither a signatory nor a State Party.

## 4.2.2 **Cambodian domestic law governing the internal labour migration of Cambodian workers**

4.2.2.1 In addition to the international law set out in section 4.2.1, internal migrant workers in Cambodia are governed by Cambodian domestic law.

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<sup>194</sup> Migrant Smuggling Protocol, article 2.

<sup>195</sup> CATOC, article 37(2).

<sup>196</sup> Migrant Smuggling Protocol, articles 6(1) and 6(2).

<sup>197</sup> *ibid.*, article 6(3).

<sup>198</sup> *ibid.*, articles 11 and 12.

<sup>199</sup> *ibid.*, article 5.

<sup>200</sup> *ibid.*, article 18.

<sup>201</sup> For the obligations of these States as signatories see note 182.

- 4.2.2.2 The primary sources of law governing the rights of workers within Cambodia are:
- the Constitution;
  - the Labour Law; and
  - regulations enacted by the RGC and the Ministry of Labour and Vocational Training (**MoLVT**).
- Other sources of law include:
- employment contracts between employers and their individual employees;<sup>202</sup>
  - collective labour agreements between an employer or group of employers and one or more trade unions which are representative of workers;<sup>203</sup> and
  - internal regulations within a workplace which all employers who have at least eight employees are required by law to establish.<sup>204</sup>
- 4.2.2.3 Key features of the domestic law governing the employment of workers in Cambodia (including internal migrant workers) include:
- that all Cambodian citizens have Constitutional rights to choose any employment according to their ability and to the needs of society, to receive equal pay for equal work, to obtain social security and other social benefits as determined by law and to form and be a member of trade unions;<sup>205</sup>
  - that all Cambodian workers who have employment contracts for work to be performed within Cambodia enjoy basic rights and protections in relation to:
    - the prohibition of forced or compulsory labour;
    - the prohibition of the hiring of people to pay off debts;
    - wages, including minimum wages and the payment of wages;
    - working hours, weekly rest and leave;
    - OHS;
    - dismissal and the termination of employment contracts;
    - the special needs of workers under 18 years of age;
    - the special needs of workers who are pregnant or mothers; and
    - non-discrimination including on the bases of race, sex, religion, political opinion, birth or membership of a workers' union;<sup>206</sup>
  - the fact that Constitutionally-protected rights to strike and to non-violent demonstration are guaranteed and implemented through the framework of the Labour Law;<sup>207</sup> and
  - the fact that domestic workers and workers who do not have a formal employment contract are excluded from the vast majority of the protections provided by the Labour Law.<sup>208</sup>

<sup>202</sup> Labour Law, article 65.

<sup>203</sup> *ibid.*, article 96.

<sup>204</sup> *ibid.*, article 22.

<sup>205</sup> Constitution, articles 36 and 75.

<sup>206</sup> Labour Law, various articles.

<sup>207</sup> *ibid.*, chapter XIII.

### 4.2.3 Domestic and regional law governing the international labour migration of Cambodian workers

#### *Introduction*

4.2.3.1 In addition to the international law set out in section 4.2.1, Cambodian migrant workers are governed by four types of domestic and regional law:

- Cambodian domestic law governing the recruitment of Cambodian migrant workers within Cambodia;
- the domestic law of the receiving country which governs the employment and rights of Cambodian migrant workers in that country;
- bilateral agreements between Cambodia and receiving countries which establish legal and administrative frameworks for the employment of Cambodian workers; and
- protections for migrant workers established within the framework of ASEAN.

#### *Cambodian domestic law governing recruitment of Cambodian migrant workers*

##### Domestic law governing the sending of Cambodian workers abroad

4.2.3.2 Cambodian domestic law is necessary to address dishonest, illegal and exploitative practices in the recruitment of Cambodian workers, regulate the sending of workers abroad and establish a framework for government oversight of living and working conditions of Cambodian workers in receiving countries. Despite these important needs, no legally-binding domestic legislation exists concerning the international migration of Cambodian workers.

4.2.3.3 In 2010 the MoLVT recognised that “*the national legal and regulatory framework governing labour migration in Cambodia is sporadic and limited.*”<sup>209</sup> In the absence of binding legislation, the sending of Cambodian workers abroad is governed by a series of overlapping, non-binding regulations. The most significant of these regulations are:

- *Sub-Decree no. 190 on the Management of the Sending of Cambodian Workers Abroad Through Private Recruitment Agencies 2011 (Sub-decree on Private Recruitment Agencies)* which replaced *Sub-decree no. 57 on the Export of Khmer Workers Overseas 1995*;
- *Sub-Decree no. 70 on the Creation of the Manpower Training and Overseas Sending Board 2006 (Sub-decree on MTOSB)* which establishes the Manpower Training and Overseas Sending Board (**MTOSB**), a public agency for recruiting, training and sending of Cambodian workers to work overseas (particularly in the Republic of Korea); and

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<sup>208</sup> Labour Law, article 1.

<sup>209</sup> MoLVT, *Policy on Labour Migration for Cambodia*, Phnom Penh, June 2010, para 5.1.2.

- a *sarachor* signed by Prime Minister Hun Sen on 15 October 2011 placing a ban on the recruitment, training and sending of Cambodian domestic workers to Malaysia in light of widespread reports of abuse.<sup>210</sup>

## 4.2.3.4

The Sub-decree on Private Recruitment Agencies attempts to regulate the sending abroad of Cambodian migrant workers and the treatment of potential migrant workers by Cambodian private recruitment agencies. It is not legally-binding, and as such it does not establish any criminal offences and cannot form the basis of a legal cause of action or a judgment of a court in cases concerning the conduct of recruitment agencies. Key features of the Sub-decree on Private Recruitment Agencies include that:

- the MoLVT is identified as the government agency responsible for managing the sending of Cambodian workers abroad in cooperation with the MoFAIC and the MoI. This responsibility includes conducting inspections of recruitment agencies;<sup>211</sup>
- recruitment agencies sending Cambodian workers abroad must be licensed with the MoLVT and fulfill certain conditions, such as having a training center of an appropriate size which provides proper accommodation and dining areas that ensure good health, sanitation and safety;<sup>212</sup>
- the minimum age for a Cambodian worker to be sent abroad is 18 years of age;<sup>213</sup>
- recruitment agencies are required to enter into and/or properly implement the following contracts:
  - a contract between the MoLVT and the recruitment agency;
  - a Job Placement Service Contract between the recruitment agency and the Cambodian worker; and
  - an employment contract between the foreign employer and the Cambodian worker which clearly specifies information about the worker's employment, including working conditions, job status, types of work, benefits and key addresses that the worker can contact if he or she requires assistance in the receiving country;<sup>214</sup>
- recruitment agencies are “*responsible*” for the working and living conditions of prospective migrant workers, including for the types of work, workplace, working hours, skills, salary, benefits, health insurance, accommodation, transport, security and safety within the working and accommodation areas of migrant workers;<sup>215</sup>
- recruitment agencies have obligations to:
  - provide workers with information on how to contact the Cambodian Embassy or Consulate in receiving countries;

<sup>210</sup> This ban is expected to remain in place until Cambodia and Malaysia finalise a **Memorandum of Understanding (MoU)** on the sending of Cambodian domestic workers to Malaysia. A MoU is in the process of being drafted and is expected to be concluded no earlier than late 2012. See also: *Prakas no. 108 on Education of HIV/AIDS, Safe Migration and Labour Rights for Cambodian Workers Abroad 2006* and *Sarachor no. 2647 on Directing Recruitment, Training, Transferring and Management of Cambodian Migrants to Work Abroad 2010* which set out guidelines for awareness-raising programmes for Cambodian migrant workers and for the recruitment of Cambodian workers.

<sup>211</sup> Sub-decree on Private Recruitment Agencies, articles 5 and 9.

<sup>212</sup> *ibid.*, articles 6 and 7.

<sup>213</sup> *ibid.*, article 4.

<sup>214</sup> *ibid.*, articles 15-18.

<sup>215</sup> *ibid.*, article 21.

## State of Migration

### An overview of forced displacement in Cambodia

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- ensure that none of their advertisements involve lying or deceit;
  - properly record all information pertaining to every individual worker who is sent abroad;
  - ensure that workers who are sent abroad receive the benefits of appropriate social security in accordance with the applicable laws and regulations of the receiving country;
  - assist workers who are sent abroad in opening and using a personal account in any safe bank in order to facilitate the sending home of remittances (see paragraph 4.3.2.9);
  - participate in and bear certain costs relating to the resolution of disputes which arise between foreign employers and Cambodian migrant workers; and
  - take certain steps in the event of the disappearance of any worker or the expiry of a worker's employment contract;<sup>216</sup> and
- penalties may be imposed on recruitment agencies which violate the provisions of the Sub-decree on Private Recruitment Agencies or other applicable laws, including written warnings and the temporary suspension or revocation of the agency's license.<sup>217</sup>

#### 4.2.3.5 Other aspects of Cambodian domestic law which may be relevant to the recruitment of Cambodian migrant workers by private recruitment agencies include:

- provisions which criminalise the falsification of identity and travel documents;<sup>218</sup>
- the prohibition on unlawfully confining another person;<sup>219</sup>
- prohibitions on forced or compulsory labour and on hiring a person to pay off a debt;<sup>220</sup>
- provisions which establish offences connected with trafficking in persons, including the prohibition on unlawfully taking away a minor from his or her parent or guardian;<sup>221</sup>
- provisions for the rescission of contracts where there is fraud, misrepresentation, abuse of circumstance, duress or where one party benefits excessively from the contract;<sup>222</sup> and
- provisions relating to the legal concepts of negligence and agency which may be relevant to cases where workers wish to hold a recruitment agency responsible or criminally liable for harm caused by the actions of foreign employers or local brokers.<sup>223</sup>

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<sup>216</sup> *ibid.*, articles 20, 22, 25-28, 30-33 and 35.

<sup>217</sup> *ibid.*, articles 39 and 40.

<sup>218</sup> Law of Nationality, articles 21 and 22; Penal Code, article 377.

<sup>219</sup> Penal Code, article 253. There are reports that prospective Cambodian migrant domestic workers have been forcibly confined in training centers in Cambodia for up to six months prior to migrating. For more information see: HRW, *They Deceived Us at Every Step: Abuse of Cambodian Domestic Workers Migrating to Malaysia*, Human Rights Watch, USA, November 2011.

<sup>220</sup> Labour Law, articles 15 and 16.

<sup>221</sup> Cambodian TIP Law; Penal Code, article 377.

<sup>222</sup> Civil Code, articles 347-351.

<sup>223</sup> *ibid.*, articles 371 and 372; Penal Code, article 42.



Deficiencies in the domestic law governing the sending of Cambodian workers abroad

4.2.3.6 The following gaps and deficiencies undermine the effectiveness of the domestic law governing the sending of Cambodian workers abroad:

- the lack of a legally-binding, comprehensive and coherent legislative framework governing this issue. The Sub-decree on Private Recruitment Agencies is widely considered to fall short of the practical and legal standards which are necessary to protect Cambodian migrant workers;
- the lack of regulation of local brokers who use deception and manipulation to recruit large numbers of workers for recruitment agencies in exchange for a fee;
- the lack of a prohibition on recruitment agencies using unscrupulous lending and incentive practices to lure workers and their families into situations of debt without fully informing them of the true nature of the loan, recruitment process and employment conditions;
- the lack of minimum standards for space, food, sanitation, health, safety or medical care in training centers operated by recruitment agencies;
- in relation to contracts signed by the worker:
  - the lack of a clear and detailed list of the minimum information to be included in the Job Placement Service Contract and the employment contract;
  - the lack of a requirement that the employment contract be signed prior to the worker's arrival in the receiving country; and
  - the lack of a requirement that steps be taken to ensure the worker fully understands the content of these contracts;
- ambiguity as to the precise nature of a recruitment agency's 'responsibility' for the working and living conditions of migrant workers under article 21 of the Sub-decree on Private Recruitment Agencies and the lack of minimum standards for these conditions;
- the lack of an obligation for recruitment agencies to follow up on the well-being of workers after they have been placed in employment abroad or to investigate and provide assistance in cases of serious illness, disappearance or death;
- the lack of a requirement for the MoLVT to inspect working and living conditions in receiving countries; and
- the lack of an effective and accessible complaint mechanism for workers to report cases of abuse, harassment and exploitation by recruitment agencies and/or foreign employers.<sup>224</sup>

<sup>224</sup> For more information about the Sub-decree on Private Recruitment Agencies see: Drolet, N., *Domestic Workers and Sub-Decree 190: Time to Protect Cambodia's Migrants*, Legal Support for Children and Women (LSCW), 2011; CARAM Cambodia, *Analysis of Sub-decree No. 190 on "Management of the Sending of Cambodian Workers to Work Abroad Through Private Recruitment Agencies"*, 31 August 2011.

#### ***Domestic law of Thailand and bilateral agreements relevant to Cambodian migrant workers in Thailand***

##### Laws concerning the immigration of Cambodian workers to Thailand

- 4.2.3.7 The majority of Cambodians who migrate to Thailand for work do so through irregular channels outside the framework of the law. Periodically, undocumented migrant workers have been given a chance to regularise their immigration status in Thailand through the Thai National Verification process (**NV Process**). The NV Process, which has been made available to migrant workers at various intervals, allows Cambodians already in Thailand to register their presence and be issued with a certificate of identity without punishment or the threat of deportation. The NV Process has not been open on a continuous basis and is not intended to be a permanent system to allow all Cambodian migrant workers who migrate through irregular channels to regularise their status and circumvent the law. Rather, the NV Process is intended to be a procedure to bring existing undocumented migrant workers who are already in Thailand within the scope of the law.<sup>225</sup>
- 4.2.3.8 For those workers who do migrate through regular channels, this process is governed by:
- the *Immigration Act 1979 B.E. 2522* (Thailand) and the *Alien Working Act 2008 B.E. 2551* (Thailand) which set out the circumstances in which a foreigner may enter, stay and be legally employed in Thailand; and
  - the *Memorandum of Understanding on Cooperation in the Employment of Workers* signed by Cambodia and Thailand on 31 May 2003 (**Thai-Cambodian Labour MoU**) which establishes an administrative procedure to facilitate the legal and organised migration of Cambodian workers to Thailand. Under this procedure the relevant government agencies in each country prepare lists of available job opportunities and suitable candidates (with the assistance of private recruitment agencies) and facilitate the process of obtaining the relevant documents for approved workers.<sup>226</sup>

##### Rights and protections for documented and undocumented Cambodian workers

- 4.2.3.9 Documented and undocumented Cambodian migrant workers in Thailand may be entitled to rights and protections under a number of legal instruments, including:
- the Thai-Cambodian Labour MoU which contains limited protections for documented migrant workers who migrate through the procedure it establishes;
  - the *Labour Protection Act 1998 B.E. 2541* (Thailand) which contains a range of minimum standards for the protection and rights of all workers who are employed by an employer for monetary remuneration in Thailand.<sup>227</sup> Domestic workers and workers in the agricultural industry are covered by different protection regimes;<sup>228</sup>

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<sup>225</sup> For more information see: Maltoni, B., *Review of Labour Migration Dynamics in Cambodia*, IOM, Phnom Penh, September 2006, section 7.5.

<sup>226</sup> Thai-Cambodian Labour MoU, articles iv-vii. For more information see: *ibid.*, section 7.4.

<sup>227</sup> *Labour Protection Act 1998 B.E. 2541* (Thailand), section 5.

<sup>228</sup> *Ministerial Regulation on Protection of Domestic Workers B.E. 2547* (Thailand); *Ministerial Regulation on Protection of Labour in the Agricultural Sector B.E. 2547* (Thailand).

- the *Labour Relations Act 1975 B.E. 2518* (Thailand) which establishes a framework for the exercise of rights of association, collective bargaining and the settlement of disputes. This framework applies to any person who works for an employer in return for a wage.<sup>229</sup> Migrant workers are not permitted to form or be elected to a leadership position within a trade union;<sup>230</sup> and
- legislation such as the *Social Security Act 1990 B.E. 2533* (Thailand) and the *Workmen's Compensation Act 1994 B.E. 2537* (Thailand) which provide social protection to persons who work for an employer in return for a wage in the event of an accident, sickness, disability or death. Domestic workers and undocumented workers are excluded from these benefits.<sup>231</sup>

### ***Domestic law of Malaysia and bilateral agreements relevant to Cambodian migrant workers in Malaysia***

#### Laws concerning the immigration of Cambodian workers to Malaysia

- 4.2.3.10 Cambodian workers who migrate to Malaysia through regular channels are governed by:
- the *Immigration Act 1959-1963* and *Immigration Regulations 1963* which set out the circumstances in which a foreigner may enter, stay and be legally employed in Malaysia;
  - the *Employment (Restriction) Act 1968* which prohibits the employment of foreign migrant workers in any business, industry or undertaking whatsoever unless the worker has been issued a valid employment permit; and
  - a bilateral agreement on *Recruitment Procedures for Cambodian Nationals for Employment in Malaysia* signed by Cambodia and Malaysia on 30 September 1999 (**Malaysian Recruitment Procedures**) which sets out procedures for the legal recruitment and employment of Cambodian migrant workers. Domestic workers are excluded from these procedures.<sup>232</sup> The Malaysian Recruitment Procedures provide that employers are responsible for the “safe-keeping” of workers’ passports but must surrender passports if the worker runs away.<sup>233</sup>
- 4.2.3.11 As of 15 October 2011 Cambodian domestic workers are also affected by the ban on recruiting, training and sending domestic workers to Malaysia (see paragraph 4.2.3.3).

#### Rights and protections for documented and undocumented Cambodian workers

- 4.2.3.12 Documented and undocumented Cambodian migrant workers in Malaysia may be entitled to rights and protections under a number of legal instruments, including:
- the Malaysian Recruitment Procedures which provide limited protections for migrant workers in relation to matters such as “suitable accommodation” and employment contracts;

<sup>229</sup> *Labour Relations Act 1975 B.E. 2518* (Thailand), section 5.

<sup>230</sup> *ibid.*, sections 88 and 101.

<sup>231</sup> *Social Security Act 1990 B.E. 2533* (Thailand), section 5; *Workmen's Compensation Act 1994 B.E. 2537* (Thailand), section 5.

<sup>232</sup> Malaysian Recruitment Procedures, clause 1.

<sup>233</sup> *ibid.*, clause 2.17.

- the *Employment Act 1955* (Malaysia) which contains a range of minimum standards for the protection and rights of workers in Malaysia who have entered into a contract of service with an employer. Different levels of protection apply to different categories of workers (with domestic workers excluded from a number of important protections);<sup>234</sup>
- the *Industrial Relations Act 1967* (Malaysia) which regulates relationships between trade unions, employers and workers who are employed under a contract of employment; and
- the *Workmen's Compensation Act 1952* (Malaysia) which provides social protection to certain categories of workers who are employed under a contract of employment, regardless of whether the contract is written or oral, and who suffer injury, disease or death arising out of and in the course of their employment. Domestic workers are excluded from this protection.<sup>235</sup>

#### ***Domestic law of the Republic of Korea and bilateral agreements relevant to Cambodian migrant workers in the Republic of Korea***

##### Laws concerning the immigration of Cambodian workers to the Republic of Korea

4.2.3.13 The majority of Cambodian workers who migrate to the Republic of Korea for work do so through regular channels on one of the following two visas:

- an E-6 visa for employment in the arts and entertainment sectors; or
- an E-9 visa for non-professional employment which is operated by the Ministry of Labour of the Republic of Korea (**Korean MoL**) under the Employment Permit Scheme (**EPS**). The EPS was established in 2003 to facilitate and manage the employment of foreign workers in the Republic of Korea in response to pressure from certain sectors to address the exploitative nature of previous employment systems. Under the EPS:
  - the Korean MoL prepares a roster of eligible foreign job seekers in consultation with the Cambodian MTOSB;<sup>236</sup>
  - small- and medium-sized businesses who have been unable to hire national workers apply to the Korean MoL for a permit to employ migrant workers;<sup>237</sup> and
  - the Korean MoL recommends to those businesses qualified candidates from the roster of foreign job seekers.<sup>238</sup>

4.2.3.14 All documented Cambodian migrant workers are governed by the *Immigration Control Act 1963* (Republic of Korea) and associated regulations which set out the circumstances in which a foreigner may enter, stay and be legally employed in the Republic of Korea. Cambodian migrant workers who enter the Republic of Korea under the EPS are also governed by the *Act on Foreign Workers' Employment, Etc. 2003* (**EPS Act**) and the *Memorandum of Understanding on the Sending of Workers to the Republic of Korea under the Employment Permit Scheme* signed by Cambodia and the Republic of Korea on 21 March 2006 (**MoU on EPS**).

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<sup>234</sup> *Employment Act 1955* (Malaysia), First Schedule.

<sup>235</sup> *Workmen's Compensation Act 1952* (Malaysia), section 2.

<sup>236</sup> EPS Act (see paragraph 4.2.3.14), article 7.

<sup>237</sup> *ibid.*, articles 6-8.

<sup>238</sup> *ibid.*, article 8.

Rights and protections for documented and undocumented Cambodian workers

- 4.2.3.15 Documented and undocumented Cambodian migrant workers in the Republic of Korea may be entitled to rights and protections under a number of legal instruments, including:
- the EPS Act which provides documented workers employed under the EPS with certain basic protections, including protection against unfair or discriminatory treatment by employers on the grounds of their status as foreign workers;<sup>239</sup>
  - the *Labour Standards Act 1997* (Republic of Korea) and associated regulations which contain a range of minimum standards for the protection and rights of all persons who work for a business or workplace and earn a wage.<sup>240</sup> Domestic workers are excluded from these protections in full and workers in workplaces employing fewer than five workers may be excluded from these protections in part;<sup>241</sup>
  - the *Framework Act on Labour Welfare 2001* (Republic of Korea) and associated regulations which set out labour welfare policies and seek to improve the quality of life of all persons who work for a business or workplace and earn a wage;<sup>242</sup>
  - the *Trade Union and Labour Relations Adjustment Act 1997* (Republic of Korea) and associated regulations which protect the rights of association, collective bargaining and collective action of workers;<sup>243</sup>
  - the *Minimum Wage Act 1986* (Republic of Korea) and associated regulations which guarantee a minimum level of wages to all persons who work for a business or workplace and earn a wage (excluding domestic workers);<sup>244</sup> and
  - legislation such as the *Employment Insurance Act 1993* (Republic of Korea) and the *Industrial Accident Compensation Insurance Act 1994* (Republic of Korea) which provide social protection to workers in the event of an accident, sickness, disability or death.

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<sup>239</sup> *ibid.*, article 22.

<sup>240</sup> *Labour Standards Act 1997* (Republic of Korea), article 2. In October 1998 the Korean MoL affirmed that undocumented migrant workers in the Republic of Korea are protected under this legislation following a series of cases in which the Supreme Court held that it did apply to undocumented workers: Korean MoL, *Illegal Foreign Workers Protected by the Labour Standards Act from Now On*, Press Release, 14 October 1998.

<sup>241</sup> *Labour Standards Act 1997* (Republic of Korea), article 11.

<sup>242</sup> This legislation does not expressly exclude undocumented migrant workers, however it has been suggested that the businesses which employ such workers may not implement the labour welfare programmes and policies set out in this law.

<sup>243</sup> In theory this law applies to all workers, however in practice a prohibition on migrant workers engaging in political activities under article 17(2) of the *Immigration Control Act 1963* (Republic of Korea) may prevent them from effectively and fully realising their rights under this legislation.

<sup>244</sup> *Minimum Wage Act 1986* (Republic of Korea), article 2.

#### *Other bilateral agreements between Cambodia and labour receiving countries*

- 4.2.3.16 In 2009 and 2011 Cambodia signed MoUs with Kuwait and Qatar respectively on the sending of Cambodian workers to those countries.<sup>245</sup> It is reported that up to 10,000 workers were expected to be sent to Kuwait to work in the services, tourism, construction and extraction sectors, earning salaries of between US\$200 and US\$300 per month. A further 2000 skilled and unskilled Cambodian workers were expected to be sent to Qatar where they would earn salaries of at least US\$300 per month.
- 4.2.3.17 As of July 2012 no Cambodian workers have been sent pursuant to these MoUs. Media sources and local organisations have reported that the reasons for the delay in sending workers are a lack of implementing regulations for the agreements and concerns about the safety of Cambodian workers (especially female domestic workers) in light of reports of abuse of Filipino and Indonesian migrant workers in Gulf States.<sup>246</sup>

#### *Protections for migrant workers established within the framework of ASEAN*

- 4.2.3.18 Cambodia and the countries which receive the greatest numbers of Cambodian migrant workers appear to be reluctant to bind themselves to international labour standards concerning the rights of workers, particularly migrant workers (see section 4.2.1). Notwithstanding this apparent reluctance, these countries have demonstrated some willingness to address labour migration issues through regional frameworks.
- 4.2.3.19 On 13 January 2007 the ASEAN Member States signed the *ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (ADMW)*, a non-binding instrument which sets out a series of general principles, the obligations of sending and receiving States and a number of commitments by ASEAN relating to the protection and promotion of the fundamental rights and dignity of migrant workers and their families. In particular, the ADMW encourages ASEAN countries to:
- intensify efforts and enhance measures to protect the fundamental human rights, promote the welfare and uphold the human dignity of migrant workers;
  - promote fair and appropriate employment protection, payment of wages, and adequate access to decent working and living conditions for migrant workers;
  - provide migrant workers who may be victims of discrimination, abuse, exploitation and violence with adequate access to legal and judicial systems;
  - set up policies and procedures to facilitate certain aspects of the migration of workers, including recruitment, preparation for deployment overseas, protection of migrant workers abroad, repatriation and reintegration into countries of origin; and

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<sup>245</sup> *Memorandum of Understanding on the Field of Exchange of Manpower between the Royal Government of Cambodia and the Government of the State of Kuwait* signed 13 January 2009; *Memorandum of Understanding between Cambodia and Qatar* signed 9 May 2011.

<sup>246</sup> See for example: Kunmakara, M., 'Cambodian workers set to enter Kuwait's labour force this year', *The Phnom Penh Post*, 23 June 2010; 'Cambodia decides not to send maids to Kuwait', *Arab Times Online*, 30 June 2011, < <http://www.arabtimesonline.com/NewsDetails/tabid/96/smId/414/ArticleID/170944/reftab/36/t/Cambodia-decides-not-to-send-maids-to-Kuwait/Default.aspx> > last accessed 30 June 2012; Garcia, B., 'Cambodia 'levelling playing fields' for would-be workers in Kuwait', *Kuwait Times*, 6 July 2011, < [http://kuwaittimes.net/read\\_news.php?newsid=MzUzNTE2ODkxNg](http://kuwaittimes.net/read_news.php?newsid=MzUzNTE2ODkxNg) > last accessed 30 June 2012; Sen, D., 'Migrant workers delayed', *The Phnom Penh Post*, 1 August 2011, p 5.

- establish and promote legal practices to regulate the recruitment of migrant workers and adopt mechanisms to eliminate illegal and unethical recruitment practices through the introduction of legal and valid contracts of employment, regulation and accreditation of recruitment agencies and employers, and blacklisting of negligent and/or unlawful agencies.<sup>247</sup>

4.2.3.20 The ADMW also calls for the development of “an ASEAN instrument on the protection and promotion of the rights of migrant workers.”<sup>248</sup> As a follow-up to the ADMW, the ASEAN Committee on the Implementation of the ADMW (ACMW) was established and convened its first meeting in September 2008. The ADMW Committee is currently in the process of drafting the proposed instrument concerning migrant workers’ rights, although as of July 2012 this instrument remains a work in progress.<sup>249</sup>

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### 4.3 Labour migration within and from Cambodia

***“Although official unemployment in the country is low, a large proportion of those who do work are in vulnerable employment... Vulnerable employment is characterised by a range of decent work deficits, including low earnings, poor access to social protection and representation (in unions), weak job and income security and poor working conditions. In Cambodia, young people and women are overrepresented among vulnerable workers.”***

– International Labour Organisation<sup>250</sup>

#### 4.3.1 Internal labour migration

4.3.1.1 Cambodia contains significant internal labour migration flows; indeed, the majority of migration in Cambodia may occur within its borders.<sup>251</sup> It is estimated that in 2009 there were approximately 2.5 million internal migrant workers, most of whom were young women from rural areas working in manual, low-paid positions.<sup>252</sup>

4.3.1.2 Migration from rural provinces to more developed urban centers is the most widely reported type of internal labour migration. The sectors which draw the greatest numbers of internal migrant workers from rural areas include the construction industry for men and the garment manufacturing, domestic work and entertainment sectors for women. There are also reports of Cambodians migrating to Phnom Penh and other urban centers to work in the tourism, food and service industries and in the informal economy sector (as tuk-tuk drivers, street sellers, etc.).

<sup>247</sup> ADMW, articles 5, 8, 9, 11, 13 and 14.

<sup>248</sup> *ibid.*, article 22.

<sup>249</sup> For more information see: ADMW Committee, *Work Plan*, 2008, < <http://www.aseansec.org/23062.pdf> > last accessed 30 June 2012; ASEAN, *ASEAN Labour Ministers Meeting*, undated, < <http://www.aseansec.org/19605.htm> > last accessed 30 June 2012.

<sup>250</sup> ILO, *Decent Work Country Programme: Cambodia (2011 – 2015)*, Phnom Penh, undated, pp 10-11.

<sup>251</sup> Maltoni, B., *Migration in Cambodia: Internal vs. External Flows*, 8<sup>th</sup> ARPMN Conference on Migration, Development and Poverty Reduction, Fuzhou (China), 25-29 May 2007; War on Want, *op. cit.* (note 162), p 4.

<sup>252</sup> War on Want, *op. cit.* (note 162), p 4.

## State of Migration

### An overview of forced displacement in Cambodia

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4.3.1.3 Whilst this rural-to-urban migration within Cambodia has traditionally received the most attention, some reports suggest that the greatest numbers of internal migrant workers could be involved in intra-provincial, short-range and rural-to-rural migration flows.<sup>253</sup> These flows remain largely uninvestigated and may warrant greater attention.

## 4.3.2 International labour migration

### *Destination countries*

4.3.2.1 Cambodia is a major source country for migrant workers. With an estimated 300,000 new workers entering the labour force every year and a domestic job market which is already over-saturated with unskilled labour, many Cambodians turn to employment in foreign countries as an alternative to unemployment and a means of achieving a better quality of life.

4.3.2.2 There are three main destination countries for Cambodian migrant workers:

- Thailand for women working in factories<sup>254</sup> and in the fish processing industry and men working in the fishing,<sup>255</sup> construction and agriculture industries. There are also reports of Cambodian women working as domestic workers and in the entertainment industry;
- Malaysia for women working as domestic workers,<sup>256</sup> men working in the construction industry and both men and women working in factories. There are also reports of women working in the entertainment industry; and
- the Republic of Korea for women working in factories and men working in factories and the construction, fishing and agriculture industries.

4.3.2.3 There are smaller numbers of Cambodian migrant workers in other countries in Asia, the Middle-East and further abroad.

### *International migration channels out of Cambodia*

4.3.2.4 International labour migration through regular channels is usually organised by private Cambodian recruitment agencies who manage the recruitment, training and placement of Cambodian migrant workers in overseas positions of employment. A non-binding regulatory framework has been established to govern the operation of these recruitment agencies (the Sub-decree on Private Recruitment Agencies), however allegations of abuse, exploitation and deception of workers by these agencies, their representatives and their foreign counterparts are yet to be effectively addressed. The use of private recruitment agencies is particularly common for migrant workers migrating to Malaysia.

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<sup>253</sup> Maltoni (2007), *op. cit.* (note 251); National Institute of Statistics, 'Percentage of migrants in each migration stream to total internal migrants', *Cambodia Inter-Censal Population Survey 2004*, 2004, < <http://www.nis.gov.kh/nis/CIPS%202004/table6.htm> >, last accessed 30 June 2012.

<sup>254</sup> Some reports suggest that the number of female Cambodian migrant workers working in Thai factories has started to increase since the RGC imposed a ban on the sending of domestic workers to Malaysia in October 2011.

<sup>255</sup> The MoLVT is reported to have a policy of prohibiting Cambodian migrant workers from working on Thai fishing boats, although the precise legal basis of this policy is unclear.

<sup>256</sup> As of 15 October 2011 the RGC has imposed a ban on the sending of Cambodian domestic workers to Malaysia: see paragraph 4.2.3.3.



- 4.3.2.5 International labour migration through regular channels may also be organised by the MTOSB (see paragraph 4.2.3.3). A number of reports indicate that the recruitment of workers by the MTOSB is considerably cheaper and involves less risk of exploitation than recruitment by private recruitment agencies.<sup>257</sup>
- 4.3.2.6 International labour migration through irregular channels often involves clandestine crossings of the Thai-Cambodian border, either with or without the assistance of a broker. The border is long, porous and has a well-established history of relatively cheap and easy crossings by undocumented workers involved in short- and longer term employment in Thailand. Thailand's large informal economic sector (which is estimated to comprise more than 50% of the country's GDP and relies on a supply of undocumented migrant workers to maintain its fiscal viability) diminishes the incentive for migrants to go through regular and more costly channels.<sup>258</sup> Illegal crossings into Thailand can be dangerous and increase the risk of migrant workers being shot, arrested or trafficked.

### ***Quantifying the phenomenon***

- 4.3.2.7 Complete, accurate and reliable statistics on the number of Cambodian workers engaged in international labour migration are not available due to the difficulty of quantifying the number of persons moving through irregular migration channels and reports that workers from other countries wrongly identify themselves as Cambodian for a variety of reasons.<sup>259</sup>
- 4.3.2.8 Despite these difficulties, the following estimates provide some indication of the magnitude of international labour migration trends in Cambodia:
- the number of Cambodian migrant workers who went to Thailand, Malaysia and the Republic of Korea through regular migration channels increased by more than 270% from 14,243 in 2007 – 2008 to 53,071 in 2009 – 2010;<sup>260</sup>
  - in 2010 Cambodian workers comprised the second largest group of foreign workers in Thailand.<sup>261</sup> It is estimated that more than 200,000 Cambodian migrant workers are currently in Thailand, with reports of more than 1,000 Cambodian workers employed in a single factory.<sup>262</sup> In the first two weeks of May 2012 alone more than 3000 Cambodians who had crossed illegally into Thailand were deported;<sup>263</sup> and
  - in a 2009 study, 55% of the surveyed households had a member who had migrated within the last five years with this number rising to as high as 83% of surveyed households in one village.<sup>264</sup>

<sup>257</sup> See for example: Sophal, C., *Review of Labour Migration Management Policies and Legal Framework in Cambodia*, ILO Asia-Pacific Working Paper Series, May 2009, section 4.2.2.

<sup>258</sup> The Asia Foundation, *Borderline: Labor Migration Policy, Practice and Protection in Cambodia*, August 2011, p 12.

<sup>259</sup> Maltoni (2006), *op. cit.* (note 225), p 29.

<sup>260</sup> MoLVT statistics sourced from the ILO in March 2011 and published in The Asia Foundation, *op. cit.* (note 258), p 11.

<sup>261</sup> MoLVT, *op. cit.* (note 209), p 3.

<sup>262</sup> The Asia Foundation, *op. cit.* (note 258), p 12; Boyle, D., 'Agreement reached at Thai seafood factory', *The Phnom Penh Post*, 17 May 2012, p 3.

<sup>263</sup> Soenthrith, S., and Mengleng, E., 'Military Officials Meet to Tackle Border Issues', *The Cambodia Daily*, 17 May 2012, p 19.

<sup>264</sup> Sophal, C., *Costs and Benefits of Cross-Country Labour Migration in the GMS: Cambodia Country Study*, Working Paper Series No. 44, CDRI, December 2009.

#### *Remittances*

4.3.2.9 Remittances from international labour migration constitute a major source of income for the families of Cambodian workers. Remittances from Cambodian migrant workers abroad rose from US\$177 million in 2004 to \$325 million in 2008 and US\$364 million in 2010.<sup>265</sup> In a 2008 study in Thailand, 40% of surveyed Cambodian migrant workers reported that remittances were the main source of income for their family in Cambodia.<sup>266</sup>

### **4.3.3 Cambodian migration policy**

4.3.3.1 Internal and international labour migration is heavily influenced by the RGC's policies on employment which involve three main pillars:

- encouraging and facilitating the orderly and legal international migration of Cambodian workers based on well-informed choices;
- protecting the rights of Cambodian workers abroad; and
- promoting domestic employment and job creation in the local market.<sup>267</sup>

4.3.3.2 The RGC actively pursues the first of these pillars as a means of combatting unemployment, alleviating poverty and stimulating economic growth and social development. It pursues this policy by establishing bilateral agreements with labour-receiving countries to facilitate the employment of Cambodian workers and collaborating with international and local organisations to increase awareness about safe migration amongst the working population.

4.3.3.3 Alongside these measures to increase international employment, the RGC has demonstrated some political will to protect the rights and improve working conditions of Cambodian workers abroad.<sup>268</sup> Despite this will, efforts to protect workers lag behind the rate at which workers are being sent abroad. The RGC's policy of protecting workers is not yet sufficiently robust to protect Cambodian workers against the risks of harm and exploitation which arise from increased international migration. There is also concern that the same effort to improve the working conditions of Cambodian workers abroad has not been channeled into improving conditions in the local job market.

4.3.3.4 In addition to these policies concerning international labour migration, the RGC seeks to ensure that foreign employment is not the only avenue for sustained economic development and poverty reduction. The RGC seeks to promote domestic employment, increase job creation in the local market and diversify and strengthen the competitiveness of the Cambodian economy. It has announced plans to promote small and medium enterprises, establish a national agency for professions and employment and establish employment centres at the provincial level to disseminate labour market information.<sup>269</sup> As of July 2012 the majority of these plans are yet to be implemented.

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<sup>265</sup> MoLVT, *op. cit.* (note 209), p 13; World Bank (2011), *op. cit.* (note 6), p 84.

<sup>266</sup> MoLVT, *op. cit.* (note 209), pp 4 and 13.

<sup>267</sup> The key instruments setting out the RGC's policy in relation to internal and international migration include the RSII, the NSDP Update and the MoLVT's *Policy on Labour Migration for Cambodia* (see note 209).

<sup>268</sup> For evidence of this political will see for example: the ban on the sending of Cambodian domestic workers to Malaysia (paragraph 4.2.3.3) and Reaksmey, H. and Lewis, S., 'Hun Sen asks ASEAN to protect migrant workers', *The Cambodia Daily*, 11 May 2012, p 25.

<sup>269</sup> MoLVT, *op. cit.* (note 209), p 12.

#### 4.3.4 Labour migration and trafficking in persons in Cambodia

“*Trafficking in persons*’ shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”

*Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organised Crime 2000*, article 3(a)<sup>270</sup>

- 4.3.4.1 The potential difficulties in distinguishing cases of labour migration involving exploitation from cases of trafficking in persons have been introduced above (see paragraph 4.1.3.1). In Cambodia these difficulties often arise from the inherent nature of recruitment and employment. Many job placements are facilitated by a recruiter or broker (a family member, friend, acquaintance or stranger) whose priority is to make a profit from the arrangement rather than to safeguard the worker’s rights. Brokers expect a fee for the service they provide, which in some cases may be paid in advance by an employer who later deducts it from the worker’s salary. These arrangements may be difficult to distinguish from the broker ‘selling’ the worker and expose workers to the risk of **debt bondage**.
- 4.3.4.2 Working conditions and terms of employment in some workplaces, both in Cambodia and abroad, amount to abuse and exploitation by objective international standards. The employment of underage workers is not uncommon,<sup>271</sup> nor is the practice of obtaining loans through the informal credit sector which are repaid by the provision of labour and/or sexual services. Deception, manipulation and abuse of positions of power and vulnerability are objectionable but unexceptional aspects of the labour migration process. Indeed, a certain degree of exploitation may be seen as the necessary cost of an opportunity for employment.
- 4.3.4.3 The distinction between labour migration involving exploitation and trafficking in persons in Cambodia is further complicated by a reluctance amongst certain stakeholders to acknowledge that private recruitment agencies have been implicated in the trafficking of Cambodian workers who are sent abroad to work. These agencies are registered legal entities under the purview of the MoLVT and assume a central role in the international migration of Cambodian workers. To label and prosecute such entities as human traffickers could have significant political and economic implications.

<sup>270</sup> For a more detailed discussion of the definition of trafficking in persons see section 5.1.

<sup>271</sup> The distinction between labour migration and trafficking in persons as it relates to underage workers involves additional conceptual difficulties. For more information see section 5.6.2.

## State of Migration

### An overview of forced displacement in Cambodia

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4.3.4.4 Despite these practical and conceptual difficulties, it is important to differentiate between labour migration and trafficking in persons because:

- separate legal regimes govern each concept, with trafficking in persons being a matter of criminal law and labour exploitation often falling more within the ambit of labour laws and social policies;<sup>272</sup>
- trafficked persons should, in theory, be more likely than victims of labour exploitation to be recognised as victims of a crime, exempted from punishment for breaking laws relating to immigration, labour or prostitution as a result of being trafficked and given opportunities to seek redress and compensation; and
- international, domestic and regional legal and policy regimes exist to provide protection and assistance to trafficked persons which are not available to victims of labour exploitation.

4.3.4.5 For the purpose of this publication the following distinction is drawn between labour migration involving exploitation and trafficking in persons in Cambodia:<sup>273</sup>

- cases where an adult worker ‘consents’ to exploitative labour practices are likely to constitute labour migration involving exploitation. In these cases the worker may submit to the exploitation due to a lack of any better economic opportunities,<sup>274</sup> a belief that their situation will improve or a variety of other reasons; and
- cases involving the following practices are more likely to constitute trafficking in persons:
  - confinement of an adult worker in a place of employment by the threat or use of force or by confiscation of the worker’s travel, identity and work documents;
  - recruitment of adult workers into situations of exploitation by means of:
    - misleading and deceptive advertising, either by a private recruitment agency, their agent or an independent broker; or
    - abuse of the worker’s position of vulnerability arising from poverty, unemployment or a lack of social or familial support. The abuse of a position of vulnerability includes offering ‘incentives’ such as cash or food (which are in fact loans) to impoverished and desperate families to lure workers into situations of debt;
  - any case in which a worker is exploited in a training center or place of employment and is not free to leave because they owe a debt, are forcibly confined or any other reason; and
  - recruitment and/or employment of a minor into a situation of exploitation.

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<sup>272</sup> Koettl, J., *Human Trafficking, Modern Day Slavery and Economic Exploitation*, World Bank Social Protection Discussion Paper No. 0911, May 2009, p 5.

<sup>273</sup> This distinction seeks to reconcile the international legal definition of trafficking in persons with the reality of recruitment and employment in Cambodia. It has received general approval from international and local organisations working on these issues in Cambodia.

<sup>274</sup> In many cases there may be only a thin line separating a case meeting this description and trafficking in persons, since abuse of a person’s vulnerability arising from a lack of economic opportunities could arguably constitute the means necessary for trafficking in persons.

## 4.4 Reasons for labour migration

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***“International labour migration... has been  
one of the coping strategies for the poor  
Khmers to move out from poverty.”***

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– *Cambodian Ministry of Labour and Vocational Training*<sup>275</sup>

### 4.4.1 The decision to migrate for work

4.4.1.1 The internal and international labour migration of Cambodian workers is driven by disparities in wealth, development and employment opportunities within Cambodia and between Cambodia and other countries in the region. Many Cambodian migrant workers share a common background of poverty, landlessness, debt and a lack of jobs in their home communities. Faced with these circumstances and limited prospects for advancement at home, workers usually make the decision to migrate of their own volition, encouraged by the success stories of neighbours and friends and the desire to achieve a better quality of life for themselves and their families. For certain workers, particularly young and female workers, the family may play a persuasive role in the making of the decision to migrate.

### 4.4.2 Choice of destination

4.4.2.1 Relatively few migrant workers make the decision to migrate based on a thorough and well-informed understanding of the full range of employment options available. Most workers choose their destination based on the recruitment opportunities which are presented to them in their home community. For some, this choice will involve following a friend who migrates and finding an opportunity for employment upon arrival; for others it will involve accepting the offer of a broker or recruitment agency to place the worker in employment elsewhere in Cambodia or abroad.

4.4.2.2 There are a number of factors which can influence a migrant worker’s choice of destination. In a 2009 survey, Cambodian workers reported that they would prefer to remain in Cambodia rather than migrate abroad, even if this decision involved a slight decrease in pay.<sup>276</sup> For other workers, the choice of destination may be influenced by:

- the promise of high salaries;
- the demand for cheap, low-skilled labour in faster developing countries in the region with strong economies and large informal sectors;
- the long and porous Thai-Cambodian border which renders irregular migration into Thailand relatively cheap and easy; and
- agreements between Cambodia and the governments of destination countries which facilitate and encourage the sending of Cambodian migrant workers abroad.

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<sup>275</sup> MoLVT, *op. cit.* (note 209), p 1.

<sup>276</sup> Sophal (December 2009), *op. cit.* (note 264), pp 25-26.

## 4.5 The experience of labour migration

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*“On February 20, 2012, three young women were shot during worker protests in front of garment factories in Svay Rieng province. One suffered life-threatening wounds to her chest and required extensive hospitalization. Shortly after the triple shooting, Cambodia’s Minister of the Interior H.E. Sar Kheng stated publicly that the shooter had been identified as Bavet town governor, Chhouk Bandith. On March 15, 2012, the well-connected Chhouk was questioned by the authorities and confessed to discharging his weapon during the protest, yet he was not arrested. The Prosecutor has since stated that he will focus only on the damage to the factories caused by the protestors, and will not charge Chhouk with any crime.”*

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– LICADHO<sup>277</sup>

### 4.5.1 An overview of the labour migration experience

- 4.5.1.1 There are a number of potentially positive aspects to the labour migration experience. Labour migration can provide an opportunity for a better life to workers facing poverty and unemployment. Some workers are able to send home remittances which assist with the economic development of their communities (see paragraph 4.3.2.9). Access to new markets and employment sectors may allow workers to seek better jobs with better pay. For female workers, the chance to access a broader range of employment sectors may contribute to their economic empowerment and allow them to break out of traditionally ‘female’ fields of employment. The transfer of skills and knowledge between countries and between areas within the same country can encourage social development.
- 4.5.1.2 In practice many Cambodian migrant and internal migrant workers do not realise this full range of benefits. These workers are predominantly unskilled and lack the financial resources to support themselves for an extended period of time without work. Thus, whilst new markets may be available to them, their ability to get better jobs or negotiate better working conditions remains limited. Most Cambodian migrant workers accept jobs which do not allow them to acquire new skills to transfer back to their home communities and a large number of women remain employed within the same traditionally female-dominated sectors of work.

### 4.5.2 Finding a job

#### *Internal migrant workers in Cambodia*

- 4.5.2.1 Many internal migrant workers follow or are encouraged by friends and acquaintances to move to urban centers to find work. Domestic workers are often recruited from their villages to work in the houses of relatives, associates or strangers through an informal network of contacts. Workers may ‘buy’ their jobs and pay each person who facilitates their recruitment a fee. Workers will often borrow money to make the move and/or

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<sup>277</sup> LICADHO, *All Talk, Little Action: Two Years After UN Human Rights Review, Cambodia Continues to Ignore Key Recommendations*, 22 March 2012.

incur debts whilst they are looking for a job, especially if they need to receive training before employment. These debts commit workers to the migration process from the early stages of job-seeking.

- 4.5.2.2 It may take several months after migrating for a worker to find a job. During this period, many workers share cramped accommodation and go without sufficient food or adequate healthcare due to a lack of income. Unemployed, impoverished and indebted internal migrant workers are highly vulnerable to exploitation. Their position affords them no strength to make demands about minimum standards of living and working conditions. Many will accept whatever jobs and whichever terms of employment they are offered.

#### ***Migrant workers in other countries***

- 4.5.2.3 The use of brokers and recruitment agents to find employment abroad is common amongst Cambodian migrant workers. Some workers are recruited in their home villages whilst others will commence the migration journey independently and enlist the assistance of a broker to get a job along the way. Smaller numbers of workers are recruited through the government-managed MTOSB (see paragraph 4.2.3.3).

- 4.5.2.4 Brokers and recruitment agencies demand fees for their services which few workers can pay in advance. To cover these fees, workers may take out informal 'loans' from the broker or a money-lender. Indebted, in a foreign country, dependent upon the broker and struggling with language and cultural barriers and a lack of social support, Cambodian migrant workers face relatively high risks of deception, misinformation, abuse and trafficking during the job-seeking process. Some reports suggest that workers who are recruited through the MTOSB enjoy a degree of protection against these risks.

### **4.5.3 Living and working conditions for migrant workers in Cambodia**

#### ***Overview***

- 4.5.3.1 Internal migrant workers are employed in a variety of sectors: agriculture, construction, food and service, tourism, garment manufacturing, domestic work, the commercial sex industry and the informal economy. Government regulation of the working conditions in these sectors and the living conditions of all workers (including internal migrant workers) is reported to be minimal or non-existent. This lack of regulation creates a ripe environment for employers and business owners to exploit workers. Internal migrant workers may be particularly vulnerable to this exploitation because:

- they need more income in order to support the costs of more than one household with their salary: their home in the place of employment and their family's home back in their community (and thus they are more likely to experience poverty);
- they may have incurred debts during the process of migrating and setting up a new home which has left them particularly dependent upon their employment; and
- they lack the financial and social support of their family and community.

## State of Migration

### An overview of forced displacement in Cambodia

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4.5.3.2 Many internal migrant workers continue to live frugally after they have found a job in order to save money to support their families back home. They often lack funds for sufficient and nutritious food, suitable accommodation and adequate medical care.

#### *Garment factory workers*

4.5.3.3 Despite efforts to improve the living and working conditions of Cambodian garment factory workers, these conditions continue to lag below internationally-accepted minimum standards in several respects.<sup>278</sup> On a positive note, the ILO reports that Cambodian garment factories generally pay the proper minimum wage and attendance bonuses, provide workers with annual leave and do not employ forced labour.<sup>279</sup> By contrast, areas of concern in relation to the working and living conditions of factory workers include:

- a recent pattern of fainting incidents in factories. The precise cause of these incidents is unclear, however it has been suggested that they are attributable to poor worker nutrition, the lack of a morning meal, poor working conditions, excessive work hours and a psychological reaction to the fainting of other workers;
- poor working conditions, including unacceptable heat levels, inadequate ventilation and lighting, insufficient soap and water available near toilets, the lack of drinking water and/or cups, a lack of appropriate chairs, dust masks and other necessary health and safety equipment, excessive compulsory overtime hours and a lack of worker health and safety policies;
- a lack of rest days and long work hours (well in excess of the statutory maximum of 8 hours per day or 48 hours per week), often without the proper payment of overtime wages;<sup>280</sup>
- other problems concerning the payment of wages, including delays in paying wages (which impact upon the ability of workers to pay their rent and afford food), failures to pay severance pay and adequate overtime and unlawful deductions of attendance bonuses when workers take annual leave. The ILO also reports that a number of factories keep more than one payroll ledger which may indicate an attempt to hide overtime work and other irregularities;
- discrimination against pregnant women and mothers at work, including dismissal or non-renewal of contracts, non-payment of maternity leave wages and childcare costs and a failure to provide mothers with breast-feeding breaks;

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<sup>278</sup> The ILO's Better Factories Cambodia (BFC) project monitors working conditions in Cambodian garment factories and the living conditions of factory workers. The results of BFC assessments are published in regular Synthesis Reports. The two most recent Synthesis Reports cover the period from 1 May 2011 to 30 April 2012: ILO, *Twenty Seventh Synthesis Report on Working Conditions in Cambodia's Garment Sector: 1 May 2011 – 31 Oct 2011*, ILO and International Finance Corporation, Geneva, 30 January 2012; ILO, *Twenty Eighth Synthesis Report on Working Conditions in Cambodia's Garment Sector: 1 Nov 2011 – 30 Apr 2012*, ILO and International Finance Corporation, Geneva, 20 June 2012. Living and working conditions for garment factory workers are also monitored by trade unions and human rights organisations, including the Coalition of Cambodian Apparel Workers' Democratic Union (C.CAWDU), LICADHO, Community Legal Education Centre (CLEC) and CCHR. Local media also report on issues relating to garment factory workers. This section draws from the research and reports of these sources.

<sup>279</sup> ILO (30 January 2012), *op. cit.* (note 278).

<sup>280</sup> Under the Labour Law, workers can be required to work a maximum of 8 hours per day or 48 hours per week and any overtime is to be paid at a rate of 150% of the normal wage: Labour Law, articles 137 and 139.



- the widespread use of short-term contracts of 3 to 6 months which:
  - deny workers access to benefits associated with longer-term employment contracts, such as paid leave and protections against termination; and
  - increase the vulnerability and uncertainty of the worker's position by not guaranteeing long-term employment. Workers on these contracts are more likely to accept exploitative employment practices and less likely to feel free to challenge employers about their rights or working conditions;
- sexual harassment and verbal abuse of workers by employers and management;
- the employment of underage workers; and
- restrictions on workers' freedom of association and intimidation of trade union members (see paragraph 4.5.3.9).

4.5.3.4 Trade unions and labour organisations have suggested that poor conditions in factories are due to inadequate and ineffective government inspections and regulation of the industry. There are contradictory reports about whether or not standards are slightly better in factories which produce items for Western brands than in other factories.

### ***Construction workers***

4.5.3.5 The living and working conditions of construction workers in Cambodia (including internal migrant workers) are relatively under-researched and under-regulated.<sup>281</sup> Reports suggest that in the absence of government oversight, workers in this industry experience a number of objectionable employment conditions. Of particular concern are:

- reports of serious OHS problems, including unsafe construction sites, a lack of safety equipment and a failure to introduce or implement policies to adequately protect workers;
- problems concerning the payment of wages, including low wages (in the absence of a minimum wage), delayed payments of wages and an absence of overtime pay; and
- long working hours including excessive and unpaid compulsory overtime.

### ***Workers in the agriculture industry***

4.5.3.6 The living and working conditions of workers in the agriculture industry (including internal migrant workers) are similarly under-researched.<sup>282</sup> Workers who migrate between provinces for agricultural work are often employed as fruit pickers or vegetable pullers. These workers experience many of the same problems as workers in other sectors, including unfair and exploitative practices concerning the payment of wages, long working hours and poor living and working conditions. Internal migrant workers in this industry are reported to face particular difficulties with accommodation, with some workers living in tents by the side of the fields with no running water or electricity.

<sup>281</sup> The organisations which do monitor these conditions include trade unions and Building and Wood Workers' International (**BWI**). This section draws from the research and reports of these sources.

<sup>282</sup> Some agricultural trade unions informally monitor these conditions but few comprehensive reports are publicly available. This section draws from the experience of these trade unions.

#### *Commercial sex workers<sup>283</sup>*

4.5.3.7 Workers in the commercial sex industry experience many forms of harm and exploitation. Minors who ‘work’ in this industry are, by definition, victims of trafficking in persons and are not legally able to consent to their exploitation. For more information about the experiences of both voluntary workers and trafficked persons in this industry see section 5.5.1.

#### *Domestic workers*

4.5.3.8 Domestic workers within Cambodia, the majority of whom are internal migrant workers, are possibly the most neglected category of workers in the country. For more information about the experiences of domestic workers in Cambodia see section 5.5.2.

#### *Trade unions, workers’ rights and the freedoms of association and expression*

4.5.3.9 Workers in Cambodia (including internal migrant workers) experience heavy restrictions on their ability to assert their rights through trade unions and other forms of peaceful expression. Trade unions and human rights groups report that many workers are unable to resolve disputes collaboratively with their employers or management and that the processes established to settle labour disputes have stalled. There are allegations that factory owners and managers ignore **Arbitration Council Awards** and enjoy impunity in failing to comply with labour laws. The RGC is noticeably absent from many of these disputes and the Garment Manufacturers Association in Cambodia (**GMAC**) is reported to have demonstrated almost no will to push for the implementation of relevant Awards and legislation by factory owners.

4.5.3.10 The ability of workers to assert their rights through participation in trade unions has been frustrated by various anti-union practices. In some cases workers have been immediately dismissed for seeking to form, lead or join a trade union.

4.5.3.11 In the absence of effective mechanisms to resolve disputes, workers have increasingly turned to strikes and protests as a means of asserting their rights. Local media sources frequently report incidences of public labour disputes, especially in the garment manufacturing industry. Most of these disputes involve demands by workers for:

- better pay, including increases in travel and housing allowances, the payment of bonus pay on public holidays and an end to salary deductions;
- better compliance with the laws relating to pregnant women and mothers at work;
- the reinstatement of trade union leaders who have been dismissed for their role in forming or running a union; and
- an end to the use of short-term contracts.<sup>284</sup>

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<sup>283</sup> The use of the term ‘worker’ to describe women engaged in the commercial sex industry may be contentious. Some organisations claim that this term recognises the agency and autonomy of the women who choose to work in this industry and affirms that they have employment and other rights as workers rather than ‘objects’. Other organisations object to the use of the term: they argue that it is a product of the institutions which profit from the industry at the expense of women and that it is used to justify and formalise structures of exploitation and abuse. The use of the term ‘sex worker’ in this publication is not intended to reflect an ideological stance on this issue.

<sup>284</sup> See for example: Pheap, A., and Chen, D-H., ‘Garment protest turns violent after accord fails’, *The Cambodia Daily*, 29 May 2012, p 24; Worrell, S., and Channyda, C., ‘Union out of loop in MoU negotiations’, *The Phnom Penh Post*, 7 June

#### 4.5.4 Living and working conditions for migrant workers abroad

##### Case Study

##### Cambodian migrant workers in Thailand – June 2012<sup>285</sup>

A Cambodian migrant worker has alleged that he and dozens of fellow migrants were arrested, beaten, stripped naked and shaved bald by Thai police, who then extorted money from them just because they did not have the correct location on their working visas.

Construction worker Lim Srun, 50, said yesterday he and 39 others had been arrested on June 14 in Songkhla province's Hat Yai district by Thai police who demanded 3,000 baht (US\$95) from each worker for their release because their work visas were for Bangkok.

*"I had no money to give them up to 3,000 Thai baht, but I took 2,600 baht along with me. Now, they took it all; I have no money to buy rice to eat. How much I left, I would eat that only,"* he said.

The migrants were sent by Cambodian labour firm AP TSE to work at a car wheel factory being constructed by the firm Christiani & Nielsen in January, which was withholding their passports and demanding they pay 3,900 baht per month in various fees, he added. Lim Srun said workers owed the firm a total US\$150 for the passport fees, while they were mystified as to what the monthly fee to police was paid for, but suspected they would face problems if they did not pay it. "How can I live? We come here as if to sell our labour to the firm for nearly no income at all."

***"How can I live? We come here as if to sell our labour to the firm for nearly no income at all."***

Moeun Tola, head of the labour program at the Cambodian Legal Education Center, said 40 other workers who had not been arrested because they had the correct location on their visas also wanted to return but were denied their passports by the firm. *"It is not the mistake of the worker, because they don't know where they would be supplied to, so it is the mistake of the recruitment agency,"* he said. *"All the 80 want to come back home, but the company refused and the passport is kept by the company. So now, the workers want the passport back so they can come home, because they are scared."*

Seng Sithichey, president of AP TSE, denied those who were arrested had been sent by his firm, which he said had issued correct legal documents to all the migrant workers it recruited for the project: *"We sent them to work legally. This was caused by brokers [who were] angry with the labourers for not sending money home, so they complained to the Thai police that they are illegal labourers,"* he said.

Phil Robertson, deputy Asia director of Human Rights Watch, said the case sounded like yet another case of Thai police exploiting migrant workers. *"Everyone ranging from the police on down to local toughs and thugs are allowed to take a piece of you with impunity, and this is a problem the Thai government fundamentally refuses to recognise,"* he said.

*"At the end of the day, the fundamental problem is Thai police systematically abuse the rights of migrant workers. They treat them as less than human, and I don't know why the Cambodian government puts up with it."*

2012, pp 1-2; Kunmakara, M., 'Strikes hit garment boom' *The Phnom Penh Post*, 7 June 2012, p 7; Sina, T., 'Factory gives in to garment workers' wage demands', *The Cambodia Daily*, 16-17 June 2012, p 2.

<sup>285</sup> This case study is quoted directly from: Channyda, C. and Boyle, D., 'Cambodian worker alleges Thai police of humiliating treatment, abuse', *The Phnom Penh Post*, 20 June 2012.

#### *Overview*

- 4.5.4.1 Organisations which work with Cambodian migrant workers report that their living and working conditions are often similar to those of internal migrant workers within Cambodia. Many migrant workers live frugally in shared accommodation and struggle to afford sufficient and adequate food and health services. Exploitation and abuse of migrant workers is rife. Language and cultural barriers put migrant workers at a particular disadvantage in terms of negotiating fair terms of employment and remuneration, especially migrant workers who do not enjoy the support of a local network of Cambodian migrants.
- 4.5.4.2 Cambodian migrant workers are often employed in '**3D Jobs**': jobs which are Dirty, Dangerous and Degrading (or Disliked). These jobs are unskilled, low-wage positions with dangerous and difficult working conditions and greater risks of exploitation and harm. Migrant workers in 3D Jobs tend to integrate rather than compete with members of the local labour force who do not want the jobs taken by unskilled migrants. Cambodian workers in these positions rarely realise the high salaries, increase in skills and improvements in quality of life which they sought to achieve by migrating. Instead, the exploitation of these workers maintains the status quo: the poorest and most vulnerable remain poor and vulnerable.<sup>286</sup>

#### *The issue of documentation*

- 4.5.4.3 Undocumented workers face heightened risks of harassment by police, arrest, detention and deportation. They enjoy less protection under many labour and industrial relations laws and are less able to assert their rights or access the justice system than documented workers. Some employers take advantage of the precarious situation of undocumented migrant workers by not complying with minimum standards for their employment and remuneration.<sup>287</sup>
- 4.5.4.4 A migrant worker can become undocumented in a number of ways, including by:
- entering the receiving country through irregular migration channels without valid travel documents and a work permit; or
  - entering the receiving country through regular migration channels with valid travel documents and a work permit but subsequently:
    - losing these documents;
    - running away from an employer who has confiscated these documents;
    - overstaying the expiry of these documents; or
    - having these documents revoked on the basis of non-compliance with the terms of the worker's visa (for example, where the worker's employment is terminated).

#### *Compulsory health, HIV and pregnancy testing*

- 4.5.4.5 Cambodian and other migrant workers who wish to enter countries such as Thailand, Malaysia and the Republic of Korea are routinely subjected to compulsory health testing, including testing for HIV, hepatitis, tuberculosis, malaria and other infectious diseases. Some migrants are required to undergo a series of successive health tests both before and after their arrival in the receiving country. Female migrant workers

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<sup>286</sup> Maltoni (2007), *op. cit.* (note 251).

<sup>287</sup> Maltoni (2006), *op. cit.* (note 225), p 28

may be compelled to undertake pregnancy testing, with one report claiming that female migrant workers in Malaysia have been required to undergo pregnancy testing as often as every six months for the length of their stay.<sup>288</sup> Workers who 'fail' these health tests, including women who are pregnant, will usually be denied entry to the country or have their work permits revoked and be deported.

4.5.4.6 The legal bases for health testing procedures are not always clear. In Malaysia, Thailand and the Republic of Korea these procedures appear to be established by government policies or internal guidelines, some of which are unpublished. In the absence of clear, consistent and publicly available policies on health testing, many migrant workers are unaware of the nature of these procedures and ill-equipped to assert their rights to privacy and physical integrity.

4.5.4.7 Of greatest concern regarding the health testing of migrants are reports that:

- health testing is conducted without the free and informed prior consent of workers. Many workers are not aware of the nature of the tests and may not know that they are being tested for HIV or pregnancy;
- no pre- or post-test counseling is provided to workers undergoing HIV testing;
- testing is not confidential and some results are delivered directly to the employer rather than to the worker;
- at least one recruitment agency in Cambodia has told its staff to persuade prospective migrant workers who are pregnant to get an abortion so that they will be allowed to migrate. The fees for the abortion are reportedly added to the worker's debt but she is not informed of this arrangement prior to the procedure;<sup>289</sup> and
- migrants who 'fail' their health tests may be deported without any counseling, medical treatment or referral to health services.

#### ***Restrictions on mobility of labour in receiving countries***

4.5.4.8 Restrictions on job mobility are not uncommon for migrant workers. In many receiving countries migrant workers must seek permission from or notify the relevant authorities about their intention to change workplaces. In Thailand, Malaysia and the Republic of Korea, where a number of migrant workers find themselves in exploitative and abusive workplaces, restrictions on the freedom of a worker to change their place of employment can have a particularly harmful effect. Reducing the mobility of labour can force workers to accept unfair terms of employment and poor working conditions. For example, Amnesty International has reported that as a result of restrictions on the mobility of migrant workers in the Republic of Korea they are "*more likely than South Korean workers to put up with poor training, inadequate safety measures and insufficient medical leave.*"<sup>290</sup>

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<sup>288</sup> Villalba, M., 'Combatting racism against migrant workers', *Migrant Forum in Asia*, Philippines, 28 May 2007, < [http://www.isiswomen.org/index.php?option=com\\_content&task=view&id=646&Itemid=200](http://www.isiswomen.org/index.php?option=com_content&task=view&id=646&Itemid=200) > last accessed 30 June 2012.

<sup>289</sup> HRW (November 2011), *op. cit.* (note 219), p 40.

<sup>290</sup> Amnesty International, *Disposable Labour: Rights of migrant workers in South Korea*, London, 2009, p 16.

## 4.6 Particular issues affecting women and children

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***“The most vulnerable category of migrant worker in Asia is the female domestic helper.”***

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– International Labour Organisation<sup>291</sup>

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***“It is heavy work, filling and collecting water. The salt is very hot, and when it dries and becomes sharp, you can cut your feet badly. There were no boots for our feet. I was getting sick a lot. I would get headaches and stomach problems after long hours in the sun.”***

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– child labourer working in the salt-fields in Kampot, Cambodia<sup>292</sup>

### 4.6.1 Women

- 4.6.1.1 The labour migration experience is not necessarily the same for women and men. The CEDAW Committee has acknowledged that: *“although both men and women migrate, migration is not a gender-neutral phenomenon. The position of female migrants is different from that of male migrants in terms of legal migration channels, the sectors into which they migrate, the forms of abuse they suffer and the consequences thereof.”*<sup>293</sup>
- 4.6.1.2 Women, especially migrant women from rural areas, comprise a significant proportion of the migrant worker population within Cambodia and abroad.<sup>294</sup> Women are highly represented amongst workers in garment factories and as domestic and commercial sex workers. Women also migrate internally and internationally to work in the tourism, agriculture, food and service and fish-processing industries. Between 1998 and 2008 female migrant workers accounted for 85% of the registered Cambodian migrant workers in Malaysia and between 2006 and 2008 they accounted for almost half of the registered Cambodian migrant workers in Thailand.<sup>295</sup> In 2012 women are reported to comprise more than 50% of all Cambodian labour migrants.<sup>296</sup>
- 4.6.1.3 Labour migration can be an important source of economic empowerment for women and may open up wider and more attractive opportunities for employment than are available to them in their home communities. Despite this potential, migrant and internal migrant women continue to be relegated to low-wage, low-skilled positions and concentrated in informal sectors of the economy. In these positions, women are at the bottom of the employment ladder and often fall outside the scope of government regulation and the protection of labour laws.
- 4.6.1.4 Many women migrant workers face a triple burden of work, family care and the need to send home remittances. The decision to migrate may be made as part of a family’s strategy for upward economic ability. In some cases, parents tap into a daughter’s

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<sup>291</sup> Sophal (May 2009), *op. cit.* (note 257), p 2.

<sup>292</sup> ILO, ‘Put an end to child labour’, *The Phnom Penh Post*, 12 June 2012, p 16.

<sup>293</sup> CEDAW Committee (5 December 2008), *op. cit.* (note 176), para 5.

<sup>294</sup> ILO and World Bank, *Women and Work in the Garment Industry*, December 2006, p i; Arnold, D., and Shih, T. H., ‘A fair model of globalisation? Labour and global production in Cambodia’, *Journal of Contemporary Asia*, vol. 40, no. 3, August 2010, pp 401-424, p 401.

<sup>295</sup> MoLVT, *op. cit.* (note 209), p 14; The Asia Foundation, *op. cit.* (note 258), p 10.

<sup>296</sup> UNESCAP, *op. cit.* (note 6), p 53.

engrained sense of responsibility to the family to encourage migration.<sup>297</sup> Migrant workers who are mothers may need to leave their children in order to earn money to support them. This dislocation can have a profound effect on women, children and the structure of the family as a whole.

4.6.1.5 The most serious problems faced by female migrant workers include:

- legislative discrimination against women employed as domestic workers who are excluded from the protection of many labour laws. It is suggested that this discrimination stems from a traditional reluctance to acknowledge the economic value of women's work in the home. A corollary to this lack of protection is a lack of access to an effective remedy for exploitation and abuse;
- compulsory health testing and discriminatory practices which interfere with the privacy, physical integrity and identity of women by imposing obligatory pregnancy tests and forcing women who fall pregnant to choose between an abortion or termination of employment (and deportation). There are reports that domestic workers in Malaysia are required to sign a 'Statement of Understanding' upon arrival to pledge that they will not fall pregnant;
- confinement to employment in sectors which are considered to be gender-appropriate for women, such as domestic work and work in the entertainment industry, which typically involve lower wages, poorer working conditions and a higher risk of harm;
- working and living conditions which are not appropriate for the particular health and sanitation needs of women;
- broad failures to comply with minimum standards for the protection of pregnant women and mothers at work;
- an increased risk of verbal, physical, psychological and sexual abuse within and outside the workplace;
- a very high risk of vulnerability to trafficking in persons, especially for domestic and commercial sex workers who work in private settings away from the public eye; and
- the fact that large numbers of women are concentrated in the garment manufacturing industry which is particularly susceptible to the impact of economic downturns.<sup>298</sup>

4.6.1.6 In an attempt to address some of these issues, the RGC and local and international organisations have established programmes to provide women with vocational training, counseling on business development and leadership, advice on income generating activities, literacy training, education about their rights at work and small loans to increase their access to fair and non-discriminatory employment.<sup>299</sup>

<sup>297</sup> War on Want, *op. cit.* (note 162), p 13.

<sup>298</sup> For more information see: CEDAW Committee (5 December 2008), *op. cit.* (note 176); UNCT, *op. cit.* (note 44); MoLVT, *op. cit.* (note 209), section 4.3; Arnold and Shih, *op. cit.* (note 294); RGC (11 August 2011), *op. cit.* (note 28).

<sup>299</sup> RGC (11 February 2004), *op. cit.* (note 25), para 53; NRIII, pp 2 and 6.

#### 4.6.2 Children

##### *Child labour*

4.6.2.1 Cambodia and the countries which receive the greatest numbers of Cambodian workers have established minimum ages for the employment of children as follows:

- in Cambodia the minimum age for the employment of children is 15 years of age (although children can be hired to do light work from 12 years of age in certain circumstances). Special provisions apply to the employment of all children under 18 years of age;<sup>300</sup> and
- the minimum age for a Cambodian to migrate for work is 18 years of age under Cambodian law and 21 years of age under Malaysian law for workers migrating to Malaysia.<sup>301</sup>

4.6.2.2 Despite these laws, many children are recruited for employment both within Cambodia and abroad. In June 2012 the ILO estimated that 1.5 million children were involved in child labour in Cambodia.<sup>302</sup> These children work as domestic workers and in the informal economy as street-sellers, beggars and rubbish-collectors. Children are also engaged in hard manual labour in the salt-fields, work which the ILO has described as “one of the worst forms of child labour.”<sup>303</sup> Children who migrate abroad are recruited as domestic workers with false identity documents, work as undocumented migrant workers and on boats in Thailand and work as street-sellers and beggars in Thailand and Vietnam.<sup>304</sup>

##### *Children in migrant worker families*

4.6.2.3 The ILO reports that “for many parents sending their children to work is an economic necessity, but it is nevertheless a decision taken with great difficulty.”<sup>305</sup> In other cases, parents have reported that they made the decision to take their children with them to work in order to protect them from other forms of harm which they might face if they were left alone in their home community. For more information on children and labour exploitation see sections 5.5.4 and 5.6.2.

4.6.2.4 Children who remain at home whilst a member of their family migrates for work may benefit from remittances, however they may also experience difficulties as a result of the absence of parents and guardians. Older children, especially girls, may be expected to fill the roles left empty by family members who have migrated. Children may need to leave school to find employment to support the household or work full-time in the home to care for children and elderly relatives.

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<sup>300</sup> Labour Law, articles 171-181.

<sup>301</sup> Sub-decree on Private Recruitment Agencies, article 4; Malaysian Recruitment Procedures, para 2.19.

<sup>302</sup> ILO (12 June 2012), *op. cit.* (note 292).

<sup>303</sup> *ibid.*

<sup>304</sup> For more information on child labour in Cambodia see: United States Department of Labor, ‘Cambodia’, 2010 *Findings on the Worst Forms of Child Labor*, 30 September 2011, pp 130-136; LICADHO and World Vision Cambodia, *Child Labor in Brick Factories: Causes and Consequences*, August 2007.

<sup>305</sup> ILO (12 June 2012), *op. cit.* (note 292).



## 4.7 Compliance with international standards and the implementation of domestic law

***“The Committee once again strongly urges the [Royal Government of Cambodia] to take measures to ensure that the trade union rights of all workers in Cambodia are fully respected and that trade unionists are able to exercise their activities in a climate free of intimidation and risk to their personal security and their lives, and that of their families.”***

*– ILO Committee on Freedom of Association<sup>306</sup>*

### 4.7.1 Cambodia

- 4.7.1.1 Cambodia has committed itself to relatively few international labour standards (see paragraph 4.2.1.6). Of those standards which Cambodia is legally bound to uphold, Cambodia appears to comply relatively well with its obligations to eliminate forced and compulsory labour (except as those obligations relate to certain groups, including local domestic workers). Cambodia is yet to fully comply with its obligations to abolish child labour and eliminate discrimination in respect of employment and occupation (especially with regard to pregnant women and mothers at work). Reports suggest that there has been a significant failure on the part of the RGC to comply with its obligations to ensure freedom of association and collective bargaining. In November 2011 the ILO Governing Body called special attention to the “*extreme seriousness and urgency*”<sup>307</sup> of allegations of murder of trade union leaders and the repression of trade unionists in Cambodia and urgently appealed to the RGC to submit a report on these issues.<sup>308</sup>
- 4.7.1.2 A number of reports indicate that government regulation of all employment sectors in Cambodia is inadequate to protect workers against exploitation and that the enforcement of the Labour Law as it relates to workers’ rights is weak. There continue to be broad failures by employers to comply with legal provisions concerning working hours, rest and the payment of overtime. The rights of women at work often go overlooked and underage children continue to be employed in unsuitable and inappropriate workplaces. The domestic framework for resolving labour disputes is weak. The Arbitration Council has been credited for its high dispute resolution rate,<sup>309</sup> however implementation of Arbitration Council Awards continues to be a problem (see paragraph 4.5.3.9).
- 4.7.1.3 Enforcement of the sub-decree preceding the Sub-decree on Private Recruitment Agencies was poor. Whether enforcement of the new regime will be more robust remains to be seen. Some positive developments in 2011 and 2012 have led to action being taken against a few private recruitment agencies, but these steps are still far from sufficient to address the systemic problems of exploitation and abuse in the recruiting and sending away of Cambodian workers by these agencies.

<sup>306</sup> ILO Committee on Freedom of Association, 362<sup>nd</sup> Report of the Committee on Freedom of Association, ILO Doc GB.312.INS/9, Geneva, November 2011, para 338(b).

<sup>307</sup> *ibid.*, para 4.

<sup>308</sup> *ibid.*, paras 328-338.

<sup>309</sup> Van Noord, H., Hwang, H. S. and Bugeja, K., *Cambodia’s Arbitration Council: Institution-Building in a Developing Country*, International Labour Organisation and the World Bank, Working Paper no. 24, Geneva, August 2011.

#### 4.7.2 Thailand, Malaysia and the Republic of Korea

- 4.7.2.1 Thailand, Malaysia and the Republic of Korea share similar issues as Cambodia concerning compliance with international labour standards and the implementation of domestic labour laws. These States are bound by relatively few international labour standards. Where standards do apply, significant areas of non-compliance arise in relation to abolishing child and forced labour, eliminating discrimination in employment and ensuring freedom of expression and collective bargaining.
- 4.7.2.2 There are reports of significant problems with the enforcement of industrial relations laws in Thailand, Malaysia and the Republic of Korea which are particularly acute in relation to migrant workers (who are often the most in need of protection against exploitation).<sup>310</sup> Undocumented and domestic workers struggle to realise in practice the limited rights to which they are entitled under domestic labour laws.
- 4.7.2.3 The procedure for the legal migration of Cambodian migrant workers to Thailand established by the Thai-Cambodian Labour MoU is ineffective. It is complicated, costly, time-consuming and, in many cases, incompatible with the way in which Thai employees hire workers in the informal sector. The Thai-Cambodian Labour MoU is particularly ineffective in the fishing sector (which employs significant numbers of Cambodian men and boys) because the lengthy process does not suit the nature of recruitment for fishing boats which takes place up to the last minutes before they set out to sea.<sup>311</sup> From the Cambodian end, the inefficiency of this procedure has been attributed to:
- under-staffing at MoLVT offices and the Passport Office; and
  - the time and high cost of the necessary administrative procedures (compared to the cost of approximately US\$100 to enter Thailand through irregular channels).<sup>312</sup>
- 4.7.2.4 For information about the enforcement of domestic and international law in Malaysia in the context of migrant domestic workers see paragraph 5.7.3.3.
- 4.7.2.5 The operation of the EPS in the Republic of Korea in practice bears little resemblance to its original purpose of placing migrant workers on an even footing with local workers.<sup>313</sup> In 2012 the International Trade Union Confederation reported that *“migrant workers [in the Republic of Korea] are subject to serious abuses of labour rights. While the laws offer them similar protection to local workers in terms of wages and basic conditions, in reality most are paid far less than their Korean counterparts, forced to work long hours and often have their wages withheld. They are tied to their employer and face restrictions in changing jobs, making them particularly vulnerable.”*<sup>314</sup>

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<sup>310</sup> For more information see: ILO Committee on Freedom of Association, *op. cit.* (note 306).

<sup>311</sup> IOM, *Trafficking of Fishermen in Thailand*, Bangkok, 14 January 2011, p 18.

<sup>312</sup> See for example: Maltoni (2006), *op. cit.* (note 225), section 7.5; Sophal (May 2009), *op. cit.* (note 257), pp 17-21; Boyle (17 May 2012), *op. cit.* (note 262).

<sup>313</sup> For more information see: Amnesty International (2009), *op. cit.* (note 290); International Trade Union Confederation, *2012 Annual Survey of Violations of Trade Union Rights - Korea, Republic of*, 6 June 2012.

<sup>314</sup> International Trade Union Confederation, *op. cit.* (note 313).

## 4.8 Avenues for future action

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*“The irregular situation in which many international migrants find themselves should not be seen to deprive them either of their humanity or of their rights... let’s remind ourselves of the fundamental principle of the Universal Declaration of Human Rights: “all human beings are born free and equal in dignity and rights.”*

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– Navi Pillay, UN High Commissioner for Human Rights<sup>315</sup>

### 4.8.1 Internal labour migration

4.8.1.1 Steps to improve working conditions in Cambodia generally will provide important benefits to internal migrant workers. Trade unions and human rights organisations in Cambodia have proposed the following courses of action to improve these conditions:

- providing vocational training and information about local employment opportunities to workers at the district or provincial level;
- increasing the living wage and establishing minimum wages in all sectors;
- increasing government oversight, regulation and inspection of all workplaces, especially in factories and the construction industry;
- restricting the use of short term contracts; and
- improving labour dispute resolution processes, including by improving the capacity of law-enforcement agencies and trade unions to enforce Arbitration Council Awards and uphold the Labour Law and court decisions.

### 4.8.2 International labour migration

4.8.2.1 In order to expand and strengthen the protection framework for Cambodian migrant workers, the RGC, civil society and other key stakeholders should work collaboratively to implement the policy recommendations proposed by the MoLVT in the *Policy on Labour Migration for Cambodia* in June 2010.<sup>316</sup> The recommendations in particular need of urgent implementation include:

- drafting comprehensive legislation governing the labour migration process and the protection of migrant workers;
- ensuring adequate protection for migrant workers by posting labour attachés to Cambodian Embassies and equipping them with the resources necessary to perform their duties;
- eliminating misleading propaganda and advertisements relating to labour migration;

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<sup>315</sup> Navi Pillay, *op. cit.* (note 165).

<sup>316</sup> See note 209.

## State of Migration

### An overview of forced displacement in Cambodia

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- implementing legislation and policies with effective enforcement mechanisms and sanctions to deter unethical recruitment practices;
- establishing a list of placement fees and documentation costs payable by migrant workers;
- coordinating with labour-receiving countries for the adoption of standardised and enforceable employment contracts;
- improving the position of Cambodian migrant workers in the labour market by enhancing worker skills through relevant vocational training; and
- providing effective remedies to all migrant workers where rights at work are violated, and creating accessible channels through which migrant workers can lodge complaints about abusive recruitment and employment practices and fraud.

4.8.3 In addition to the abovementioned recommendations, further concrete steps are required to deter unethical recruitment. In particular, key stakeholders have recommended:

- that a new specialised Department be created or an inter-ministerial commission involving the MoLVT, MoWA, MoFAIC and MoI be established to prepare comprehensive and binding legislation concerning the sending of Cambodian migrant workers abroad and to oversee the implementation of that legislation;
- that steps be taken to prohibit private recruitment agencies from offering loans and incentives to prospective migrant workers (for example, through the establishment of a government-managed short term loan facility); and
- that steps be taken to make it unprofitable for private recruitment agencies to engage in unethical recruitment and fail to protect workers, including by using the guaranty money which all recruitment agencies deposit with the MoLVT<sup>317</sup> to cover the costs of assistance to and compensation for workers who are recruited into exploitative workplaces (rather than holding it for or returning it to the recruitment agency).

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<sup>317</sup> Sub-decree on Private Recruitment Agencies, articles 8 and 10.

## **4.9 Partners in Action**

### **4.9.1 Royal Government of Cambodia**

4.9.1.1 The government Ministries involved in overseeing and preparing laws and policies concerning the internal and international migration of Cambodian workers are:

- the MoLVT;
- the MoWA;
- the MoI; and
- the MoFAIC.

4.9.1.2 The Inter-Ministerial Taskforce for Migration (**IMTM**) was established in October 2006 and is co-chaired by the MoLVT and the MoWA. It is a forum for members of key government Ministries to coordinate on labour migration issues, however it has only met periodically and infrequently since its inception.

4.9.1.3 The Inter-Ministerial Working Group for Implementation of the Memorandum of Understanding with Thailand is responsible for overseeing the implementation of the Thai-Cambodian Labour MoU.

4.9.1.4 Police, border officials and the staff of Cambodian Embassies and Consulates in foreign countries also play important roles in international labour migration and the provision of support to Cambodian migrant workers abroad.

### **4.9.2 United Nations agencies**

4.9.2.1 The ILO is the United Nations specialised agency responsible for seeking the promotion of social justice and internationally recognised human and labour rights. In Cambodia and the region, the ILO coordinates with governments, trade unions of employers and workers and other civil society stakeholders regarding a range of issues concerning labour and migration. In particular, the ILO manages the Better Factories Cambodia project and the Decent Work Country Programme in Cambodia.

4.9.2.2 The OHCHR, UNICEF and UN Women have general mandates to monitor human rights in Cambodia and the region, which extend to the rights at work of labour migrants.

### **4.9.3 Local and international organisations**

4.9.3.1 A large number of local and international organisations engage with internal and international labour migration issues within Cambodia. A selection of these organisations include:

- the IOM which has projects concerning migrant health and the facilitation and regulation of international labour migration from Cambodia;

- the Cambodian Women and Children's Crisis Centre (**CWCC**) which provides a range of advocacy and protection services to women and children who have experienced violence and abuse (either as a result of labour migration or otherwise). These services include reintegration and repatriation, literacy and vocational skills training, safe shelters and legal assistance. CWCC has offices in Phnom Penh, Poipet, Siem Reap and Kampong Thom;
- LSCW which works to promote gender equality, protect children and women from all forms of exploitation, push for the respect of their rights and increase their awareness of those rights. LSCW also works with Cambodian men, women and children victims of trafficking in persons. It provides legal assistance and support to victims and promotes research into the experiences of women and children and Cambodian migrant workers. LSCW has offices in Phnom Penh, Koh Kong province and Prey Veng province;
- CARAM Cambodia which works in the field of migrant health and is particularly concerned with the issue of compulsory health testing for migrants;
- the Cambodian Working Group for Domestic Workers, a new network of civil society organisations founded in November 2011 to advocate for domestic workers and the ratification of the Domestic Workers Convention; and
- various human rights organisations which monitor and report on labour migration issues, including LICADHO and CCHR.

#### 4.9.4 Regional mechanisms

- 4.9.4.1 The ACMW is in the process of drafting an ASEAN instrument on the protection and promotion of the rights of migrant workers (see paragraph 4.2.3.20). The ACMW is also the ASEAN body responsible for ensuring the effective implementation of the commitments made by ASEAN Member States under the ADMW.
- 4.9.4.2 The Task Force on ASEAN Migrant Workers (**TF-AMW**) is a regional body comprised of trade unions, human rights organisations and migrant worker associations which aims to support the development of a rights-based framework for the protection and promotion of the rights of migrant workers. It seeks to support and promote the development of the ASEAN instrument on the protection and promotion of the rights of migrant workers.
- 4.9.4.3 The Secretary-General of ASEAN is tasked with submitting an annual report on the progress of the implementation of the ADMW.

## Chapter Five

# Trafficking in Persons

***“A broker said that the company is looking for women to work in Malaysia. When I asked if there is anyone who will help my daughter if she is in trouble, the broker said that if something happens to the girl, if she dies for example, the company would pay the compensation... He said, ‘You can rest all your life with that money’.”***

– father of a 21 year old Cambodian domestic worker who died in a Phnom Penh training center in April 2011<sup>318</sup>

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<sup>318</sup> HRW (November 2011), *op. cit.* (note 219), p 5.

## 5.1 What is trafficking in persons?

*“Despite the adoption of treaties and laws prohibiting slavery... many men, women and children continue to live in modern-day slavery through the scourge of trafficking in persons.”*

*– Hillary Clinton, U.S. Secretary of State<sup>319</sup>*

### 5.1.1 The legal definition of trafficking in persons

5.1.1.1 The concept of trafficking in persons (or human trafficking) is defined in the *United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children 2000 (Trafficking Protocol)* which supplements the CATOC.

5.1.1.2 Trafficking in persons of an adult involves three separate elements:

- 1 the ACTION of recruiting, transporting, transferring, harbouring or receiving a person or persons;
- 2 by MEANS of:
  - the threat or use of force;
  - other forms of coercion, abduction, fraud, deception or abuse of power and/or abuse of a position of vulnerability; or
  - the giving or receiving of payments or benefits to achieve the consent of a person having control over another person; and
- 3 for the PURPOSE of exploitation. Exploitation includes at a minimum the exploitation of the prostitution of others, other forms of sexual exploitation, **forced labour or services, slavery or practices similar to slavery**, servitude or the removal of organs.<sup>320</sup>

5.1.1.3 Trafficking in persons of a minor occurs when the action and purpose elements of the above definition have been satisfied.<sup>321</sup> Thus, recruitment of a minor for the purpose of exploitation will constitute trafficking in persons even where no coercive or threatening means have been employed.

5.1.1.4 Several points of note arise from the international definition of trafficking in persons:

- trafficking in persons is a crime. As such, trafficked persons should be treated as victims of a crime rather than as criminals who may have violated laws relating to immigration, labour and/or prostitution as a result of being trafficked;
- trafficking in persons is not limited to the forced prostitution and sexual exploitation of women and girls. It includes all forms of exploitation of men, women and children;
- trafficking in persons does not necessarily involve movement across an international border or indeed any movement at all. Trafficking in persons can take place transnationally or within a single country or town;

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<sup>319</sup> U.S. Department of State, *Trafficking in Persons Report 2012*, 19 June 2012, p 2.

<sup>320</sup> Trafficking Protocol, article 3(a).

<sup>321</sup> *ibid.*, articles 3(c) and (d).



- trafficking in persons extends beyond the recruitment and transport of persons to the harbouring and receipt of trafficked persons;
- a person does not need to be abducted or coerced by the use or threat of direct force to become a victim of trafficking in persons. The definition includes more subtle means of coercion such as deception and abuse of a person's vulnerability;
- trafficking in persons does not necessarily involve organised criminal groups; and
- trafficking in persons is distinct from the concepts of people smuggling, migrant smuggling and irregular migration. Whilst trafficked persons may begin their journey as smuggled migrants or through irregular migration channels, trafficked persons are distinguishable from other groups of people on the move due to the presence of coercive means and an intention to exploit.

### 5.1.2 The issue of consent

5.1.2.1 The consent of a victim of trafficking in persons to the intended exploitation is irrelevant where:

- the victim is an adult and any of the means set out in the definition of trafficking in persons are employed; or
- the victim is a minor, regardless of whether or not any of the means set out in the definition of trafficking in persons are employed.<sup>322</sup>

5.1.2.2 This rule reflects the legal and logical principle that it is not possible to 'consent' to a situation which has been brought about by means of force, coercion, abduction, deception or abuse of power or vulnerability. Thus, whilst a victim of trafficking in persons may consent to migrating or to working within a particular industry or establishment, that consent is nullified and deemed irrelevant as soon as coercive, threatening or other means are employed or where the victim is a minor.

5.1.2.3 The importance of consent being irrelevant in cases of trafficking in persons is that:

- it reaffirms that trafficked persons are victims of a crime regardless of whether or not they consented to any or all of the migration and recruitment processes; and
- traffickers cannot raise the consent of victims as a defence to criminal prosecution.

### 5.1.3 Trafficking in persons and labour migration involving exploitation

5.1.3.1 There can be a considerable overlap between trafficking in persons and labour migration involving exploitation, especially when an experience begins as one of labour migration and evolves into trafficking in persons. For more information about the nature and importance of the distinction between these two concepts see sections 4.1.3 and 4.3.4.

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<sup>322</sup> *ibid.*, article 3(b).

## 5.2 International, domestic and regional law

***“The crime is not abstract; it is about people. Every single occurrence of modern slavery is happening to a person – someone’s sister, mother, brother, father, daughter or son.”***

*– U.S. Department of State, Trafficking in Persons Report 2012<sup>323</sup>*

***“Effective action to prevent and combat trafficking in persons, especially women and children, requires a comprehensive international approach in the countries of origin, transit and destination that includes measures to prevent such trafficking, to punish the traffickers and to protect the victims of such trafficking, including by protecting their internationally recognized human rights.”***

*– Preamble to the Trafficking Protocol*

### 5.2.1 International law

#### *The international framework to address trafficking in persons*

5.2.1.1 Prior to 2000, the legal definition of trafficking in persons shifted to reflect evolutions in international discourses about slavery, prostitution and irregular migration. Different understandings of the concept prevented the development of a universal instrument which addressed all of its aspects. Without such an instrument, a comprehensive and effective international approach to preventing and combatting trafficking in persons was difficult to establish.

#### *United Nations Convention Against Transnational Organised Crime*

5.2.1.2 The adoption of the CATOC and three supplementary Protocols in 2000 and 2001 marked a shift in the international effort to address transnational organised crime and transformed the legal framework surrounding the crime of trafficking in persons.<sup>324</sup>

5.2.1.3 The purpose of the CATOC is to promote international cooperation to prevent and combat transnational organised crime.<sup>325</sup> Amongst other obligations, States Parties to the CATOC are legally bound to:

- establish as offences under their domestic law the crimes of participation in an organised criminal group, laundering the proceeds of crime, corruption and the obstruction of justice;<sup>326</sup> and
- take various legislative and other measures to prevent and address these offences where they are transnational in nature and involve an organised criminal group.<sup>327</sup>

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<sup>323</sup> U.S. Department of State (2012), *op. cit.* (note 319), p 10.

<sup>324</sup> States which intend to become a State Party to the Trafficking Protocol must also become a State Party to the CATOC: CATOC, article 37(2).

<sup>325</sup> *ibid.*, article 1.

<sup>326</sup> *ibid.*, articles 5, 6, 8, 23 and 34(2).

<sup>327</sup> *ibid.*, article 3. For the legal definitions of ‘transnational in nature’ and ‘organised criminal group’ for the purpose of the CATOC and its Protocols see page viii.

5.2.1.4 Cambodia ratified the CATOC without reservation on 12 December 2005 and thus is legally bound to comply with its terms in full. Of the countries in the region whose trafficking networks are most closely related to those of Cambodia:

- Malaysia became a State Party to the CATOC on 24 September 2004 (with a reservation concerning the settlement of disputes about the application or interpretation of the CATOC); and
- Thailand and Vietnam became signatories to the CATOC on 13 December 2000 but have not yet ratified it.<sup>328</sup>

### ***The Trafficking Protocol***

5.2.1.5 The Trafficking Protocol is the first legally-binding instrument to elaborate a clear, internationally agreed definition of trafficking in persons. By setting out a standardised definition of the crime, the Trafficking Protocol seeks to eliminate conceptual and legal differences which can impede international efforts to prevent and combat trafficking in persons where it occurs both transnationally and domestically.

5.2.1.6 The Trafficking Protocol contains provisions relating to preventing and combatting trafficking in persons, protecting victims and promoting cooperation between States. In particular, States Parties to the Trafficking Protocol are legally bound to:

- criminalise under their domestic law the offence of trafficking in persons and offences of attempting to commit, participating as an accomplice in or organising or directing other persons to commit an offence of trafficking in persons;<sup>329</sup>
- protect and provide assistance to the victims of trafficking in persons, including by:
  - protecting their privacy and identity;
  - ensuring that they are provided with information on relevant court and administrative proceedings against offenders and given an opportunity to present their views and concerns;
  - taking into account the age, gender and special needs of victims, in particular the special needs of children;
  - endeavouring to provide for the physical safety of victims;
  - ensuring that victims have the possibility of obtaining compensation for damage suffered;
  - facilitating the repatriation of victims without unreasonable delay;
  - protecting victims who are witnesses in criminal proceedings against the threat of retaliation or intimidation;
  - considering implementing measures to provide for the physical, psychological and social recovery of victims and adopting legislative or other measures to permit victims to remain in the State Party's territory in appropriate cases, either temporarily or permanently;<sup>330</sup> and
- take certain measures to prevent and cooperate with other States Parties to address trafficking in persons where it is transnational in nature and involves an organised criminal group.<sup>331</sup>

<sup>328</sup> For the obligations of Thailand and Vietnam as signatories under international law see note 182.

<sup>329</sup> Trafficking Protocol, article 5.

<sup>330</sup> *ibid.*, articles 6-8 and 24.

<sup>331</sup> *ibid.*, articles 4 and 9-13.

## State of Migration

### An overview of forced displacement in Cambodia

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5.2.1.7 Cambodia ratified the Trafficking Protocol without reservation on 2 July 2007 and thus is legally bound to comply with its terms in full. Of the countries in the region whose trafficking networks are most closely related to those of Cambodia:

- Malaysia became a State Party to the Trafficking Protocol on 26 February 2009 (with a reservation concerning the settlement of disputes about the application or interpretation of the Trafficking Protocol);
- Thailand became a signatory on 18 December 2001 but has not yet ratified the Trafficking Protocol;<sup>332</sup> and
- Vietnam is neither a signatory nor a State Party to the Trafficking Protocol.

#### ***International human rights law***

5.2.1.8 Cambodia and the countries in the region whose trafficking networks are most closely related to those of Cambodia have further and overlapping obligations to prevent and combat trafficking in persons and protect victims under international human rights law. In particular, Cambodia, Malaysia, Thailand and Vietnam are legally bound to:

- take all appropriate measures, including legislation, to suppress all forms of trafficking in women and the exploitation of the prostitution of women;<sup>333</sup>
- ensure that no person is held in slavery or servitude and that the slave-trade in all its forms is prohibited;<sup>334</sup>
- suppress the use of forced or compulsory labour in all its forms;<sup>335</sup> and
- ensure that no person is subjected to torture or to cruel, inhuman or degrading treatment or punishment.<sup>336</sup>

5.2.1.9 In relation to child victims of trafficking in persons, Cambodia, Malaysia, Thailand and Vietnam have additional legal obligations to:

- protect children against exploitation, abuse and any activity which violates their rights under the CRC and other international human rights law instruments;
- prohibit, prosecute and prevent:
  - the abduction and sale of children;
  - child prostitution, child pornography and the sexual exploitation and abuse of children;
  - the worst forms of child labour, including forced or compulsory labour and any work that is likely to be hazardous, to interfere with the child's education or to be harmful to the child's health or physical, mental, spiritual, moral or social development; and
  - all other forms of trafficking of children; and
- protect child victims of these crimes and promote their physical and psychological recovery and social reintegration.<sup>337</sup>

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<sup>332</sup> For Thailand's obligations as a signatory under international law see note 182.

<sup>333</sup> CEDAW, article 6.

<sup>334</sup> UDHR, article 4; ICCPR, article 8 (does not apply to Malaysia).

<sup>335</sup> *ILO Forced Labour Convention 1930* (No. 29), article 1.

<sup>336</sup> UDHR, article 5; ICCPR, article 7 (does not apply to Malaysia); CAT, articles 2 and 16 (does not apply to Malaysia).

***International principles and guidelines relating to trafficking in persons***

- 5.2.1.10 A number of non-binding international instruments contain important policies, principles and guidelines concerning trafficking in persons. Of particular relevance are:
- the *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985*<sup>338</sup> which provides important guidance to States on providing access to justice and fair treatment, restitution and compensation to persons who suffer harm as a result of violations of criminal law and/or internationally recognised norms relating to human rights;
  - the OHCHR *Recommended Principles and Guidelines on Human Rights and Human Trafficking (2002)*<sup>339</sup> which provide guidance to States on a number of aspects of trafficking in persons, including the primacy of human rights, prevention, victim protection and assistance, criminalisation, punishment and redress;
  - the UNICEF *Guidelines on the Protection of Child Victims of Trafficking (2006)*<sup>340</sup> which provide guidance to States on issues relating to trafficked children; and
  - the UNHCR *Guidelines on International Protection No. 7*<sup>341</sup> which provide interpretative legal guidance to governments, legal practitioners, decision-makers and the judiciary on the application of the Refugee Convention to victims or potential victims of trafficking in persons.

**5.2.2 Domestic law – Cambodia*****Law on Suppression of Human Trafficking and Sexual Exploitation 2008***

- 5.2.2.1 In 2008 Cambodia enacted a new piece of anti-trafficking legislation, the *Law on Suppression of Human Trafficking and Sexual Exploitation 2008 (Cambodian TIP Law)*, to replace the *Law on Suppression of the Kidnapping and Trafficking of Human Persons and the Exploitation of Human Persons 1996* and implement the Trafficking Protocol.
- 5.2.2.2 The Cambodian TIP Law applies both within Cambodia and to any offence committed outside the territory of Cambodia where the perpetrator or victim is a Cambodian citizen.<sup>342</sup>
- 5.2.2.3 The Cambodian TIP Law does not set out a legal definition of ‘trafficking in persons’ but rather defines and criminalises a comprehensive range of acts committed throughout the trafficking in persons and exploitation processes including:
- unlawful removal of a person;
  - unlawful recruitment of a person for exploitation;

<sup>337</sup> CRC, articles 2, 19, 32, 34-37 and 39; Optional Protocol to the CRC, articles 1 and 8; ICESCR, article 10(3) (does not apply to Malaysia); *ILO Worst Forms of Child Labour Convention 1999* (No. 182), article 1.

<sup>338</sup> UN General Assembly, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, 29 November 1985, UN Doc. A/RES/40/34.

<sup>339</sup> OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, 20 May 2002, UN Doc. E/2002/68/Add.1.

<sup>340</sup> UNICEF, *Guidelines on the Protection of Child Victims of Trafficking*, September 2006.

<sup>341</sup> UNHCR, *Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons At Risk of Being Trafficked*, 7 April 2006, UN Doc. HCR/GIP/06/07.

<sup>342</sup> Cambodian TIP Law, articles 2 and 3.

## State of Migration

### An overview of forced displacement in Cambodia

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- the act of selling, buying or exchanging a person;
- transportation of a person;
- receipt of a person;
- abduction, detention or confinement of a person;
- offences relating to prostitution and child prostitution;
- offences relating to pornography and child pornography; and
- offences against a child under 15 years of age.<sup>343</sup>

5.2.2.4 The Cambodian TIP Law also criminalises:

- attempts to commit an offence;
- acting as an accomplice or instigator, which includes but is not limited to organising or directing another person to commit an offence; and
- offences committed by representatives, agents or employees of a legal entity or principal done in the scope of its business or in the interest of the legal entity or principal.<sup>344</sup>

5.2.2.5 For the purpose of these offences, ‘exploitation’ is defined in similar terms as in the Trafficking Protocol and includes *“the exploitation of the prostitution of others, pornography, commercial sex acts, forced labour or services, slavery or practices similar to slavery, debt bondage, involuntary servitude, child labour or removal of organs.”*<sup>345</sup>

5.2.2.6 The U.S. Department of State considers the penalties prescribed for these offences to be sufficiently stringent and commensurate with penalties for other serious crimes.<sup>346</sup> Harsher penalties are imposed where it can be proved that the abovementioned crimes were committed with a particular purpose (such as exploitation or the cross-border transfer of a person). The harshest penalties are imposed where:

- the victim is a minor;
- the perpetrator is a public official who abuses his or her authority over the victim; or
- the offence is committed by an organised group.

#### ***Other relevant legislation***

5.2.2.7 The Constitution prohibits *“the commerce of human beings, exploitation by prostitution and obscenity which affects the reputation of women.”*<sup>347</sup>

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<sup>343</sup> *ibid.*, articles 8-43.

<sup>344</sup> *ibid.*, article 4.

<sup>345</sup> *ibid.*, article 10.

<sup>346</sup> U.S. Department of State (2012), *op. cit.* (note 319), p 107.

<sup>347</sup> Constitution, article 46.

- 5.2.2.8 The Criminal Code criminalises a number of acts which may be committed by traffickers, including:
- procurement, meaning to:
    - make a financial gain out of the prostitution of others;
    - aid in or protect the prostitution of others or organise prostitution;
    - recruit, abduct or induce a person into prostitution; or
    - exercise pressure on any person to become a prostitute;<sup>348</sup>
  - operating a place of prostitution, consenting to activities involving prostitution in an establishment or making premises available for prostitution;<sup>349</sup> and
  - acts endangering minors, including subjecting a minor to harmful working conditions, indecent assault against a child under 15 years of age and inciting a minor to beg.<sup>350</sup>
- 5.2.2.9 The Penal Code and the *Law on Anti-Corruption 2010 (Law on Anti-Corruption)* criminalise offences relating to corruption amongst government and law-enforcement officials which apply to public officers who facilitate trafficking in persons.<sup>351</sup>
- 5.2.2.10 The Labour Law prohibits forced or compulsory labour and the hiring of people to work to pay off debts.<sup>352</sup> It also places restrictions on the employment of children.<sup>353</sup>
- 5.2.2.11 The Law on Domestic Violence criminalises violence against certain groups of people, including “*persons living under the roof of the house and who are dependent on the household.*”<sup>354</sup> This protection could arguably extend to include some victims of trafficking in persons working as domestic workers within Cambodia.
- 5.2.2.12 A number of laws criminalise acts associated with the illegal movement of people across Cambodian borders, including:
- the *Law on Immigration 1994 (Law on Immigration)* which imposes penalties on any person who assists in helping an unauthorised foreigner enter Cambodia or conceals foreigners as they enter Cambodia;<sup>355</sup> and
  - the Law of Nationality which criminalises the falsification of Cambodian identity cards or passports and the involvement of any official or government agent or other person who conspires or assists in such falsification.<sup>356</sup>

#### ***Legal provisions concerning victims of trafficking in persons***

- 5.2.2.13 Neither the Cambodian TIP Law nor any other domestic legislation establishes a formal, legally-binding regime for the protection, assistance and rehabilitation of victims of trafficking in persons. The only protection afforded to victims by the Cambodian TIP Law is a prohibition on the media revealing the identities of victims.<sup>357</sup>

<sup>348</sup> Penal Code, article 284 (other related offences are criminalised in articles 285-290).

<sup>349</sup> *ibid.*, articles 291-293.

<sup>350</sup> *ibid.*, chapter 5.

<sup>351</sup> *ibid.*, articles 517 and 594; Law on Anti-Corruption, chapter 6.

<sup>352</sup> Labour Law, articles 15 and 16.

<sup>353</sup> *ibid.*, sections VIII(A) and (B).

<sup>354</sup> Law on Domestic Violence, article 2.

<sup>355</sup> Law on Immigration, article 29.

<sup>356</sup> Law on Nationality, articles 21 and 22.

<sup>357</sup> Cambodian TIP Law, article 49.

## State of Migration

### An overview of forced displacement in Cambodia

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- 5.2.2.14 Neither the Cambodian TIP Law nor any other domestic legislation expressly recognises that trafficked persons should be treated as victims and not as criminals who may have violated laws relating to immigration, labour or prostitution. The only protection afforded to victims in this regard is under a series of non-binding guidelines issued by the RGC and other stakeholders, including:
- *Guidelines on the Implementation of the Law on Suppression of Human Trafficking and Sexual Exploitation* (2008) which state that persons identified as prostitutes are not to be punished as offenders under the Cambodian TIP Law;
  - *Guideline for the Protection of the Rights of Trafficked Children of the Kingdom of Cambodia* (2007) which sets out rights for child victims of trafficking and procedures for dealing with these victims; and
  - *Guidelines for Practices and Cooperation between the Relevant Government Institutions and Victim Support Agencies in Cases of Human Trafficking* (2007) which set out guidelines for the rescue, protection and provision of services to victims of trafficking in persons.
- 5.2.2.15 Whilst these guidelines contain important standards and principles for the protection of victims, they carry no legal force and reports indicate that a number of government officials, front-line law-enforcement officers, human rights defenders and victim assistance organisations are not familiar with them.<sup>358</sup>
- 5.2.2.16 In light of this lack of legal protection, victims of trafficking in persons may be at risk of criminal punishment under a number of domestic laws. There are reports that victims who have been trafficked for the purpose of commercial sexual exploitation have been charged with violating laws which prohibit solicitation in public.<sup>359</sup> Victims who have been trafficked into Cambodia from other countries could also face penalties for violating Cambodian immigration and labour laws.<sup>360</sup>

#### ***Anti-trafficking policy***

- 5.2.2.17 The RGC's key policy document concerning trafficking in persons is the NPA on STSLS. The NPA on STSLS is comprised of the following five strategies, each of which in turn involves a number of activities to be carried out by various government bodies:
- strengthening policy implementation and enhancing national and international cooperation;
  - preventing human trafficking and sexual and labour exploitation;
  - enhancing criminal justice mechanisms (suppressing and prosecuting trafficking in persons);
  - protecting victims (support for repatriation, rehabilitation and reintegration into society), with special attention to children; and
  - improving monitoring and evaluation.

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<sup>358</sup> HRW, *Off the Streets: Arbitrary Detention and Other Abuses against Sex Workers in Cambodia*, USA, 2010, pp 23-24. This conclusion was supported in interviews conducted by the author with various stakeholders in March to June 2012.

<sup>359</sup> Cambodia TIP Law, article 24; Penal Code, article 298.

<sup>360</sup> Law on Immigration, article 29; Labour Law, articles 261-265.



### 5.2.3 Domestic law – Malaysia, Thailand and Vietnam

#### *Malaysia*

##### *Anti-Trafficking in Persons Act 2007*

- 5.2.3.1 In 2007 Malaysia enacted the *Anti-Trafficking in Persons Act 2007 (Malaysian TIP Law)* which was amended in 2010 to include provisions concerning migrant smuggling and extend the definition of trafficking in persons. The Malaysian TIP Law applies regardless of the nationality or citizenship of the offender where:
- Malaysia is the receiving country, the exploitation occurs in Malaysia or the trafficking in person starts in or transit through Malaysia, regardless of whether the conduct constituting the offence took place inside or outside of Malaysia; or
  - an offence is committed on the high seas on board any ship or any aircraft registered in Malaysia or by any citizen or permanent resident of Malaysia.<sup>361</sup>
- 5.2.3.2 The Malaysian TIP Law defines ‘trafficking in persons’ as “*all actions involved in acquiring or maintaining the labour or services of a person through coercion, and includes the act of recruiting, conveying, transferring, harbouring, providing or receiving a person.*”<sup>362</sup>
- 5.2.3.3 The Malaysian TIP Law criminalises a range of acts in the trafficking in persons and exploitation processes including:
- trafficking in persons;
  - profiting from the exploitation of a trafficked person;
  - making, obtaining, giving, selling or possessing a fraudulent travel or identity document for the purpose of facilitating an act of trafficking in persons;
  - recruiting or agreeing to recruit another person to participate in the commission of an act of trafficking in persons;
  - providing facilities or financial services for the purpose of trafficking in persons;
  - harbouring trafficked persons or preventing, hindering or interfering with the arrest of a person where there is reason to believe that person has committed or is planning to commit an act of trafficking in persons; and
  - withholding information about an act of trafficking in persons.<sup>363</sup>
- 5.2.3.4 Further, the Malaysian TIP Law:
- criminalises attempting to commit or abetting the commission of an offence of trafficking in persons;

<sup>361</sup> Malaysian TIP Law, articles 3 and 4.

<sup>362</sup> *ibid.*, article 2.

<sup>363</sup> *ibid.*, articles 12-15 and 18-24.

## State of Migration

### An overview of forced displacement in Cambodia

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- holds criminally liable directors, managers, secretaries or other officers responsible for management or assisting in the management of a corporate entity where an offence of trafficking in persons has been committed by the corporate entity in certain circumstances; and
- holds employers criminally liable for the acts, omissions, neglect or default of their employees or agents in relation to offences of trafficking in persons in certain circumstances.<sup>364</sup>

5.2.3.5 The U.S. Department of State considers that the penalties prescribed for these offences are commensurate with penalties for other serious crimes.<sup>365</sup> Harsher penalties apply where the victim is a minor.

#### Other domestic legislation

5.2.3.6 The *Penal Code* (Malaysia) criminalises a number of acts relevant to trafficking in persons, including:

- treating people as slaves;
- exploiting people for the purpose of prostitution;
- living on or trading in prostitution;
- owning or managing a brothel;
- compelling any person to labour against their will; and
- inciting a child to an act of gross indecency.<sup>366</sup>

#### Legal provisions concerning victims of trafficking in persons

5.2.3.7 The Malaysian TIP Law grants victims of trafficking in persons immunity from criminal prosecution for:

- illegal entry into and residence in the receiving country; and
- the procurement or possession of any fraudulent travel or identity document which the victim obtained or was supplied for the purpose of entering the receiving country

where such acts are the direct consequence of an act of trafficking in persons that is alleged to have been or was committed.<sup>367</sup>

5.2.3.8 Victims of trafficking in persons who are trafficked for the purpose of commercial sexual exploitation may be at risk of punishment under the *Penal Code* for the offence of soliciting for the purpose of prostitution.<sup>368</sup>

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<sup>364</sup> *ibid.*, articles 29, 64 and 65.

<sup>365</sup> U.S. Department of State (2012), *op. cit.*, (note 319), page 235.

<sup>366</sup> *Penal Code* (Malaysia), articles 370-374 and 377E.

<sup>367</sup> Malaysian TIP Law, article 25.

<sup>368</sup> *Penal Code* (Malaysia), article 372B.

## ***Thailand***

### *Anti-Trafficking in Persons Act 2008 B.E. 2551*

5.2.3.9 In 2008 Thailand enacted the *Anti-Trafficking in Persons Act 2008 B.E. 2551 (Thai TIP Law)* which applies both within Thailand and to persons who commit an offence of trafficking in persons outside the territory of Thailand.<sup>369</sup> The Thai TIP Law adopts the definition of trafficking in persons set out in the Trafficking Protocol.<sup>370</sup>

5.2.3.10 The Thai TIP Law criminalises the following offences:

- trafficking in persons (as defined in the Trafficking Protocol);
- supporting or assisting the commission of an offence of trafficking in persons;
- preparing or conspiring to commit an offence of trafficking in persons;
- being the member of an organised criminal group where any member of that group commits an offence of trafficking in persons;
- obstructing the processes of investigating and prosecuting an offence of trafficking in persons; and
- certain acts which may lead to the identification of a victim of trafficking in persons.<sup>371</sup>

5.2.3.11 The U.S. Department of State considers that the penalties prescribed for these offences are sufficiently stringent and commensurate with penalties for other serious crimes.<sup>372</sup> Harsher penalties are imposed where:

- the offence is committed by a member of an organised criminal group;
- the offender falsely professes him or herself to be an official and exercising the functions of an official;
- the offender is a member of parliament or a public official; or
- the offence is committed against a minor.<sup>373</sup>

### Other domestic legislation

5.2.3.12 The *Penal Code B.E. 2499* (Thailand) criminalises a number of acts which may be relevant to trafficking in persons, including:

- any person over the age of 16 years subsisting wholly or partially on the earnings of a prostitute; and
- various offences relating to the production, possession and circulation of pornography.<sup>374</sup>

<sup>369</sup> Thai TIP Law, article 11.

<sup>370</sup> *ibid.*, section 6.

<sup>371</sup> *ibid.*, articles 6-10, 54 and 56.

<sup>372</sup> U.S. Department of State (2012), *op. cit.* (note 319), p 339.

<sup>373</sup> Thai TIP Law, articles 10, 12, 13 and 52.

## State of Migration

### An overview of forced displacement in Cambodia

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#### Legal provisions concerning victims of trafficking in persons

- 5.2.3.13 Chapter 4 of the Thai TIP Law outlines the assistance and protections which should be provided to victims of trafficking, including food, shelter, medical treatment, physical and mental rehabilitation, education, training, legal aid, repatriation, compensation and a right to temporarily remain and work in Thailand.
- 5.2.3.14 In addition to these rights and services the Thai TIP Law offers protection from prosecution to victims of trafficking for the following offences:
- entering, leaving, or residing in Thailand without permission;
  - giving false information to an official;
  - forging or using a forged travel document;
  - soliciting a person for the purpose of prostitution and assembling together in a place of prostitution for the purpose of prostitution; and
  - being an alien working without permission.<sup>375</sup>

#### **Vietnam**

#### Penal Code and Law on Prevention, Suppression Against Human Trafficking 2011

- 5.2.3.15 Vietnam is not a State Party to the Trafficking Protocol however it has enacted domestic legislation to criminalise trafficking in persons as follows:
- the *Penal Code* (Vietnam) (**Vietnamese Penal Code**) criminalises ‘trafficking in humans’ and the offences of trading in, fraudulently exchanging or appropriating children;<sup>376</sup> and
  - the *Law on Prevention, Suppression Against Human Trafficking 2011* (**Vietnamese TIP Law**) which came into effect in January 2012 criminalises a range of acts including:
    - the recruitment, transportation, receipt or harbouring of persons for sexual exploitation, forced labour, the removal of organs, other inhuman purposes or for the abovementioned offences under the Vietnamese Penal Code;
    - coercing another person to commit or conducting brokerage to help other persons commit any of the abovementioned offences;
    - taking or threatening to take revenge against victims, witnesses or their families in cases involving trafficking in persons;
    - obstructing the denunciation, notification and handling of cases involving trafficking in persons;
    - discriminating against victims of trafficking in persons;
    - falsely assuming the position of a victim of trafficking in persons; and
    - abusing a person’s power or position to shield, ignore, wrongly handle or not handle any of the abovementioned offences.<sup>377</sup>

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<sup>374</sup> *Penal Code B.E. 2499* (Thailand), articles 286 and 287.

<sup>375</sup> Thai TIP Law, article 41.

<sup>376</sup> Vietnamese Penal Code, articles 119 and 120. The Vietnamese Penal Code does not elaborate a definition of ‘trafficking in humans’ however UNIAP has reported that the definition which has been employed in practice is “the sale and purchase of a person for profit” (without the need to establish a means or exploitation element): United Nations Inter-Agency Project on Human Trafficking (**UNIAP**), *Human Trafficking Laws: Legal Provisions for Victims*, undated, p 22.

5.2.3.16 The U.S. Department of State considers that the penalties prescribed for the abovementioned offences under articles 119 and 120 of the Vietnamese Penal Code are sufficiently stringent and commensurate with penalties for other serious crimes.<sup>378</sup> Harsher penalties are imposed for the offence of ‘trafficking in humans’ where it is committed:

- for the purpose of prostitution, taking the victim’s bodily organs or for taking the victim abroad;
- in an organised or professional manner;
- against more than one person; or
- more than one time.<sup>379</sup>

Harsher penalties are imposed for the offences of trading in, fraudulently exchanging or appropriating children where they are committed:

- in an organised or professional manner;
- for the purpose of prostitution, taking the victim’s bodily organs or for taking the victim abroad;
- for a despicable motive or inhuman purposes;
- against more than one child;
- with an element of dangerous recidivism; or
- so as to cause “*serious consequences*.”<sup>380</sup>

5.2.3.17 Criminal penalties are yet to be established for the offences established by the Vietnamese TIP Law.<sup>381</sup>

#### Other domestic legislation

5.2.3.18 The Vietnamese Penal Code criminalises a number of additional acts which may be relevant to trafficking in persons, including:

- illegally arresting, holding in custody or detaining other persons;
- various offences relating to the production, circulation, sale and purchase of pornography; and
- harbouring or procuring prostitutes.<sup>382</sup>

<sup>377</sup> Vietnamese TIP Law, articles 3 and 23. These offences will not be operational until the Supreme People’s Court has issued detailed guidance establishing criminal penalties for each offence: U.S. Department of State (2012), *op. cit.* (note 319), p 372.

<sup>378</sup> *ibid.*

<sup>379</sup> Vietnamese Penal Code, article 119.

<sup>380</sup> *ibid.*, article 120.

<sup>381</sup> U.S. Department of State (2012), *op. cit.* (note 319), p 372.

<sup>382</sup> Vietnamese Penal Code, articles 123 and 253-255.

#### Legal provisions concerning victims of trafficking in persons

- 5.2.3.19 The Vietnamese TIP Law sets out a series of policies and procedures for trafficking-related issues, including the identification, rescue and protection of victims and the provision of a range of victim services.<sup>383</sup>

## 5.2.4 Regional law

### *Coordinated Mekong Ministerial Initiative against Human Trafficking*

- 5.2.4.1 On 29 October 2004 the six governments of the Greater Mekong Sub-region (**GMS**) (Cambodia, China, Lao PDR, Myanmar, Thailand and Vietnam) signed a non-binding *Memorandum of Understanding on Cooperation against Trafficking in Persons in the Greater Mekong Sub-region (COMMIT MoU)* and established the Coordinated Mekong Ministerial Initiative against Human Trafficking (**COMMIT**), a government-led process and formal alliance to combat trafficking in persons in the region. The COMMIT process is driven by six COMMIT Taskforces comprised of government officials from each of the six COMMIT countries. UNIAP serves as the COMMIT Secretariat.
- 5.2.4.2 The COMMIT MoU sets out a series of commitments concerning:
- policy development and regional cooperation;
  - the adoption and enforcement of anti-trafficking laws and legal frameworks to end impunity for traffickers and achieve justice for victims;
  - the protection, recovery and social reintegration of victims of trafficking in persons, including a commitment to ensure that trafficked persons are not held in detention and that they are provided with shelter and appropriate physical, psychosocial, legal, educational and health-care assistance;
  - the prevention of trafficking in persons and vulnerability reduction; and
  - the monitoring and evaluation of the implementation of the COMMIT MoU.
- 5.2.4.3 On 14 December 2007 the six governments of the GMS signed a *Joint Declaration of the Coordinated Mekong Ministerial Initiative Against Human Trafficking* reaffirming the commitments made in the COMMIT MoU.
- 5.2.4.4 In January 2011 the *COMMIT 3<sup>rd</sup> Sub-Regional Plan of Action for 2011-2013 (COMMIT SPA III)* was adopted. The COMMIT SPA III sets out targets and activities for the GMS governments under the same five broad areas of action outlined in the COMMIT MoU.

### **ASEAN**

- 5.2.4.5 Cambodia, Malaysia and Vietnam are States Parties to the *ASEAN Treaty on Mutual Assistance in Criminal Matters 2004 (MLA Treaty)*. Thailand is a signatory to the MLA Treaty but is yet to ratify it.<sup>384</sup> The MLA Treaty seeks to improve the capacity of law-enforcement bodies to prevent, investigate and prosecute criminal matters by providing a framework for increased bilateral cooperation and **mutual legal assistance**.<sup>385</sup>

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<sup>383</sup> Vietnamese TIP Law, chapters IV and V.

<sup>384</sup> For Thailand's obligations as a signatory under international law see note 182.

<sup>385</sup> Mutual legal assistance in this context includes the taking of evidence or obtaining voluntary statements from persons, making arrangements for persons to give evidence or to assist in criminal matters, effecting service of

It requires States Parties to “render to one another the widest possible measure of mutual legal assistance in criminal matters, namely investigations, prosecutions and resulting proceedings.”<sup>386</sup>

- 5.2.4.6 On 9 November 2004 the ASEAN Member States adopted the *ASEAN Declaration Against Trafficking in Persons, Especially Women and Children (ADTIP)*. The ADTIP sets out commitments by ASEAN Member States to increase cooperation, adopt measures to suppress trafficking in persons and assist and protect victims. The ADTIP includes a commitment to “distinguish victims of trafficking in persons from the perpetrators.”<sup>387</sup>
- 5.2.4.7 On 13 January 2007 the ASEAN Member States adopted the *ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (ADMW)*. The ADMW sets out a commitment by ASEAN Member States to “take concrete measures to prevent or curb the smuggling and trafficking in persons by... introducing stiffer penalties for those who are involved in these activities.”<sup>388</sup>
- 5.2.4.8 On 27 June 2007 the ASEAN Senior Officials Meeting on Transnational Crime (**SOMTC**) endorsed the *ASEAN Practitioner Guidelines on Effective Criminal Justice Responses to Trafficking in Persons (ASEAN Practitioner Guidelines)*. The purpose of the ASEAN Practitioner Guidelines is to assist the criminal justice agencies of ASEAN Member States to end impunity for traffickers and achieve justice for trafficked persons. They set out a comprehensive list of principles in two parts: the first part deals with evidentiary matters and contains principles concerning the strengthening of legal frameworks, specialisation and cooperation on trafficking issues, the management of victims as witnesses, special measures for child victims, witness protection issues and trial issues; the second part deals with international operational and legal cooperation and contains principles concerning extradition, mutual legal assistance and networking.
- 5.2.4.9 In November 2007 SOMTC was tasked with developing an *ASEAN Convention on Trafficking in Persons (ACTIP)*.<sup>389</sup> As of July 2012 a draft of the ACTIP is yet to be formulated, however the ASEAN Member States continue to express support for such an instrument and have encouraged SOMTC to accelerate its consideration of the issue.<sup>390</sup>

### **The Bali Process**

- 5.2.5 The Bali Process provides a framework through which Cambodia and other countries in the region can work together on practical measures to help combat people smuggling, trafficking in persons and related transnational crime in the region (see paragraph 2.2.3.6).

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judicial documents, executing searches and seizures, examining objects and sites, providing original or certified copies of relevant documents, records and items of evidence, identifying or tracing property derived from the commission of an offence and instrumentalities of crime, the restraining of dealings in property or the freezing of property derived from the commission of an offence that may be recovered, forfeited or confiscated, the recovery, forfeiture or confiscation of property derived from the commission of an offence, locating and identifying witnesses and suspects or such other assistance as may be agreed: MLA Treaty, article 1(2).

<sup>386</sup> *ibid.*, article 1(1).

<sup>387</sup> ADTIP, clause 5.

<sup>388</sup> ADMW, clause 17.

<sup>389</sup> SOMTC, *Joint Communique of the Sixth ASEAN Ministerial Meeting on Transnational Crime*, Bandar Seri Begawan, 6 November 2007, para 7.

<sup>390</sup> *ASEAN Leaders' Joint Statement in Enhancing Cooperation Against Trafficking in Persons in Southeast Asia*, Jakarta, Indonesia, 8 May 2011, para 6.

## State of Migration

### An overview of forced displacement in Cambodia

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- 5.2.6 In March 2011 the Fourth Regional Ministerial Conference of the Bali Process agreed:
- that trafficked persons are victims of a crime and States should be encouraged to enhance efforts to provide appropriate protection and assistance to them, including through rehabilitation, reintegration and victim support;
  - that border integrity and law-enforcement cooperative measures are important but must be accompanied by practical cooperative solutions that also address humanitarian and protection needs;
  - to reinvigorate cooperation on practical measures and activities aimed at increasing the capacity of States to address trafficking in persons; and
  - to strengthen engagement on information and intelligence sharing.<sup>391</sup>

#### ***United Nations Global Initiative to Fight Trafficking***

- 5.2.6.1 In October 2007 the United Nations Global Initiative to Fight Trafficking (**UN.GIFT**) held an *East Asia and the Pacific Regional Workshop on Criminal Justice Responses to Trafficking in Persons*. Delegations from 16 countries in the region (including Cambodia, Malaysia, Thailand and Vietnam) participated in the workshop and adopted a comprehensive series of non-binding recommendations concerning issues such as:
- the need for front-line law-enforcement officers to understand the crime of trafficking in persons and the nature of their powers and responsibilities to provide an effective initial response;
  - the need for prosecutorial and judicial responses to be organised in a way that promotes effective prosecution and adjudication of cases of trafficking in persons in accordance with international standards;
  - the need to protect and fully support victims of trafficking in persons as witnesses in cases of trafficking in persons; and
  - the establishment of systems and procedures to enable cross-border, regional and international legal cooperation on cases of trafficking in persons and support more effective criminal justice responses to trafficking in persons.<sup>392</sup>

#### ***Bilateral agreements***

- 5.2.6.2 Cambodia has concluded a number of non-binding bilateral agreements concerning trafficking in persons with Thailand and Vietnam, including:
- a *Memorandum of Understanding on Bilateral Cooperation for Eliminating Trafficking in Children and Women and Assisting Victims of Trafficking* concluded between Cambodia and Thailand on 31 May 2003 which was reaffirmed in *Guidelines for Cooperation on Criminal Justice Process Trafficking-Related Crimes* concluded between Cambodia and Thailand in July 2006;

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<sup>391</sup> Fourth Regional Ministerial Conference of the Bali Process, *op. cit.* (note 102).

<sup>392</sup> UN.GIFT, *Report of the Chairperson: Ending Impunity & Securing Justice*, East Asia and the Pacific Regional Workshop on Criminal Justice Responses to Trafficking in Persons, Bangkok, 2-4 October 2007.



- an *Agreement on Bilateral Cooperation for Eliminating Trafficking in Women and Children and Assisting the Victims of Trafficking* concluded between Cambodia and Vietnam on 10 October 2005;
- an *Agreement on Cooperation Against Vietnam-Cambodia Cross-border Human Trafficking, Especially Trafficking in Women and Children* concluded between Cambodia and Vietnam in 2007; and
- a *Cooperation Agreement on Standard Operating Procedures for the Identification and Repatriation of Trafficked Victims* concluded between Cambodia and Vietnam on 3 December 2009.

5.2.6.3 The primary purpose of these agreements is to set out broad principles governing the cooperation between States on issues relating to trafficking in persons. They reaffirm that trafficked persons should be treated as victims rather than law-breakers, establish procedures for protecting and providing assistance to victims and establish general mechanisms for cooperation through which States can assist each other to combat, prevent and prosecute cases of trafficking in persons.

5.2.6.4 Cambodia and Malaysia have been in the process of negotiating a MoU with similar terms to the abovementioned agreements for several years.

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## 5.3 Trafficking in persons in Cambodia

***“I am mourning my only daughter.”***

**16-year old Toch Srey Neth signed up to go to Malaysia as a domestic worker through a private recruitment agency in Cambodia when she was 15 years old. In the home of her employer she was kept in slave-like conditions: beaten, under-fed and overworked without pay.**

**On the morning of 24 June 2012, a few weeks after she was brought home, she died at Calmette hospital in Phnom Penh from multi-organ failure caused by irreversible septic shock arising from her mistreatment in Malaysia**

*– reported by the Phnom Penh Post<sup>393</sup>*

### 5.3.1 A conceptual introduction

5.3.1.1 Trafficking in persons in Cambodia is a complex and nuanced phenomenon. Advocacy, action and cooperation on trafficking issues are complicated in some cases by a sharp disparity between the international legal definition of trafficking in persons and local or regional understandings of the concept. On one reading of the law, many persons who are exploited locally and abroad could arguably satisfy the legal definition of a victim of trafficking. In practice, however, many of these people may not consider themselves to be victims of a crime. Similarly, there are reports that some people who meet the legal definition of a trafficker do not consider themselves to have acted unlawfully. Thus, certain actions may constitute a crime of trafficking in persons by law but not by public perception.

<sup>393</sup> David, S., ‘Beaten, unfed’ teen maid dies’, *The Phnom Penh Post*, 25 June 2012, p 3.

- 5.3.1.2 Self-identification as a victim or trafficker is not determinative of whether or not a crime has been committed, and the legal definition of trafficking in persons should not be discounted on the basis that it does not correspond with popular opinion. Nevertheless, the way in which trafficking in persons is understood locally should not be overlooked. Given that a certain degree of exploitation and deception is inherent in the recruitment and employment of Cambodian workers and that in a country as poor as Cambodia many people have vulnerabilities which can be exploited, to insist upon a rigid adherence to the strict legal definition may prove counter-productive to efforts to combat and prevent trafficking.
- 5.3.1.3 It is impractical to insist that the majority of workers within a country may have been trafficked or that, in a country such as Cambodia, all children who work in ‘exploitative’ conditions are victims of trafficking. Such assertions oversimplify the complex dynamics and structure of Cambodian society and the root causes of exploitation and abuse. They attempt to bring within the framework of criminal law matters which may be better placed within social policy and development discourses. A number of local and international organisations have recognised that the criminal justice system may not be the most appropriate forum for all cases which, on a broad reading, could be classified as trafficking in persons. Instead, these organisations develop working understandings of the concept rooted in law but adapted to the particular realities of Cambodian life. This approach prioritises the protection of victims and acknowledges that most trafficking cases occupy a grey area which eschews strict legal classification.

## 5.3.2 The nature of trafficking in persons

- 5.3.2.1 Cambodia is a source, destination and transit country for transnational trafficking and contains a number of internal trafficking flows. Internal trafficking networks are predominantly informal arrangements involving family members, acquaintances and opportunistic ‘brokers’. Transnational trafficking networks range in size and nature from small-scale *ad hoc* activities to well-organised international operations. Traffickers and the networks through which they operate are dynamic and continuously evolve to meet demand and accommodate legal, regulatory and other constraints to make a profit.
- 5.3.2.2 The most common routes for trafficking in persons relevant to Cambodia are as follows:
- persons are trafficked from Cambodia into Thailand, Malaysia and Vietnam for labour and commercial sex exploitation;
  - persons are trafficked into Cambodia from Vietnam for commercial sex exploitation;
  - persons are trafficked through Cambodia from Vietnam to Thailand and Malaysia for commercial sex and labour exploitation; and
  - persons are trafficked internally within Cambodia for commercial sex and labour exploitation.
- 5.3.2.3 The most widely reported cases involving trafficking in persons are those of women who are exploited as domestic workers in Malaysia, men who are exploited on Thai fishing boats and women and girls who are exploited in the commercial sex industry in a number of countries. Other important groups of victims of trafficking can sometimes be overlooked, including women and girls who are exploited as domestic workers within Cambodia.

### 5.3.3 Victims of trafficking in persons

5.3.3.1 There is no single, homogenous profile for a victim of trafficking in persons in Cambodia. Men, women and children from Cambodia and surrounding countries are trafficked for diverse forms of exploitation including:

- forced labour as domestic workers, in factories or sweatshops, on farms or plantations and in the fishing, seafood processing and construction industries;
- commercial sexual exploitation, including virginity selling and exploitation for the purposes of prostitution or pornography; and
- other forms of exploitation, including the exploitation of children.

5.3.3.2 Victims come from both rural regions and urban centers in border areas and internal provinces. In Cambodia, most victims of trafficking are ‘recruited’ rather than abducted or threatened with direct force. By contrast, reports indicate that victims who are recruited in Vietnam by Vietnamese organised crime networks face a greater risk of the threat or use of force throughout the trafficking process.

5.3.3.3 Poverty and a lack of social support and job opportunities render many groups within Cambodia vulnerable to trafficking in persons. Some of the key indicators of vulnerability amongst these groups include:

- lower levels of education in general and concerning safe migration and the risks of trafficking in persons in particular (especially in more rural or remote areas);
- debt and lending through the informal credit sector;
- residence in non-border provinces. Persons who migrate internally to the Thai-Cambodian border and subsequently seek to cross into Thailand to find work are reported to be at greater risk of trafficking than the populations along the border who have networks in both countries and are better informed about the safest routes for irregular migration and places for employment;
- Vietnamese ethnicity, especially for women and girls living in Cambodia. Persons of ethnic-Vietnamese origin in Cambodia are at risk of statelessness (see chapter 3) which renders them particularly susceptible to exclusion from legal employment, landlessness and poverty. Their inability to access bank loans may compel them to have recourse to the informal credit sector which further increases vulnerability to trafficking. There are reports that traffickers target ethnic-Vietnamese women and girls for recruitment into the commercial sex industry because their fairer complexions appeal to the tastes of foreign clients;
- residence in communities where entry into the commercial sex industry and virginity selling have become ‘normalised’ as a means of supporting a family;
- precarious and dysfunctional family relationships and households involving domestic violence or sexual abuse; and
- previous victimisation in the commercial sex industry or as victims of rape and the associated social stigma and sexual shame which render women and girls vulnerable to revictimisation and trafficking.

### 5.3.4 Quantifying the problem

5.3.4.1 It is impossible to quantify the number of victims or perpetrators of trafficking in persons in Cambodia with accuracy. The numbers of people trafficked into, out of, through and within Cambodia are significant, however different government bodies, law-enforcement offices and local and international organisations understand the size of the problem differently. Trafficking statistics can be difficult to segregate from broader statistics concerning illegal migration or labour exploitation, and quantification is further complicated by an unwillingness amongst trafficked persons to publicly self-identify as a victim. No single source purports to have accurately and comprehensively mapped the entire trafficking in persons problem as it affects Cambodia.

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## 5.4 Reasons for the existence of trafficking in persons

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*“My parents asked me to [sell my virginity to] a man who was forty or fifty years old... At first, I did not agree. But later on, I thought about it again. I saw my father sick and my family indebted. I told my mother: “Tell dad, I agree, I will sacrifice.” I was volunteering to work. I could not say no because I would be considered as an undutiful daughter.”*

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– teenage girl from Prey Veng province, Cambodia<sup>394</sup>

### 5.4.1 Vulnerability of victims to trafficking in persons

5.4.1.1 Trafficking networks flourish wherever there are desperate and vulnerable communities and people are willing to engage in practices which may expose them to the risk of trafficking in the hope of improving their quality of life. The primary factors giving rise to a vulnerability to trafficking in persons in Cambodia are:

- poverty;
- indebtedness arising as a result of loans taken in the informal credit sector for a variety of reasons, including to cover costs of living, pay medical expenses, as capital for small businesses or to support gambling and other addictions;
- landlessness, including as a result of forced evictions (see Chapter 6);
- a lack of job opportunities, labour migration and a willingness to accept living and working conditions which are less than satisfactory in order to achieve a better quality of life (see Chapter 4); and
- a lack of knowledge about safe migration and the risks of trafficking in persons (including that safe migration involves more than simply legal migration).

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<sup>394</sup> Lainez, N., *Transacted Children and Virginity: Ethnography of Ethnic Vietnamese in Phnom Penh*, Alliance Anti-Traffic, June 2011, p 20.

## 5.4.2 Institutional factors

5.4.2.1 A complex web of legal, political, economic and social factors create an enabling institutional framework which allows trafficking networks to thrive as profitable enterprises. In Cambodia, the institutional factors which facilitate trafficking in persons include:

- the existence of an extensive and unregulated informal credit sector through which poor families are granted loans beyond what they can repay and are charged inflated rates of interest. Despite the prohibition on hiring people to work to pay off debts in Cambodia,<sup>395</sup> this practice is not uncommon in cases where individuals or families become debt-bonded to lenders and are required to provide labour or sexual services to repay their loan;
- high local and foreign demand for commercial sex services as the global sex and tourism industries expand and the potential for profit increases;
- the prevalence of exploitative labour and employment practices, including the employment of underage children, the confiscation of passports of migrant workers and the acceptance of unsatisfactory living and working conditions; and
- other factors which obstruct the effective prosecution and suppression of trafficking in persons and afford impunity to traffickers, including:
  - corruption amongst police, government and immigration officials responsible for combatting trafficking;
  - inadequate enforcement of anti-trafficking legislation due to a lack of understanding of the relevant laws and their application amongst law-enforcement, prosecutors and the judiciary; and
  - inherent difficulties in investigating and prosecuting informal trafficking networks which are comprised of disconnected chains of small-time actors (rather than identifiable organised crime networks).

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## 5.5 The experience of trafficking in persons

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***“I felt like I was under detention  
in the middle of nowhere in the ocean.”***

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*– Cambodian fisherman trafficked onto a Thai fishing boat in Africa<sup>396</sup>*

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***“I woke up at 4 a.m., cleaned my employer’s house, his two cars, bathed and fed the children.... Then I worked in his office and cleaned four rooms, tables and floors. After that, he took me to his mother’s house where I worked until 9 pm. Then I returned to my employer’s house and worked until 2 a.m., but they still hit me and told me I was lazy. They didn’t give me food. I slept hungry two or three times a week”***

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*– 16 year old Cambodian domestic worker in Malaysia<sup>397</sup>*

<sup>395</sup> Labour Law, article 16

<sup>396</sup> Chakrya, K. S., ‘Men rescued from fishing boat slavery’, *The Phnom Penh Post*, 17 May 2012.

<sup>397</sup> HRW (November 2011), *op. cit.* (note 219), p 5.

#### 5.5.1 Sexual exploitation

##### *Overview of the experience of sexual exploitation<sup>398</sup>*

5.5.1.1 Victims of trafficking in persons for the purpose of sexual exploitation are most commonly involved in:

- prostitution in brothels and other entertainment venues such as karaoke parlours, casinos, bars and high-end hotels; and
- virginity selling.<sup>399</sup>

5.5.1.2 Not all workers in the commercial sex industry are victims of trafficking in persons. Whilst reports indicate that the great majority of workers in this industry experience exploitation, only those who are minors or who meet the legal definition for trafficking in persons are considered victims of trafficking.

##### Prostitution

5.5.1.3 Brothels have traditionally been the most common location for commercial sex exploitation in Cambodia and neighbouring countries. More recently, in the wake of increasing government scrutiny and regulation of these venues, less conspicuous establishments such as karaoke parlours, casinos, bars, discotheques, restaurants and high-end hotels have flourished as more discreet and indirect places to access the same services. Whilst some of these venues have rooms on-site for the provision of commercial sex services, others serve as an introductory location and require that women provide services off-premises in an attempt to avoid police attention. At a minimum, women and girls who work in these establishments are usually expected to sit with clients and be kissed and touched. Women in higher-end establishments may have a right to refuse sex with a client, however in most other cases women and girls enjoy as little freedom of choice as a worker in a brothel.

5.5.1.4 Women in these venues are rarely paid an adequate amount to reflect the fair value of the services which they provide. In some cases women receive as little as US\$2 per customer while brothel- and venue-owners derive great profit from the business. Underage girls in these venues are exploited because they are legally deemed to be too young to consent to offering sexual services.

5.5.1.5 Within many brothels and other entertainment venues a particular social structure is established to reinforce the relationship of exploitation between owners and workers. Semi-parental relationships involving ties of duty and obligation are fostered between workers and brothel owners whereby owners are called 'ma', 'pa', 'aunt' or 'uncle'. In entertainment venues, women and girls often work in small groups under the control of a 'mummy' who negotiates deals with clients and offers protection for the workers under her control. These relationships consolidate the workers' duty to obey those who exploit them.<sup>400</sup>

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<sup>398</sup> The following section focuses on the sexual exploitation of women and children in the commercial sex industry in Cambodia and abroad. Reports indicate that transgendered persons may also be trafficked into this industry, however these cases are under-explored and require further research.

<sup>399</sup> There are reports that trafficked women and girls are also involved in the production of pornography in Cambodia, however this phenomenon is relatively under-researched.

<sup>400</sup> For more information see: Brown (August 2007), *op. cit.* (note 19), pp 20-21.

Virginity selling

- 5.5.1.6 The demand for virginity selling is considered to be an “*overwhelmingly Asian male phenomenon*”<sup>401</sup> with reports that the majority of clients in Cambodia are Cambodian and Chinese men who hold a belief in the rejuvenating and purifying qualities of sex with a virgin.<sup>402</sup> The sale of a girl’s virginity is usually negotiated by her parents, either directly or through an intermediary, or by the owner of a brothel or entertainment venue. The act itself often takes place at a hotel where the girl is expected to stay with the client for up to a week. The average amount which a girl or her family will make from a sale is around US\$500 although there are reports of clients paying as little as US\$100 to purchase a girl’s virginity (of which a number of people involved in the sale will demand a cut). In one report 17% of the girls surveyed received no money at all for the sale of their virginity.<sup>403</sup> Some girls return to their home after the sale whilst others stay on to work in brothels or other entertainment venues at a significantly reduced ‘price’. The IOM reports that virginity selling is arguably the greatest factor contributing to entry into the commercial sex industry with 38% of commercial sex workers in one survey having sold their virginity.<sup>404</sup>
- 5.5.1.7 In some cases girls report that the decision to sell their virginity was their own,<sup>405</sup> however by law a minor cannot consent to sex and the existence of coercive means to convince a girl who has reached the age of majority to sell her virginity will nullify the effect of her consent.

***What makes it trafficking in persons?***

- 5.5.1.8 By law, the presence of any of the ‘means’ set out in the definition of trafficking in persons distinguishes adult victims of trafficking from adult voluntary commercial sex workers who experience exploitation in the course of their employment. In practice, local and international organisations who work with women and children in the commercial sex industry may develop their own understandings of trafficking in persons for application to their work. According to some of these understandings, almost all women who are exploited in the industry are deemed to be victims of trafficking; according to others, only those who are forcibly prevented from leaving their place of employment. A number of reports suggest that the majority of commercial sex workers in Cambodia do not meet this definition: they are exploited and may have been deceived during their recruitment, but they are not forcibly confined.
- 5.5.1.9 In those cases where women are forcibly confined to their place of employment, women are usually debt bonded to the brothel or venue owner. This situation can arise when women offer themselves or are offered by their families to entertainment venue owners to provide sexual services in exchange for a loan (which either pays off a previous debt or incurs a new one). Women are prevented from leaving the employ of the venue owner until they have worked to repay the debt. Brothel guards and motodup drivers who are loyal to brothel owners prevent debt-bonded women from running away.

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<sup>401</sup> *ibid.*, p 58.

<sup>402</sup> *ibid.*, p 56; U.S. Department of State (2012), *op. cit.* (note 319), p 107.

<sup>403</sup> Brown (August 2007), *op. cit.* (note 19), p 58.

<sup>404</sup> *ibid.*, p 55.

<sup>405</sup> *ibid.*, section 7; Lainez, *op. cit.* (note 394).

## State of Migration

### An overview of forced displacement in Cambodia

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5.5.1.10 This narrower understanding of trafficking in persons excludes a wider range of exploited adult sex workers who may, by law, be classified as victims of trafficking. These potential victims include women who are recruited into the commercial sex industry by the following means:

- deception, subtle coercion and abuse by entertainment venue owners of the woman's position of vulnerability arising from poverty and a lack of support networks. These means may be used to pressure women into acquiescing to the sale of their virginity and the provision of sexual services. Many virgins and other women are targeted for recruitment in entertainment venues on the grounds of their vulnerability. They may be told that they have been recruited to perform simple bartender services or to sing and dance. Through the use of different pay scales, salaries which are insufficient to support a living and the withholding of wages from women who do not sit with clients, venue owners abuse the vulnerabilities of these women to manipulate them into allowing clients to sexually harass them and providing sexual services to clients; and
- abuse by traffickers of a woman's shame about not being a virgin (either as a result of rape, the sale of virginity, previous experience in the commercial sex industry or prior consensual sex). Women may become victims of trafficking when brothel and entertainment venue owners exploit women's fear that they will not be reaccepted into their communities, be able to earn a living in another way or be eligible for marriage to manipulate them into staying in the commercial sex industry.

5.5.1.11 For minors, the fact of their recruitment and the existence of sexual exploitation are sufficient to constitute trafficking in persons. No coercive or deceptive means are necessary, although in practice many girls who are recruited for sexual exploitation experience the abovementioned pressures. Minors are particularly susceptible to coercion and pressure from within their family. Further, minors engaged in virginity selling and prostitution are more likely to be subjected to overtly forceful means to secure their compliance, including forced intoxication and drugging. The IOM reports that in one study 82% of girls surveyed were unconscious and a further 8% were drunk or drugged with sexual stimulants or amphetamine-type drugs at the time of their first commercial sex act.<sup>406</sup>

#### ***Forms of harm experienced by victims of sexual exploitation***

5.5.1.12 Victims of trafficking for the purpose of sexual exploitation experience some of the most physically and psychologically destructive forms of harm, including:

- death, severe physical injury and psychological trauma caused by rape and other forms of sexual assault, beatings, torture and other forms of cruel, inhuman and degrading treatment by clients, traffickers and owners and staff of brothels and entertainment venues;
- exposure to sexually transmitted infections, including hepatitis and HIV;
- forcible drugging leading to drug addiction, infection and related health issues;
- lack of access to adequate medical care and psychosocial support in the event of serious injury, infection or pregnancy;

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<sup>406</sup> Brown (August 2007), *op. cit.* (note 19), p 58.



- restricted freedom of movement, communication and association;
- withheld wages;
- feelings of shame, despair and exclusion caused by social stigma and a belief that the experience of trafficking (especially the fact of being raped or no longer being a virgin) has 'spoiled' the victim. Victims may believe they have ruined their chances of being reaccepted by their community or being eligible for marriage. These beliefs lead to a vulnerability to revictimisation; and
- arrest, detention and deportation of women working in the commercial sex industry abroad, especially for women who do not identify themselves as victims of trafficking when they are arrested for fear of public identification.<sup>407</sup>

## 5.5.2 Labour exploitation of domestic workers in Cambodia and abroad

### *Overview of the experience of labour exploitation of domestic workers*

- 5.5.2.1 The recruitment of Cambodian women and girls to work as domestic workers and the exploitative conditions of their employment place many of them at risk of trafficking for the purpose of labour exploitation.
- 5.5.2.2 Relatively little research has been conducted on the recruitment and employment of Cambodian domestic workers who are employed locally. A report published by the IOM in 2007<sup>408</sup> and anecdotal reports indicate that the majority of these workers are rural to urban migrant girls. Most girls are at least 13 years of age when they are first recruited as a domestic worker within Cambodia, although there are reports of girls as young as 6 years old being employed.<sup>409</sup> The IOM report states that most of these girls have low levels of education, come from dysfunctional family backgrounds and families in debt and are sent to work by their parents with minimal consultation. They are usually recruited through informal networks of family members and acquaintances. Some local domestic workers are relatives of the members of the household and are brought to cities to work in homes in exchange for food and rent. A considerable number of domestic workers are unpaid, either because they do not receive a salary at all (especially where they are a relative of the employer) or because their salary is paid directly to their family.
- 5.5.2.3 The recruitment of Cambodian domestic workers who are employed abroad is usually managed by private recruitment agencies and involves the following stages:
- *recruitment*: women and girls are either targeted by a local broker in their village or approach a recruitment agency voluntarily in response to advertisements in the media and stories of the success of other domestic workers;
  - *pre-departure training and orientation*: prospective migrant domestic workers are required to live for 3 to 6 months in a training centre within Cambodia to receive basic training and complete various administrative requirements such as completing health tests and obtaining passports, work permits and employment contracts;

<sup>407</sup> For more information see: Brown (August 2007), *op. cit.* (note 19).

<sup>408</sup> Brown, E., *Out of Sight, Out of Mind? Child Domestic Workers and Patterns of Trafficking in Cambodia*, IOM, January 2007.

<sup>409</sup> *ibid.*, p 20.

## State of Migration

### An overview of forced displacement in Cambodia

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- *transit*: domestic workers recruited by private recruitment agencies travel through regular migration channels. Upon arrival in the receiving country some domestic workers are required to stay in the office of a local agent for a few days and to clean and cook for office staff until they are sent to the home of their employer;
- *placement in the home of the employer*; and
- *repatriation*, either at the end of the contract period or upon rescue by Cambodian Embassy or Consulate officials or local or international organisations.

5.5.2.4 The recruitment of underage girls to work as domestic workers is a widespread and significant problem both within Cambodia and abroad, with one study reporting that only 52% of Cambodian domestic workers in Malaysia surveyed were of a suitable age for overseas domestic employment under the laws of both Cambodia and Malaysia.<sup>410</sup> A number of sources report that recruitment agencies facilitate and encourage the falsification of identity documents as a means of allowing underage girls to be placed as domestic workers abroad. This practice makes it difficult to track, identify and rescue underage workers with false documents, especially when their age and name are changed without the knowledge of the child's family.

5.5.2.5 The exploitation of domestic workers arises from the fact that they are required to work excessively long hours, endure unacceptable living and working conditions, are unable to leave the house of their employer and receive little or no pay.

#### ***What makes it trafficking in persons?***

5.5.2.6 Within Cambodia there appears to be broad recognition of the fact that any adult who is recruited and/or transported for the purpose of exploitation as a domestic worker abroad and is forcibly confined within the home of the employer is a victim of trafficking in persons. Recognition of local domestic workers as potential victims of trafficking in persons is less developed.

5.5.2.7 According to the legal definition of trafficking, a wider range of recruitment practices may give rise to trafficking in persons. In particular, any adult domestic worker who is recruited or employed for the purpose of exploitation may be defined as a victim of trafficking where one or more of the following means are present (regardless of whether or not she is also forcibly confined within the home of her employer):

- deceptive and fraudulent recruitment practices by private recruitment agencies and local brokers who give prospective domestic workers incomplete, false and misleading information about the nature of the tasks to be performed and the working and living conditions of the position. Prospective domestic workers are often lured into exploitation by false promises of easy work and good living conditions. Many workers are not informed that they will be confined in a training centre prior to departure;
- exploitation of a prospective migrant worker's position of vulnerability arising from poverty. Private recruitment agencies and local brokers use illegal and unscrupulous lending practices to coerce workers into situations of debt bondage and forced labour. There are reports that they target the most impoverished families and entice them with the offer of large cash advances and incentives such

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<sup>410</sup> UNIAP, *Recruitment Agencies and the Employment of Cambodian Domestic Workers in Malaysia*, Bangkok, July 2011, p 27.

as rice, cattle and mobile phones. These costs become a debt owed by the worker to the agency or broker, however many families report that at the time of recruitment they were led to believe that these offers were gifts rather than loans. Recruitment agencies compound this debt by charging exorbitant recruitment, training and passport application fees. Since most families are unable to repay this debt upfront, workers have no choice but to continue with the migration process to work off the debt; and

- coercion to remain in the employ of the home owner by:
  - confiscating the worker's passport such that she is not free to leave unless she chooses to become undocumented and risk arrest, detention and deportation; or
  - withholding wages for the first six to seven months of employment whilst employers recoup the costs they have incurred in paying recruiters for the recruitment, training, transport and placement of the worker. This non-payment of wages is a powerful coercive means of preventing workers from leaving abusive workplaces because they have incurred debts, endured months of exploitation and are yet to receive any payment to send home to their families as a result of these efforts.

5.5.2.8 The legal classification of women who are recruited to be migrant domestic workers and are forcibly confined within a training center prior to departure is more difficult to define. Whilst these situations clearly involve the action and means elements of the definition of trafficking in persons, in the absence of a purpose to exploit (which may not arise until the woman is actually sent abroad) these cases are more likely to fall within the scope of ordinary criminal law rather than be deemed to constitute trafficking in persons.

5.5.2.9 All underage girls who are recruited to work as domestic workers in exploitative conditions within Cambodia or abroad are victims of trafficking in persons, regardless of whether or not any of the abovementioned means are employed during the process of their recruitment or employment.

#### ***Forms of harm experienced by exploited domestic workers***

5.5.2.10 Domestic workers experience serious forms of exploitation, abuse and harm at all stages of their recruitment and employment processes.

5.5.2.11 In training centers and prior to placement as a domestic worker, women and girls who have been recruited to migrate abroad to work may:

- be forced to live in poor, overcrowded and unsanitary conditions and be denied adequate nutrition, food and water. There are reports of workers sleeping on the floor without pillows, mattresses, blankets or mosquito nets;
- be denied freedom of movement and association through forcible confinement in training centers and prohibitions on contact with family members and friends, even in the event of family emergencies;
- be required to perform excessive domestic tasks with no remuneration and suffer from exhaustion. There are reports of women becoming so weak in training centres that they cannot walk;

## State of Migration

### An overview of forced displacement in Cambodia

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- be subjected to verbal, physical and psychological abuse by staff in training centers and punishments for attempts to escape, misbehaviour and failure to learn foreign languages. There are reports of beatings with sticks, forced isolation and workers being made to stand with water buckets on their heads for extended periods of time. Women may also be threatened with police action if they try to run away;
- be denied the right to privacy, with some recruitment agencies searching the belongings of workers prior to their departure and confiscating diaries, notebooks and the contact information of relatives and friends;
- experience severe psychological harm, such that some workers attempt suicide or risk their lives trying to escape;
- be denied access to adequate medical care or a reprieve from daily duties even in cases of severe illness. There are reports that workers who are hospitalised have been forced to return to training centers before they have recovered. There are also reports of deaths within training centers but a failure to investigate the circumstances surrounding these cases has prevented families and organisations from ascertaining the exact causes of death; and
- be subjected to compulsory medical testing which is conducted without free and informed prior consent, including testing for pregnancy, HIV, hepatitis and other diseases. Recruitment agency staff have reported that they are encouraged by management to persuade pregnant women to get an abortion, deduct the fee for the procedure from the worker's salary and not inform them of this additional cost.<sup>411</sup>

5.5.2.12 During the course of their employment, the forms of harm experienced by many domestic workers within Cambodia and abroad include:

- physical, sexual, psychological and verbal abuse. In 2012 there have been reports of domestic workers being raped, beaten, punched in the face, forced to eat their own excrement and threatened with the risk of being thrown out a window.<sup>412</sup> In some cases this mistreatment results in the death of the worker;<sup>413</sup>
- exploitative working and living conditions and terms of employment amounting to forced labour, including
  - excessive work hours, sometimes of more than 20 hours per day in multiple houses and workplaces without rest;
  - no rest days or leave;
  - a lack of food and water;
  - restrictions on freedom of communication and movement, including through the confiscation of travel and identity documents;
  - a lack of health care or medical treatment in case of injury or sickness; and
  - poor living conditions, including being forced to sleep in storerooms, kitchens, hallways or open spaces;

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<sup>411</sup> For more information on the treatment of prospective migrant domestic workers in training centres in Cambodia see: HRW (November 2011), *op. cit.* (note 219).

<sup>412</sup> See for example: Narim, K., and Dene-Hern, C., 'Maid Held by Malaysian Employers, Mother Says', *The Cambodia Daily*, 9 May 2012, p 23; Lewis, S., and Bopha, P., 'Malaysian couple charged with abusing maid', *The Cambodia Daily*, 31 May 2012, p 20.

<sup>413</sup> Yeap, C., and David, S., 'Malaysian couple charged in death of Cambodian maid', *The Phnom Penh Post*, 17 April 2012.

- irregular or non-payment of wages and excessive salary deductions for the fees employers have paid upfront to recruitment agencies to cover the costs of the worker's recruitment, training and placement;
- denial of basic employment rights, including the right to have, understand and retain a copy of an employment contract;
- isolation from support networks and a lack of access to legal and social assistance. Most domestic workers are not given information about where to seek help in the event of a problem with their employment and are denied effective assistance by recruitment agencies; and
- arrest, detention and deportation when workers flee abusive households without their travel and identity documents.<sup>414</sup>

5.5.2.13 Migrant domestic workers who are rescued or otherwise return home before the completion of their employment contract may also be at risk of arrest and detention by recruitment agencies who claim the worker still owes them a debt.

### 5.5.3 Labour exploitation of workers on Thai fishing boats

#### *Overview of the experience of labour exploitation on Thai fishing boats*

5.5.3.1 Significant numbers of Cambodian men and boys are transported to Thailand and sold to work on Thai fishing boats in conditions of forced labour similar to slavery. Whilst most fishermen are transported to ports in Thailand and sold to fishing boat captains upon arrival, others are flown from Bangkok to South Africa where they are transported to Thai boats which fish in African waters. Most trafficked fishermen are put to work on boats going to foreign waters because these boats are offshore for longer periods of time which makes it easier to trap fishermen into situations of exploitation.

5.5.3.2 The exploitation of these workers arises from the slave-like working conditions on the boats, the use of debt bondage and the non-payment of wages.

#### *What makes it trafficking in persons?*

5.5.3.3 In practice there are some differences of opinion as to the circumstances in which the transport of Cambodian men to work on Thai fishing boats will constitute trafficking in persons. Most Cambodians who work on Thai fishing boats make the original decision to migrate voluntarily and do so with the assistance of a broker (although reports suggest that many are not aware that they will be working as fishermen). On one view, the trafficking in persons of adult fishermen may only occur once they are held as *de facto* prisoners and physically prevented from leaving a boat because it is out at sea.

5.5.3.4 On another view, under the legal definition of trafficking a wider range of circumstances may give rise to a situation of trafficking in persons. The presence of deception, coercion and abuse of a position of vulnerability during the recruitment of adult fishermen, in combination with exploitation, may be sufficient to constitute trafficking in persons even without forcible confinement on a boat.

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<sup>414</sup> For more information on the treatment of migrant domestic workers by employers in Malaysia see: HRW (November 2011), *op. cit.* (note 219).

## State of Migration

### An overview of forced displacement in Cambodia

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5.5.3.5 On this broader view, the means which are employed in the trafficking of these workers include:

- fraud and deception by labour brokers about the nature of the work, expected length of service and amount and payment of wages. Some workers are unaware that they will be working on fishing boats until they are delivered to the pier in Thailand. Other workers are aware that they will be working as fishermen, but are not told that they will be sent as far away as Africa or that they will be at sea for up to several years at a time and forced to labour in poor conditions;
- exploitation of the position of vulnerability of migrant workers, particularly undocumented migrant workers, who are in Thailand unable to speak Thai, fearful of arrest and deportation, in debt to the broker for incurred travel costs and without access to support or social networks; and
- debt bondage, whereby fishermen are compelled to work to repay various fees paid by the boat owner to the broker for the worker and the reasonably assessed value of their labour is not applied to the repayment of their debt.

5.5.3.6 Underage Cambodian boys who are recruited and transported to work in exploitative conditions on Thai fishing boats are victims of trafficking in persons regardless of whether or not any of the above mentioned means are present.

#### ***Forms of harm***

5.5.3.7 The forms of harm experienced by trafficked persons in the fishing industry include:

- forced labour in conditions similar to slavery, including:
  - being kept at sea for up to several years without pay;
  - working for 18 to 20 hours per day without any days of rest;
  - being forced to perform extremely arduous and dangerous labour; and
  - being forced to work even when fatigued or ill;
- threats and exposure to severe physical abuse by boat captains, including beatings and murder in cases where a worker is too weak or sick to work;
- poor living conditions, hygiene and nutrition, including a lack of space, poor quality and insufficient food and water, a lack of toilets, chronic sleep deprivation and a denial of access to medical care;
- injuries or death due to lack of training and dangerous conditions;
- irregular or non-payment of wages, or payment of reduced wages;
- total restrictions on freedom of movement, such that some fishermen rarely or never go ashore in the several years of their service; and
- a lack of legal protection due to the exclusion of fishermen from the protection of Thai labour laws, poor regulation of fishing boats by Thai authorities, the lack of written employment contracts and the long periods of time spent offshore; and
- arrest, detention and deportation of fishermen who escape.<sup>415</sup>

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<sup>415</sup> For more information on the trafficking of Cambodian men on Thai fishing boats see: UNIAP, *Exploitation of Cambodian Men at Sea: Facts About the Trafficking of Cambodian Men onto Thai Fishing Boats*, Phnom Penh, 22 April

## 5.5.4 Exploitation of children

- 5.5.4.1 In addition to exploitation in the commercial sex industry, as domestic workers and on Thai fishing boats, Cambodian children are exploited as beggars, street-sellers, cart-pullers and rubbish collectors in Cambodia, Thailand and Vietnam. The labour of children is also exploited in the production and farming of rubber, salt, bricks and shrimp.<sup>416</sup> Some children are sold into begging rings run by organised criminal gangs, especially in the border provinces near Vietnam.
- 5.5.4.2 There are some reports of mistreatment of Cambodian children who are exploited and may be victims of trafficking. For example, in May 2012 local media sources reported that parents near the Thai-Cambodian border were deliberately breaking their children's legs to make them more pitiful when they were begging in Thailand.<sup>417</sup> There is anecdotal evidence from other parts of Cambodia of similarly harmful mistreatment of children who are recruited to beg. Despite these reports, two recent studies of Cambodian children in Thailand and Vietnam did not identify obvious trends of abuse amongst children begging and working in those countries.<sup>418</sup> Indeed a number of parents who take their children with them to work in Cambodia and neighbouring countries report that they do so to protect them from harm they may face if they are left alone or in the care of others back home.
- 5.5.4.3 For more information on the trafficking of children see section 5.6.2.

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## 5.6 Particular issues affecting women and children

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***“The trafficking of persons, particularly women and children... is one of the most egregious violations of human rights that the United Nations now confronts. It is widespread and growing. It is rooted in social and economic conditions in the countries from which the victims come, facilitated by practices that discriminate against women and driven by cruel indifference to human suffering on the part of those who exploit the services that the victims are forced to provide. The fate of these most vulnerable people in our world is an affront to human dignity and a challenge to every State, every people and every community.”***

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– Kofi Annan, former Secretary-General of the United Nations<sup>419</sup>

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2009; IOM, *Trafficking of Fishermen in Thailand*, Bangkok, 14 January 2011; United Nations Office on Drugs and Crime (UNODC), *Transnational Organized Crime in the Fishing Industry*, Vienna, 2011.

<sup>416</sup> For more information see: ILO (12 June 2012), *op. cit.* (note 202); LICADHO and World Vision Cambodia, *op. cit.* (note 304); U.S. Department of Labor, *op. cit.* (note 304).

<sup>417</sup> David, S., and Yeap, C., ‘Families harming own children to beg’, *The Phnom Penh Post*, 15 May 2012.

<sup>418</sup> Friends International, *The Nature and Scope of the Foreign Child Beggar Issue in Bangkok (Especially as Related to Cambodian Child Beggars)*, Thailand, December 2011; a report by the IOM on Cambodian child beggars in Vietnam, due for publication mid-2012.

<sup>419</sup> Annan, K., ‘Foreword’, *United Nations Convention Against Transnational Organised Crime and the Protocols Thereto*, New York, 2004, p iv.

## State of Migration

### An overview of forced displacement in Cambodia

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#### 5.6.1 Women

5.6.1.1 Victims of trafficking for the purpose of sexual exploitation in the commercial sex industry and labour exploitation as domestic workers are almost exclusively women and girls.

5.6.1.2 Whilst both men and women can be victims of trafficking, women may be disproportionately affected by exploitation and experience unique problems which warrant special attention. Women are particularly vulnerable to trafficking due to:

- the existence and demands of the commercial sex industry;
- the fact that they generally have lower education and literacy levels, less skills and training and fewer options for good, well-paid jobs both within Cambodia and abroad;
- the fact that they are more likely to seek assistance from a family member or acquaintance to find employment (and thus are more susceptible to deception and abuse) than men who are more likely to maintain a relative degree of control over their own recruitment process;
- the fact that large numbers of women are employed as domestic workers and commercial sex workers and therefore work outside the public eye; and
- legislative discrimination which excludes domestic workers and commercial sex workers from protection under many labour and employment laws and thus leaves women in these industries particularly vulnerable to exploitation and abuse.

#### 5.6.2 Children

5.6.2.1 Children comprise a significant portion of the victims of trafficking in persons in Cambodia. Children are trafficked for sexual exploitation as commercial sex workers, objects of child pornography and for virginity selling. They are trafficked for labour exploitation as domestic workers, fishermen on Thai fishing boats and workers in other industries (see section 5.5.4).

5.6.2.2 Unlike for adult victims of trafficking, all that is required for trafficking in persons of a minor is recruitment and exploitation. This distinct legal standard has been adopted at the national and international levels in recognition of the fact that children are particularly vulnerable to abuse and require special protections against exploitation. This vulnerability is the result of a number of aspects of the inherent nature of childhood, including:

- the fact that children may be less likely to be aware of the dangers of trafficking and are less likely to have the experience and maturity necessary to detect and avoid deception or to resist manipulative or coercive practices; and
- the fact that due to an imbalance of power between children and adults, children are unlikely to be in a position to negotiate the sale of their virginity or physical or sexual services.



- 5.6.2.3 The fact of exploitation of children is usually clear, especially when they work in the commercial sex industry or in dangerous and difficult working conditions. By contrast, the application of the internationally agreed legal definition of trafficking in persons to these children may be less clear. According to this definition, any child who is 'recruited' (including by his or her own parents) and/or transported for the purpose of exploitation is a victim of trafficking in persons. It is not necessary that the child be coerced or pressured into working, nor is it relevant whether or not an organised criminal group is involved in the recruitment and exploitation of the child. It is legally and conceptually incorrect to assert that a child who is willing to work or who works alongside his or her family is, as a result of those facts, not a victim of trafficking.
- 5.6.2.4 In Cambodia, where a disproportionately large number of children work in objectively hazardous and exploitative conditions, this definition may produce unworkable results. It may not be in the best interests of all children who meet the legal definition of trafficking to be labeled as a victim of a crime, particularly where the consequence of that label might be the criminal prosecution of the child's parents and serve no preventative effect. Thus, whilst it may be appropriate to apply the legal definition of trafficking in persons in some cases (such as those involving children exploited in the commercial sex industry), in other cases it may be better to position the exploitation of children within the framework of broader discussions about society, poverty and the family rather than within the domain of criminal law.

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## 5.7 Compliance with international standards and enforcement of domestic law and policy

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***In the year to June 2012 "the Cambodian government convicted eight owners, staff members and managers from three licensed recruitment agencies for crimes related to trafficking for labour exploitation... Endemic corruption at all levels continued to impede anti-trafficking endeavours and local observers believe it to be the cause of impunity afforded to firms engaging in illegal recruitment practices that contribute to trafficking."***

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*- U.S. Department of State, Trafficking in Persons Report 2012<sup>420</sup>*

### 5.7.1 Key achievements – Cambodia, Malaysia, Thailand and Vietnam

- 5.7.1.1 In accordance with their obligations under international law to address trafficking in persons, Cambodia, Malaysia, Thailand and Vietnam have introduced domestic legislation to criminalise and prevent trafficking in persons and to protect the victims of trafficking within their jurisdictions (see sections 5.2.2 and 5.2.3). These laws have been accompanied by the establishment of a range of specialised government and law-enforcement agencies to implement and enforce anti-trafficking law and policy.
- 5.7.1.2 Cambodia, Malaysia, Thailand and Vietnam have also taken steps to increased regional cooperation and transnational efforts to address trafficking in persons and protect victims through the frameworks of COMMIT, ASEAN and the Bali Process (see section 5.2.4).

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<sup>420</sup> U.S. Department of State, *op. cit.* (note 319), pp 107-108.

## State of Migration

### An overview of forced displacement in Cambodia

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5.7.1.3 These important achievements establish the institutional structures through which anti-trafficking efforts can be implemented. Their effectiveness, however, depends upon the fair, consistent and adequate enforcement of anti-trafficking agreements and domestic laws. In its annual *Trafficking in Persons Report*, the U.S. Department of State has ranked Cambodia on the Tier 2 List for compliance with minimum standards to eliminate trafficking in persons since 2010. This rank recognises that whilst Cambodia does not fully comply with these minimum standards, it has consistently demonstrated that it is making significant efforts to do so. In 2012 Vietnam was also elevated to the Tier 2 List. By contrast, Malaysia and Thailand remain a level below Cambodia and Vietnam on the Tier 2 Watch List and, in 2012, narrowly escaped being demoted to Tier 3 (the lowest possible rank) after being granted conditional waivers by the U.S. Department of State.<sup>421</sup>

## 5.7.2 Ongoing issues – Cambodia<sup>422</sup>

### *Prosecution of trafficking in persons cases*

5.7.2.1 Cambodia is successfully prosecuting an increasing number of cases involving trafficking in persons under both the Cambodian TIP Law and the Penal Code.<sup>423</sup> In 2011 these cases included prosecutions of owners, staff members and managers of licensed recruiting agencies for crimes related to trafficking for labour exploitation. Despite these positive developments, efforts to secure convictions and address impunity for traffickers continue to be undercut by ongoing difficulties in implementing and enforcing the Cambodian TIP Law. Of particular concern are:

- the relatively low rates of arrest, prosecution and conviction of cases compared to the reported size of the trafficking in persons problem in Cambodia;
- ongoing reluctance to prosecute owners and managers of private recruitment agencies and terminate their licenses for offences related to trafficking in persons; and
- reports that cases involving the sexual exploitation and abuse of women and girls are being resolved extra-judicially through the informal negotiation of compensation payments by perpetrators to the families of victims. These arrangements (which also occur outside the context of trafficking in other sexual assault cases) are compromised by a dramatic imbalance of power between perpetrators and victims. They create impunity for perpetrators and encourage the belief that young women can be sexually exploited for a price.

5.7.2.2 These issues have been attributed to:

- confusion amongst lower-level law-enforcement officers, prosecutors and the judiciary regarding the legal concept of trafficking in persons and the application of the Cambodian TIP Law. In particular, there are reports that judges and prosecutors have inaccurately charged trafficking offenders under non-trafficking laws and prosecuted non-trafficking cases under the Cambodian TIP Law;

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<sup>421</sup> *ibid.*

<sup>422</sup> Section 5.7.2 is largely informed by the U.S. Department of State's *Trafficking in Persons Reports* for 2011 and 2012: U.S. Department of State (2012), *op. cit.* (note 319); U.S. Department of State, *Trafficking in Persons Report 2011*, 27 June 2011. The findings of these reports were confirmed by interviews conducted by the author with key stakeholders in Cambodia in March – June 2012.

<sup>423</sup> U.S. Department of State (2012), *op. cit.* (note 319), p 107.

- endemic corruption at various levels of government and law-enforcement which impedes efforts to investigate and prosecute cases of trafficking in persons. Investigations into or raids on commercial sex establishments and labour recruitment agencies have been undermined by police tip-offs;
- a reluctance to crack down on private recruitment agencies and an unwillingness amongst police to pursue investigations of commercial sex establishments and labour recruitment agencies which are believed to have connections with high-ranking government officials and enjoy a protected status;
- the lack of trust or a functioning relationship between victims of commercial sexual exploitation and law enforcement authorities;
- a lack of coordination between police investigators and prosecutors which impedes effective prosecution of trafficking offenders; and
- other problems with the judicial system, including delayed trials caused by absent defence lawyers and judges, court officials failing to notify parties when trials are resumed, lengthy legal processes and a lack of effective witness and victim protection which dissuades victims from cooperating in cases.

#### ***Protection of victims of trafficking in persons***

5.7.2.3 Local and international organisations who work with victims of trafficking in Cambodia believe that there is considerable progress yet to be made in complying with Cambodia's international and regional obligations to provide support and assistance to victims. In particular:

- local organisations have expressed a strong desire for the RGC to take over responsibility for providing shelters and other post-harm services to victims of trafficking from local and international organisations;
- there is concern about the lack of adequate and legally-binding protections for victims of trafficking under Cambodian domestic law, including the lack of a provision which reaffirms Cambodia's regional commitments to recognise trafficked persons as victims;
- there appears to be a lack of political will to recognise certain trafficked persons as victims and extend protection to them, including local domestic workers; and
- the cost, time and complexity of procedures for victims of trafficking to obtain compensation from or file civil cases against traffickers have rendered these procedures inaccessible to many victims.

#### ***Prevention of trafficking in persons***

5.7.2.4 The RGC has taken positive steps to prevent internal and transnational trafficking in persons, most significantly through public awareness campaigns and the moratorium on sending domestic workers to Malaysia. Despite these measures, Cambodia's efforts to prevent trafficking in persons remains incomplete in the following respects:

- police and immigration officers outside the provincial Anti-Human Trafficking and Juvenile Protection Offices are yet to recognise that they too have an active and fundamental role to play in preventing trafficking in persons;

- law-enforcement and immigration officers on the front-line continue to have fundamental gaps in their understanding of the nature and application of the legal concept of trafficking in persons. Whilst officials in the upper levels of government and law-enforcement appear to have a sound understanding of the concept, this knowledge is yet to be transferred down the ranks to the officers who work most closely with potential traffickers and victims of trafficking;
- significant efforts to reduce local demand for commercial sex acts are yet to be made despite evidence that local clients comprise the majority of demand in Cambodia for sexual services generally and sexual services from children in particular;
- further efforts are required to address corruption within the government and law-enforcement agencies and put an end to the enabling environment for trafficking in persons; and
- labour exchange agreements continue to be negotiated with labour-receiving countries in the absence of adequate safeguards to protect Cambodian workers against trafficking in persons in those countries.

### 5.7.3 Ongoing issues – Malaysia, Thailand and Vietnam

5.7.3.1 Compliance with international law, implementation of regional agreements and the enforcement of local anti-trafficking laws in Malaysia, Thailand and Vietnam are relatively poor, especially in Malaysia and Thailand.

5.7.3.2 Corruption amongst government and law-enforcement officials who are directly involved in and provide impunity to trafficking networks is one of the most significant and widely reported issues undermining anti-trafficking efforts in these countries. Other common issues include insufficient progress in prosecuting cases involving trafficking in persons, a lack of understanding about how to enforce anti-trafficking laws, a failure to properly protect and provide assistance to victims and deficiencies in the functioning of criminal justice systems.

5.7.3.3 Additional areas of concern in Malaysia include:

- a failure by government and law-enforcement authorities to recognise, investigate and prosecute cases involving exploitative labour conditions through the framework of trafficking in persons. Police have reportedly refused to investigate complaints by migrant domestic workers of passport confiscation or withheld wages;
- the forcible detention of victims (including children) in IDCs or ‘government shelters’ which resemble IDCs. There are reports that victims are detained for extensive periods, isolated, denied basic freedoms, unable to work to earn income, have little or no access to adequate legal, health or psychological assistance and care, may be prevented from accessing services provided by external organisations and are punished for misbehaviour. This policy violates Malaysia’s obligations to recognise trafficked persons as victims of a crime and acts as an obstacle to the successful prosecution of cases by acting as a disincentive for victims to report their experiences to the authorities;
- reports that staff from foreign Embassies have been denied access to their citizens who are being held in government ‘shelters’ for trafficked persons; and

- the poor treatment of victims participating in the prosecution of trafficking cases. There are reports that some victims are required to repeat their story multiple times to different officials during the investigation process. During the trial, victims have been locked in their rooms, handcuffed to and from court appearances, subjected to body pat-downs and searches and left uninformed about the legal processes in which they are involved and the expected length of their detention.<sup>424</sup>

#### 5.7.3.4 Additional areas of concern in Thailand include:

- a failure to adequately regulate employment in the fishing industry or to address widespread reports of trafficking in persons on Thai fishing boats;
- structural deficiencies in Thai labour laws which leave certain groups vulnerable to trafficking, including domestic workers and workers in the fishing industry. In particular, Thai laws relating to the fishing industry have been deemed to be outdated, ill-enforced and inadequate to address the problem of trafficking on Thai fishing boats;<sup>425</sup>
- the forced detention of foreign victims of trafficking in government ‘shelters’ until Thai authorities are prepared to repatriate them. There are reports of victims fleeing these shelters due to slow legal and repatriation processes, the inability to earn an income in the shelters, language barriers and distrust of government officials. The practice of preventing victims from earning an income whilst in a government shelter is in direct contravention of the Thai TIP Law which envisions victims receiving permission to temporarily remain and work in Thailand;<sup>426</sup> and
- the fact that a failure to effectively identify trafficked persons leads to victims being punished for violating immigration and other laws.<sup>427</sup>

#### 5.7.3.5 Additional areas of concern in Vietnam include:

- the prosecution of cases involving labour trafficking under criminal fraud statutes and labour laws which do not provide criminal penalties for labour trafficking (rather than under article 119 of the Vietnamese Penal Code);
- a lack of financial resources, inadequately trained personnel, cumbersome mechanisms for interagency cooperation and poorly coordinated enforcement of existing legal instruments which are ill-suited to supporting the identification and prosecution of trafficking cases;
- reports that victims are reluctant to participate in investigations and trials due to the fear of retribution by organised criminal gangs; and
- the lack of adequate support shelters and suitable housing for victims, especially male victims of trafficking.<sup>428</sup>

\* \* \*

<sup>424</sup> For more information see: *ibid.*, pp 234-238.

<sup>425</sup> See for example: IOM (14 January 2011), *op. cit.* (note 415), pp 9-10.

<sup>426</sup> Thai TIP Law, article 37.

<sup>427</sup> For more information see: U.S. Department of State (2012), *op. cit.* (note 319), pp 388-342

<sup>428</sup> For more information see: *ibid.*, pp 370-374.

## 5.8 Avenues for future action

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***“Criminalisation per se is not an end in itself.  
It must be accompanied by the effective enforcement  
of the law and the imposition of appropriate  
punishments for trafficking and related offences.”***

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*– Joy Ngozi Ezeilo, United Nations Special Rapporteur  
on Trafficking in Persons, Especially in Women and Children<sup>429</sup>*

### 5.8.1 Action concerning the prosecution of trafficking in persons cases

5.8.1.1 The capacity of law-enforcement officers, prosecutors and judges to implement the Cambodian TIP Law could be increased by providing further specialised training on:

- how to apply the law in a criminal procedure context;
- the framework for international cooperation with law-enforcement officers in other countries established by the MLA Treaty (paragraph 5.2.4.5); and
- interagency cooperation and coordination between law-enforcement and court officers;

This training could draw from and seek to implement the guidelines and principles set out in resources such as the ASEAN Practitioner Guidelines (paragraph 5.2.4.8), the *ASEAN Handbook on International Legal Cooperation in Trafficking in Persons Cases* and UNODC publications such as the *Anti-Human Trafficking Manual for Criminal Justice Practitioners*.<sup>430</sup>

### 5.8.2 Action concerning the protection of victims

5.8.2.1 Urgent action is required to protect and assist domestic workers who are victims of trafficking in persons. This action could include, at a minimum:

- the repeal, as a matter of priority, of all discriminatory legislative provisions which exclude domestic workers from the protection of labour and industrial relations laws (both in Cambodia and in other countries in the region) so that domestic workers can enjoy full recognition as employees with rights;
- Cambodia and other States in the region ratifying the Domestic Workers Convention (see paragraph 4.2.1.4) and introducing domestic legislation to give effect to its terms; and
- the governments of Cambodia and Malaysia continuing to negotiate a MoU concerning the sending of Cambodian workers to Malaysia which provides a sufficiently robust protection framework for migrant domestic workers.

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<sup>429</sup> Joy Ngozi Ezeilo (UN Special Rapporteur on Trafficking in Persons, especially Women and Children) quoted in ‘UN expert calls for justice for all victims of human trafficking... even the ‘imperfect’ ones’, OHCHR, Geneva, 26 June 2012, < <http://www.ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=12290&LangID=E> > last accessed 30 June 2012.

<sup>430</sup> The *ASEAN Handbook on International Legal Cooperation in Trafficking in Persons Cases*, the *Anti-Human Trafficking Manual for Criminal Justice Practitioners* and other UNODC publications relevant to trafficking in persons are available at: <http://www.unodc.org/unodc/en/human-trafficking/publications.html?ref=menuaside>.

5.8.2.2 The protection frameworks for Cambodian victims of trafficking in persons in Cambodia and foreign countries could be improved by:

- formally recognising trafficked persons as victims under Cambodian domestic law and granting them immunity from punishment for violations of immigration, labour and prostitution laws which occur as a result of being trafficked;
- increasing the capacity of Cambodian Embassy and Consulate staff to identify and assist trafficked persons outside of Cambodia and cooperating with foreign governments to ensure that Cambodian victims are repatriated as quickly as possible and with due regard to the welfare and best interests of the victim; and
- simplifying the procedures for victims of trafficking in persons to obtain restitution and/or compensation and making them more accessible to all victims.

5.8.2.3 Government agencies, law-enforcement bodies and human rights organisations would benefit from a wider dissemination of the various guidelines which have been issued by the RGC concerning the protection of victims of trafficking (see paragraph 5.2.2.14). Specialised training on how to apply these principles in practice would also assist law-enforcement officers to perform their duties more effectively.

### 5.8.3 Action concerning the prevention of trafficking in persons

5.8.3.1 One of the most effective ways to prevent trafficking in persons in Cambodia is to make the business of trafficking unprofitable. This outcome could be achieved by:

- improving the capacity of victims to seek compensation from traffickers;
- using the guaranty money which private recruitment agencies deposit with the MoLVT to cover the costs of assistance to and compensation for workers who are recruited into exploitative workplaces (rather than holding it for or returning it to the recruitment agency); and
- implementing a zero-tolerance policy for small-time brokers and smugglers who are caught transporting people illegally across Cambodian borders.

5.8.3.2 Other measures which would assist to prevent trafficking in persons include:

- reducing local demand for commercial sex services in the same way as steps have already been taken to reduce foreign demand and sex tourism;
- addressing deceptive and unlawful recruitment practices (see paragraph 4.8.3);
- urgently reviewing the nature of the informal credit sector and the way in which unregulated and unscrupulous money lending practices can increase vulnerability to trafficking in persons;
- increasing efforts to address corruption amongst government and law-enforcement officers which facilitates trafficking in persons; and
- continuing efforts to increase public awareness about safe migration, with emphasis on the fact that safe migration involves more than legal migration.

\* \* \*

## 5.9 Partners in Action

### 5.9.1 The Royal Government of Cambodia

- 5.9.1.1 The National Committee to Lead the Suppression of Human Trafficking, Smuggling, Labour Exploitation and Sexual Exploitation of Women and Children (**National Committee to Lead STSLS**) is the RGC body responsible for leading and commanding all national anti-trafficking efforts. The National Committee to Lead STSLS was created in 2009 under the leadership of His Excellency Sar Kheng, Deputy Prime Minister and Minister of the Interior. It is comprised of members from 16 Ministries and includes a Secretariat supported by six inter-ministerial technical working groups:
- the Prevention Working Group led by the MoWA;
  - the Protection, Rehabilitation, Reintegration and Repatriation Working Group led by the Ministry of Social Affairs, Veterans and Youth Rehabilitation (**MoSAVY**);
  - the Law Enforcement Working Group led by the General Commissariat of National Police;
  - the Justice Working Group led by the Ministry of Justice;
  - the International Cooperation Working Group led by the MoWA; and
  - the Child Affairs Working Group led by the MoSAVY.
- 5.9.1.2 The Department of Anti-Human Trafficking and Juvenile Protection within the MoI and provincial Anti-Human Trafficking and Juvenile Protection Offices are responsible for investigating and participating in the prosecution of cases involving trafficking in persons.
- 5.9.1.3 The MoSAVY collaborates with local and international organisations to provide protection services to victims, including repatriation, recovery, rehabilitation and reintegration services.
- 5.9.1.4 The MoWA works to prevent trafficking in persons and collaborate with local and international organisations to provide protection services for women, including rehabilitation and reintegration.
- 5.9.1.5 The Coordinated Mekong Ministerial Initiative Against Trafficking Task Force in Cambodia (**COMMIT Task Force**) is the Cambodian government body responsible for implementing the bilateral and multilateral agreements to which Cambodia is a State Party (including the COMMIT MoU), strengthening cooperation on anti-trafficking efforts amongst GMS countries and contributing to the development of national plans of action concerning trafficking in persons.



## 5.9.2 United Nations agencies

- 5.9.2.1 UNIAP has a mandate to facilitate a stronger and more coordinated response to trafficking in persons in the GMS. In fulfilling this mandate, and as the COMMIT Secretariat, UNIAP coordinates with the RGC, other United Nations agencies and local and international organisations on national and regional anti-trafficking projects. UNIAP's main functions include: 1) supporting the RGC and other governments in the region in combatting trafficking and implementing the COMMIT SPA III; 2) maximising the United Nations' contribution to anti-trafficking responses (including to the COMMIT process); 3) facilitating the optimal allocation of anti-trafficking resources and 4) identifying and supporting special projects to address new and emerging issues and opportunities in the field of trafficking in persons.
- 5.9.2.2 The ILO works collaboratively with the RGC and other governments in the region, UNIAP and local and international organisations to strengthen the capacity of governments to combat trafficking in persons. The ILO's main functions include assisting in the drafting and implementation of bilateral agreements on trafficking in persons and encouraging safe migration.
- 5.9.2.3 The OHCHR, UNICEF and UN Women also have important roles to play in supporting the RGC, UNIAP and local and international organisations in adopting a rights-based approach to trafficking in persons and addressing the effects of trafficking on victims.

## 5.9.3 Local and international organisations

- 5.9.3.1 The IOM works in Cambodia and other countries in the region with governments, organisations and trafficked persons. It has a number of projects which seek to strengthen the capacity of governments to address trafficking in persons, prevent trafficking in persons and provide assistance to victims. In particular, the IOM has projects which address the trafficking of Cambodian men into the Thai fishing industry and the vulnerability of migrant workers to trafficking. Through its Global Assistance Fund the IOM facilitates the repatriation of Cambodian victims of trafficking in persons.
- 5.9.3.2 The CWCC provides a range of services to women and children who have experienced violence and abuse, including victims of trafficking in persons. These services include temporary safe shelters, legal assistance in court cases, services for the repatriation, rehabilitation and reintegration of victims and awareness campaigns for communities and law-enforcement officers to prevent trafficking in persons and violence against women. CWCC has offices in Phnom Penh, Poipet, Siem Reap and Kampong Thom.
- 5.9.3.3 LSCW works to promote gender equality, protect children and women from all forms of exploitation, push for the respect of their rights and increase their awareness of those rights. LSCW also works with Cambodian men, women and children victims of trafficking in persons. It provides legal assistance and support to victims and promotes research into the experiences of women and children and Cambodian migrant workers. LSCW has offices in Phnom Penh, Koh Kong province and Prey Veng province.
- 5.9.3.4 Chab Dai Coalition is an international NGO founded in Cambodia in 2005 which aims to facilitate networking and information sharing on trafficking issues and to empower and equip communities and village leaders to protect children from trafficking, abuse and exploitation.

## State of Migration

### An overview of forced displacement in Cambodia

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5.9.3.5 An extensive network of other local and international organisations also work on issues related to trafficking in persons, including legal issues and prosecutions, victim protection and assistance and prevention strategies. For a full list of these organisations see the UNIAP Cambodia Human Trafficking Stakeholder Directory at: [http://www.no-trafficking.org/cambodia\\_dir.html](http://www.no-trafficking.org/cambodia_dir.html).

## 5.9.4 Regional entities

5.9.4.1 Within the ASEAN framework, the ASEAN Ministerial Meeting on Transnational Crime (**MMTC**) is the entity responsible for formulating and overseeing ASEAN policy on the issue of trafficking in persons. Within the MMTC, SOMTC and its Working Group on Trafficking in Persons are the primary ASEAN mechanisms tasked with drafting policies and developing common standards and approaches to trafficking in persons within and between ASEAN Member States and considering ways to strengthen regional and international cooperation to prevent and combat trafficking.

## Chapter Six

# Land disputes and forced evictions

***“Give them the land title and their house building will increase, the growth will increase. Now, they do not dare to build houses because they live in fear since [the land title] is not clear. So we have to facilitate them as legal [occupants] by giving them a primary land title.”***

– Prime Minister Hun Sen<sup>431</sup>

***“There is no clearer example in Cambodia today of the rich and powerful exploiting the poor and marginalized. And no better opportunity for the judicial system to finally play its role in upholding the law and protecting the rights of ordinary citizens against the abuse of power.”***

– Peung Yok Hiep, Director of Legal Aid of Cambodia<sup>432</sup>

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<sup>431</sup> Address to students who have volunteered to measure land at the Koh Pich Convention Centre on 26 June 2012 quoted in Sovuthy, K. and Naren, K., ‘Hun Sen lauds land project, lashes media’, 27 June 2012, *The Cambodia Daily*, p 1.

<sup>432</sup> Peung Yok Hiep (Director of Legal Aid of Cambodia) talking about a land dispute involving Jarai Indigenous peoples in Ratanakiri quoted in Amnesty International, *Cambodia: a Risky Business – Defending the Right to Housing*, September 2008, p 8.

## 6.1 What are land disputes and forced evictions?

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***“Forced evictions and homelessness intensify social conflict and inequality and invariably affect the poorest, most socially, economically, environmentally and politically disadvantaged and vulnerable sectors of society.”***

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– United Nations Commission on Human Rights<sup>433</sup>

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***“The eradication of hunger and poverty, and the sustainable use of the environment, depend in large measure on how people, communities and others gain access to land, fisheries and forests. The livelihoods of many, particularly the rural poor, are based on secure and equitable access to and control over these resources. They are the source of food and shelter; the basis for social, cultural and religious practices; and a central factor in economic growth.”***

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– United Nations Committee on World Food Security<sup>434</sup>

### 6.1.1 Land disputes

6.1.1.1 Land disputes can arise between individuals, communities, private companies and/or the government for a number of reasons, including uncertainty as to land title or land tenure.

#### ***Land title***

6.1.1.2 **Title** or land title is a legal right of ownership of land.<sup>435</sup> In most countries, title is recorded and/or guaranteed by the State through the use of a **land registration system**, an official public system which records legal rights to land. Land registration ensures open and honest dealings with land by both citizens and government. Land registration systems can be based on the registration of deeds (written legal instruments which transfer ownership of land) or the registration of title (a Torrens-style system). Under both systems title to land is enforceable against everyone, including the government.

6.1.1.3 Under a deeds registration system, the deed itself transfers title and the public title register merely notifies other people that the land has been transferred. In order to encourage people to use the registration system, a registered deed will defeat the title given by an unregistered deed. Thus, in the event of a dispute over ownership of land, the person who holds a deed which has been registered will be the legal owner of the land. However, if a deed is defective (for example, if it has been forged) it will be deemed not to have transferred title even if it is registered.

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<sup>433</sup> UN Commission on Human Rights, *Forced Evictions*, Resolution 1993/77, 10 March 1993, Preamble.

<sup>434</sup> UN Committee on World Food Security (CFS), *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*, 11 May 2012 (**Tenure Governance Guidelines**), Preamble.

<sup>435</sup> In some contexts the word ‘title’ may also be used to refer to the legal document which land-owners possess as proof of their ownership of land. For the purpose of this chapter, ‘title’ refers to the legal right of ownership and ‘land certificate’ refers to the physical document which provides evidence of ownership.

- 6.1.1.4 In contrast, under a Torrens-style registration of title system, the act of registration transfers title and deeds are not used. When land is sold, inherited or changes hands for other reasons, title (ownership) is not transferred until the legal documents evidencing the transfer are recorded in the public register. Instead of merely notifying other people that land has been transferred, the public register is determinative of title. Thus, in the event of a dispute over ownership of land, the person who is recorded in the register as having title will be the legal owner of the land. If the transfer documents are defective (for example, if they have been forged), and the person who registers them is not aware of the defect, they will nevertheless get a valid title guaranteed by the State.
- 6.1.1.5 A **cadastre** is a comprehensive public register of data about the land properties within a country or district, including information about the ownership, location and dimensions of properties. Cadastres are prepared by conducting cadastral surveys of the boundaries of land parcels and preparing cadastral maps which indicate those boundaries. Cadastres were originally used for taxation purposes but may also be used for the purpose of land registration. Cadastres reflect the location and size of land but are not evidence of title. In some countries land registration systems and cadastres are used together to show who owns land and how (as recorded in the public title register) and the location and size of that land (as recorded in the cadastre).

### *Land tenure*

- 6.1.1.6 Whereas title refers to the legal relationship between people and land (ownership), **land tenure** refers to the legal relationship amongst people or between people and the government which determines who can use land, for how long and under what conditions. Land tenure is derived from the rules, institutions and systems which govern the use of land and may be based on written policies and laws and/or unwritten customs and practices.<sup>436</sup>
- 6.1.1.7 **Land tenure insecurity** occurs when land-owning or land-using households risk losing their land rights in the future. A number of factors can give rise to this insecurity, including a failure to uphold and enforce effective legal and administrative regimes to protect land rights. Land tenure insecurity resulting in landlessness can contribute to food insecurity and poverty, lead to violations of human rights, deter responsible investment and improvement of land and be a cause of social and political tensions. The United Nations Food and Agriculture Organisation (**FAO**) reports that: “*having secure and equitable access to natural resources can allow people to produce food for their consumption and to increase income. Inadequate and insecure tenure rights to natural resources often result in extreme poverty and hunger.*”<sup>437</sup>

## 6.1.2 Forced evictions

- 6.1.2.1 The United Nations Committee on Economic, Social and Cultural Rights (**CESCR**) defines **forced evictions** as: “*the permanent or temporary removal against the will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of and access to appropriate forms of legal or other protection.*”<sup>438</sup>

<sup>436</sup> FAO, *Governance of Tenure*, undated, < <http://www.fao.org/nr/tenure/en/> > last accessed 30 June 2012; International Fund for Agricultural Development, ‘Dimensions of rural poverty – land – definitions’, *Rural Poverty Portal*, undated, < <http://www.ruralpovertyportal.org/web/guest/topic/definition/tags/land> > last accessed 30 June 2012.

<sup>437</sup> FAO, *loc. cit.* (note 436).

<sup>438</sup> CESCR, *The Right to Adequate Housing (Art. 11(1) of the Covenant): Forced Evictions*, General Comment no. 7, Sixteenth session, 20 May 1997, para 3 (*emphasis added*).

- 6.1.2.2 Evictions in themselves are not necessarily unlawful, nor will they always constitute a violation of human rights. What distinguishes forced evictions from other (lawful) evictions is a lack of due process and a denial of access to appropriate legal or other protections, including fair compensation and respect for the right to adequate housing.

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## 6.2 International, domestic and regional law

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***“Forced evictions constitute gross violations of a range of internationally recognized human rights, including the human rights to adequate housing, food, water, health, education, work, security of the person, security of the home, freedom from cruel, inhuman and degrading treatment, and freedom of movement. Evictions must be carried out lawfully, only in exceptional circumstances, and in full accordance with relevant provisions of international human rights and humanitarian law.”***

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– Miloon Kothari, former United Nations Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living<sup>439</sup>

### 6.2.1 International law

#### ***Fundamental human rights relating to land***

- 6.2.1.1 Under international law, Cambodia is legally bound to recognise the right of every person to an adequate standard of living for their health and well-being, which includes adequate housing.<sup>440</sup> The CRC and the CEDAW make particular note of this right for children and rural women.<sup>441</sup> Cambodia is also legally bound to respect and uphold the rights of all persons to own property and not to be arbitrarily deprived of property.<sup>442</sup>
- 6.2.1.2 In addition to these rights which relate specifically to housing and land, Cambodia is legally bound to respect and uphold a range of rights which may be threatened by forced evictions and situations of homelessness and landlessness. Of particular note are the rights to take part in the conduct of public affairs and to employment, education, the highest attainable standards of physical and mental health and freedom from hunger and arbitrary interference with privacy, the family or the home.<sup>443</sup>
- 6.2.1.3 International law imposes special obligations on States in cases involving children. Where land evictions affect children Cambodia is required to take into account the best interests of the child as a primary consideration and ensure to children such protection and care as is necessary for their well-being and the full enjoyment of their rights.<sup>444</sup>

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<sup>439</sup> Kothari, M. (United Nations Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living (**UN Special Rapporteur on Adequate Housing**)), *Report on Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled ‘Human Rights Council’*, UN Doc. A/HRC/4/18, 5 February 2007, Annex 1 (para 6).

<sup>440</sup> UDHR, article 25(1); ICESCR, article 11(1); ICERD, article 5(e)(iii).

<sup>441</sup> CRC, articles 27(1) and (3); CEDAW, article 14(2)(h).

<sup>442</sup> UDHR, article 17(2); ICERD, article 5(d)(v).

<sup>443</sup> UDHR, articles 12, 17, 23 and 26; ICESCR, articles 6, 11(2), 12 and 13; ICCPR, articles 17 and 25(a).

<sup>444</sup> CRC, articles 3-4.

***Rights of Indigenous peoples***

- 6.2.1.4 The *United Nations Declaration on the Rights of Indigenous Peoples 2007 (UNDRIP)* sets out a number of rights and protections for Indigenous peoples which may be relevant in the context of land disputes. Indigenous peoples enjoy protection against any action which has the aim or effect of dispossessing them of their lands, territories or resources, including forcible removal or relocation without the free, prior and informed consent of the Indigenous peoples concerned and prior agreement on just and fair compensation.<sup>445</sup> Indigenous peoples also have the right to participate in decision-making and to be consulted on matters which affect their rights.<sup>446</sup>
- 6.2.1.5 The ICCPR recognises the rights of minorities and Indigenous peoples to enjoy their own culture, profess and practise their own religion, and use their own language. These cultural rights include the enjoyment of ways of life that are linked to land and the use of land and natural resources.<sup>447</sup>
- 6.2.1.6 The CERD has called upon all States Parties to the ICERD (including Cambodia):
- to recognise and protect the rights of Indigenous peoples to own, develop, control and use their communal lands, territories and resources;
  - to return those lands and territories to Indigenous peoples where they have been taken away without free and informed consent; and
  - where it is not possible to return land which has been taken away from Indigenous peoples, to provide them with just, fair and prompt compensation.<sup>448</sup>

***Forced evictions and land tenure insecurity***

- 6.2.1.7 As a corollary to the right to adequate housing and other rights set out above, the CESCR has stated that “*all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats.*”<sup>449</sup> The UN Commission on Human Rights has urged all governments to undertake immediate measures to eliminate the practice of forced evictions, confer legal security of tenure on all persons threatened with forced eviction and provide immediate restitution, compensation and/or appropriate and sufficient alternative accommodation or land to persons and communities which have been forcibly evicted.<sup>450</sup>
- 6.2.1.8 The CESCR has set out minimum guidelines which States Parties to the ICESCR (including Cambodia) should observe in order to comply with international human rights law when carrying out evictions (**CESCR Eviction Guidelines**). In particular, the CESCR Eviction Guidelines state that evictions should only be carried out when:
- all feasible alternatives have been explored in consultation with the affected persons, with a view to avoiding or minimising the need to use force;

<sup>445</sup> UNDRIP, articles 8(2)(b), 10, 25-30 and 32.

<sup>446</sup> *ibid.*, articles 18, 19

<sup>447</sup> United Nations Human Rights Committee, *The Rights of Minorities (Article 27)*, General Comment no. 23, Fiftieth session, 8 April 1994, para 7.

<sup>448</sup> CERD, *Indigenous Peoples*, General Recommendation no. 23, Fifty-first session, 18 August 1997, para 5.

<sup>449</sup> CESCR, *The Right to Adequate Housing (Article 11(1))*: General Comments, General Comment no. 4, Sixth session, 13 December 1991, para 8(e).

<sup>450</sup> UN Commission on Human Rights, *op. cit.* (note 433), paras 3 and 4.

## State of Migration

### An overview of forced displacement in Cambodia

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- the affected persons have been given adequate and reasonable notice prior to the scheduled date of eviction;
- government officials or their representatives are present during the eviction and the persons carrying out the eviction are properly identified;
- there is not particularly bad weather and it is not night time;
- legal remedies or procedures have been provided to those who are affected by eviction orders, including legal aid and adequate compensation for any property which is affected; and
- the eviction will not result in individuals being rendered homeless or vulnerable to the violation of their other rights, including the rights to life, security of the person, non-interference with privacy, family and home and to the peaceful enjoyment of possessions.<sup>451</sup>

6.2.1.9 The UN Special Rapporteur on Adequate Housing has developed *Basic Principles and Guidelines on Development-Based Evictions and Displacement (Basic Principles on Evictions)*.<sup>452</sup> The Basic Principles on Evictions provide further guidance to States on how to ensure that forced evictions comply with international law by setting out a comprehensive package of principles concerning the general obligations of States, actions which should be taken prior to, during and after an eviction and remedies for people affected by forced evictions.

6.2.1.10 On 11 May 2012 the CFS endorsed the Tenure Governance Guidelines (see note 434) which provide voluntary, non-binding guidance to States and other key actors on improving the governance of tenure and promoting secure tenure rights and equitable access to land. These guidelines were elaborated with a view to progressively realising poverty eradication, sustainable livelihoods, social stability, housing security, rural development, environmental protection, the right to adequate food and sustainable social and economic development.<sup>453</sup> The Tenure Governance Guidelines recognise that:

- States have obligations under international law to protect human rights and provide secure tenure rights to land;
- States should:
  - protect tenure right holders against the extinguishment or arbitrary loss of their tenure rights and forced evictions;
  - provide just compensation where land is taken for public purposes;
  - prevent tenure disputes from arising and escalating into violent conflicts, including by providing access to timely, affordable and effective remedies through impartial and competent judicial and administrative bodies; and
  - prevent corruption in all forms and at all levels of land tenure systems and institutions through transparent processes and decision-making;
- non-State actors (including businesses) have responsibilities to respect human rights and legitimate tenure rights; and

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<sup>451</sup> CESCR (1997), *op. cit.* (note 438), paras 13-16.

<sup>452</sup> Kothari (2007), *op. cit.* (note 439), Annex 1.

<sup>453</sup> Tenure Governance Guidelines, para 1.1.



- Indigenous peoples may have customary land tenure systems which should be recognised and protected.

### ***Rights of persons who seek to assert or defend property and human rights***

6.2.1.11 Under international human rights law Cambodia is legally bound to recognise and respect the following rights for all persons, including those who seek to assert or defend property and human rights in the context of land disputes:

- the right to life, liberty and security of the person;<sup>454</sup>
- the rights to freedom of expression and peaceful assembly;<sup>455</sup>
- the right to freedom from arbitrary arrest or detention;<sup>456</sup>
- the right of all accused persons to a fair and public hearing by a competent, independent and impartial tribunal established by law;<sup>457</sup> and
- the right to an effective remedy determined by competent judicial, administrative or legislative authorities in the event of violation of human rights.<sup>458</sup>

### ***International law governing the conduct of law-enforcement officers***

6.2.1.12 The *United Nations Code of Conduct for Law Enforcement Officials 1979 (Law Enforcement Code of Conduct)* sets out a number of non-binding principles relevant to the role and conduct of law-enforcement officers who carry out their duties in the context of a dispute. In particular, the Law Enforcement Code of Conduct requires that law-enforcement officers:

- respect and protect human dignity and maintain and uphold the human rights of all persons;<sup>459</sup> and
- only use force when strictly necessary and to the extent required for the performance of their duty.<sup>460</sup>

6.2.1.13 The *United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials 1990 (Basic Principles on the Use of Force and Firearms)* also set out non-binding principles relevant to the role of law-enforcement officers involved in land disputes. In particular, the Basic Principles on the Use of Force and Firearms state that:

- in carrying out their duties law-enforcement officers shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result;<sup>461</sup>

<sup>454</sup> UDHR, article 3; ICCPR, articles 6 and 9.

<sup>455</sup> UDHR, articles 19 and 20; ICCPR articles 19 and 21.

<sup>456</sup> UDHR, article 9; ICCPR, article 9.

<sup>457</sup> UDHR, article 10; ICCPR, article 14.

<sup>458</sup> UDHR, article 8; ICCPR, article 2(3).

<sup>459</sup> Law Enforcement Code of Conduct, article 2.

<sup>460</sup> *ibid.*, article 3.

<sup>461</sup> Basic Principles on the Use of Force and Firearms, article 4.

## State of Migration

### An overview of forced displacement in Cambodia

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- whenever the lawful use of force and firearms is unavoidable, law-enforcement officers shall:
  - exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved;
  - minimise damage and injury, and respect and preserve human life;
  - ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment; and
  - ensure that relatives or close friends of the injured or affected person are notified at the earliest possible moment;<sup>462</sup>
- law-enforcement officers shall only use firearms against other persons:
  - in self-defence or the defence of others against an imminent threat of death or a grave threat to life;
  - when less extreme means are insufficient to achieve this objective;
  - after the officials have identified themselves, given a clear warning of their intention to use firearms and allowed a sufficient time for the warning to be observed;<sup>463</sup>
- in recognition of the fact that everyone has the right to participate in lawful and peaceful assemblies, law-enforcement officers involved in dispersing peaceful assemblies shall avoid the use of force or restrict such force to the minimum extent necessary. Law-enforcement officers involved in dispersing violent assemblies may only use firearms when less dangerous means are not practicable, to the minimum extent necessary and in accordance with the limits set out above;<sup>464</sup> and
- exceptional circumstances such as internal political instability or any other public emergency may not be invoked to justify any departure from the Basic Principles on the Use of Force and Firearms.<sup>465</sup>

## 6.2.2 Domestic law

### *Sources of law*

6.2.2.1 The primary domestic legal instruments relevant to land issues in Cambodia are:

- the Constitution;
- the Land Law which establishes a framework for the recognition of land ownership and property rights in Cambodia; and
- an extensive series of sub-decrees implementing the Land Law and relevant to other aspects of land ownership and use.<sup>466</sup>

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<sup>462</sup> *ibid.*, article 5.

<sup>463</sup> *ibid.*, articles 9 and 10.

<sup>464</sup> *ibid.*, articles 12-14.

<sup>465</sup> *ibid.*, article 8.

<sup>466</sup> These sub-decrees include: *Sub-decree no. 46 on the Procedures to Establish Cadastral Index Map and Land Register* dated 31 May 2002 (**Sub-decree on Systematic Land Registration**); *Sub-decree no. 47 on Organization and Functioning of the Cadastral Commission* dated 31 May 2002 (**Sub-decree on the Cadastral Commission**); *Sub-decree no. 48 on Sporadic Land Registration* dated 31 May 2002 (**Sub-decree on Sporadic Land Registration**); *Sub-decree no. 19 on Social Land Concessions* dated 19 March 2003 (**Sub-decree on SLCs**); *Sub-decree no. 146 on Economic Land Concessions* dated 27 December 2005 (**Sub-decree on ELCs**); *Sub-decree no. 118 on State Land Management* dated 7 October 2005 (**Sub-decree on State Land Management**); *Sub-decree no. 83 on Procedures of Registration of Land of Indigenous Communities* dated 9 June 2009 (**Sub-decree on Indigenous Land**).

### *Categories of land*

6.2.2.2 Land in Cambodia is divided into the following distinct categories, each of which is governed by different legal rules and procedures concerning ownership and use:

- *State public land*, being land belonging to the State which has a public interest use and comprises:
  - land having a natural origin (forests, natural lakes, etc.);
  - land developed for general public use (ports, railways, etc.);
  - land made available in its natural state or specifically developed for public use (roads, public parks, etc.);
  - land allocated to render a public service (public schools and hospitals, etc.);
  - natural reserves protected by law;
  - archeological, cultural and historical patrimonies;
  - Royal properties that are not the private properties of the Royal Family; or
  - other land having public interest use characteristics.<sup>467</sup>

This land is inalienable and cannot be acquired by **extraordinary acquisitive possession** (see paragraph 6.2.2.10), although the RGC may grant temporary and revocable authorisations to occupy and/or use it.<sup>468</sup> State public land which loses its public interest use may be converted into State private land by the RGC;<sup>469</sup>
- *State private land*, which comprises all other land which is not legally privately or collectively owned or possessed under the Land Law.<sup>470</sup> This land may be the subject of a sale, lease or grant of a land concession (including a Social Land Concession (**SLC**) or an Economic Land Concession (**ELC**));<sup>471</sup>
- the *private property* of an individual or legal entity; or
- the *collective property* of a group or community, including:
  - land belonging to Indigenous communities; and
  - land within the premises of Buddhist monasteries which is allocated in perpetuity to the Buddhist religion and cannot be sold or exchanged.<sup>472</sup>

6.2.2.3 The Land Law and a series of sub-decrees set out frameworks for the mapping, identification, classification and registration of various types of land. The identification and mapping of State land is to be carried out through a “*coordinated and transparent process*” involving public consultation.<sup>473</sup>

### *Domestic law concerning land registration*

6.2.2.4 Private ownership of land in Cambodia is guaranteed by the State through the use of a public land registration system which is implemented by the **Cadastral Commissions** under the supervision of the Ministry of Land Management, Urban Planning and Construction (**MoLMUPC**).<sup>474</sup> Land rights are recorded by the Cadastral Commissions in the **Land Register**.<sup>475</sup>

<sup>467</sup> Land Law, article 15; Sub-decree on State Land Management, article 4.

<sup>468</sup> Land Law, article 16.

<sup>469</sup> *ibid.*

<sup>470</sup> *ibid.*, articles 12 and 17; Sub-Decree on State Land Management, articles 3(a) and 5.

<sup>471</sup> Land Law, article 17; Sub-decree on SLCs; Sub-decree on ELCs.

<sup>472</sup> *ibid.*, chapter 3 (part 1).

<sup>473</sup> Sub-Decree on State Land Management, article 6.

<sup>474</sup> Land Law, article 226; Sub-decree on the Cadastral Commission.

<sup>475</sup> Land Law, article 229.

## State of Migration

### An overview of forced displacement in Cambodia

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- 6.2.2.5 The land registration system in Cambodia is concerned with two types of registration:
- the initial registration of unregistered land which can occur in three ways:
    - by **sporadic land registration**, whereby individual owners of unregistered land apply to their District Cadastral Commission (**DCC**) for registration when they need or choose to do so. Once the procedure set out in the Sub-decree on Sporadic Land Registration has been completed and if the application is successful, the DCC will enter the land in a cadastral map, the Provincial Cadastral Commission (**PCC**) will record the land in the public Land Register and the owner will receive a land certificate acknowledging their ownership of the land;<sup>476</sup>
    - by **systematic land registration**, whereby the government undertakes cadastral surveys, prepares cadastral maps, registers unregistered land and issues land certificates in designated areas.<sup>477</sup> Between 2002 and 2009 land was systematically registered in 2,323 villages and more than 1 million land certificates were issued within the framework of the World Bank-funded Land Management and Administration Project (**LMAP**).<sup>478</sup> In 2012 the RGC is yet to complete the systematic registration of land; or
    - by a special procedure for the registration of land which is collectively owned by Indigenous communities;<sup>479</sup> and
  - the registration of subsequent dealings with registered land, including the transfer of title (ownership) by sale, gift, exchange or succession and other dealings such as subdivisions and mortgages. The legal documents evidencing these dealings must be filed with the Cadastral Commissions which will record them in the Land Register.<sup>480</sup>
- 6.2.2.6 The system for land registration in Cambodia appears to be based on the registration of title rather than the registration of deeds (see paragraph 6.1.1.2), however at this early stage of its development and implementation it remains somewhat difficult to classify.

#### ***Domestic law concerning possession and ownership of land***

- 6.2.2.7 All Cambodian citizens and entities have the right to own land and legal ownership is to be protected by law.<sup>481</sup> The RGC may only expropriate (confiscate) private property from a person in the public interest, as provided for by law and after the payment of fair and just compensation.<sup>482</sup> Claims of land ownership prior to 1979 are not recognised.<sup>483</sup>
- 6.2.2.8 Under Cambodian domestic law, as in many legal systems, ownership of land is different from possession of land. A person who owns their land has a legally enforceable right to deal with it as he or she sees fit (within the limits of the law), including to occupy it to the exclusion of all other persons or to sell it. By contrast, a person who possesses land may have a right to occupy and/or use it, but those rights are not necessarily permanent and he or she may not have a right to sell the land.

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<sup>476</sup> For more information about sporadic land registration see: Sub-decree on Sporadic Land Registration.

<sup>477</sup> For more information about systematic land registration see: Sub-decree on Systematic Land Registration.

<sup>478</sup> For more information about the LMAP see: Grimsditch, M. and Henderson, N., *Untitled: Tenure Insecurity and Inequality in the Cambodian Land Sector*, Bridges Across Borders Southeast Asia, Centre on Housing Rights and Evictions and JRS Cambodia, 2009.

<sup>479</sup> A separate land register exists for the registration of this land: Sub-decree on Indigenous Land, article 11.

<sup>480</sup> Land Law, articles 238 and 244.

<sup>481</sup> Under the Law on Foreign Property Ownership non-citizens are granted limited rights to own property in Cambodia.

<sup>482</sup> Constitution, article 44; Land Law, articles 4, 5, 8 and 9.

<sup>483</sup> Land Law, article 7.

- 6.2.2.9 Under the Land Law there are only two ways in which a private individual who possesses land may transform his or her possession into a right of ownership: by extraordinary acquisitive possession or by possession of land the subject of an SLC.
- 6.2.2.10 The process for obtaining title to land by extraordinary acquisitive possession is set out in Chapter 4 of the Land Law as follows:
- any person who enjoyed peaceful, uncontested possession of land that could “*lawfully be privately possessed*”<sup>484</sup> for at least 5 years prior to the promulgation of the Land Law in 2001 obtained a right to request a land certificate evidencing their title to the land (ownership). Any person who had enjoyed peaceful, uncontested possession of land for less than 5 years in 2001 was able to request to extend their possession until they reached the five year requirement and obtained the right to request a land certificate. Any person who has enjoyed peaceful and uncontested possession of land since prior to the promulgation of the Land Law in 2001 but has not yet applied for confirmation of title still has a right to do so;<sup>485</sup>
  - if the request for confirmation of title is contested, the person challenging the request must prove that he or she meets the criteria set out above or that he or she purchased the land from the original possessor;<sup>486</sup>
  - in order for confirmation of title to be granted, the applicant’s possession of land must have been unambiguous, non-violent, notorious to the public, continuous and in good faith;<sup>487</sup> and
  - in the period until the Cadastral Commissions (with the ability to confirm title and issue land certificates) and the Land Register were established, persons in possession of land were deemed to have a right *in rem* over the land (a legally enforceable right to possess but not own land) and could be issued with certificates recognising their ‘title of possession’. When the Land Register was established, certificates evidencing title of possession were only deemed to constitute evidence of title (ownership) in the absence of any dispute. In the event of a dispute, a further investigation as to ownership was carried out with titles of possession providing evidence but not determinative proof of title.<sup>488</sup>
- 6.2.2.11 The process for converting land the subject of a SLC into ownership is set out in the Sub-decree on SLCs. Any person who receives land as part of a SLC grant and occupies it for 5 years will obtain a right to ownership of the land and may request a land certificate.<sup>489</sup>
- 6.2.2.12 Only legal possession can lead to ownership, which means that possession of State public property or illegal possession of any other land will never give rise to a right to own the land.<sup>490</sup> Any person who unlawfully entered into possession of land after the promulgation of the Land Law in 2001 is deemed to be an illegal occupant and cannot convert their possession into ownership.<sup>491</sup>

<sup>484</sup> The precise meaning of this expression is somewhat ambiguous which has created uncertainty as to land ownership and rights in a number of cases.

<sup>485</sup> Land Law, articles 29- 31 and 42.

<sup>486</sup> *ibid.*, article 30.

<sup>487</sup> *ibid.*, article 38.

<sup>488</sup> *ibid.*, articles 39 and 40.

<sup>489</sup> Sub-decree on SLCs, article 18.

<sup>490</sup> Land Law, articles 6 and 43.

<sup>491</sup> *ibid.*, article 34.

## State of Migration

### An overview of forced displacement in Cambodia

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6.2.2.13 In addition to the two abovementioned processes for converting possession into ownership, private individuals may obtain title to land through conventional procedures for the acquisition of land (including sale, gift, exchange or succession).<sup>492</sup>

#### *Domestic law concerning land concessions*

6.2.2.14 Chapter 5 of the Land Law provides for the grant of land concessions which are intended to respond to a social or economic purpose. Land concessions are legal rights to occupy and use (but not own) State private property which are established by legal documents (contracts). There are several types of land concessions including:

- SLCs which are intended to provide a social benefit to “*the poor who lack land for residential and/or family farming purposes*”<sup>493</sup> by allowing beneficiaries to build residential constructions and/or to cultivate lands belonging to the State;
- ELCs which respond to an economic purpose by allowing beneficiaries to clear land for industrial agricultural exploitation; and
- other types of land concessions which fall outside the scope of the Land Law.

6.2.2.15 The procedures for granting land concessions are determined by sub-decree.<sup>494</sup> Key elements of these procedures include that the grant of a land concession must involve public consultation and social and environmental impact assessments must be carried out prior to any grant.<sup>495</sup> Land concessions must not exceed 10,000 hectares in size and land concessions granted to the same person or to legal entities controlled by the same person must jointly not exceed this limit.<sup>496</sup> Land concessions must not violate roadways, sidewalks, waterways, pools, ponds and water reserves used by the people in their daily lives.<sup>497</sup> The maximum duration of a land concession is 99 years.<sup>498</sup> Concessions may be revoked by the RGC in the event of non-compliance with legal requirements or cancelled by a court if the concessionaire does not comply with the terms of the contract.<sup>499</sup> Land concessions which fail to comply with Chapter 5 of the Land Law are null and void.<sup>500</sup>

6.2.2.16 On 7 May 2012 Prime Minister Hun Sen signed an *Order on the Measures to Strengthen and Increase the Effectiveness of the Management of Economic Land Concessions (Order on ELCs)* which placed a temporary ban on the granting of ELCs and called for a review of existing ELCs to ensure compliance with the relevant laws. ELCs which had already obtained in principle approval from the RGC and were in the course of being negotiated prior to the date of the Order on ELCs are not affected by the moratorium.<sup>501</sup> In June 2012 media sources reported that the RGC had violated the Order on ELCs by granting a series of new ELCs covering more than 44 hectares of land.<sup>502</sup> The RGC has denied that these are in fact new ELCs and claims that they had already been approved prior to the

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<sup>492</sup> *ibid.*, chapter 6.

<sup>493</sup> Sub-decree on SLCs, article 2(a).

<sup>494</sup> See for example: Sub-decree on SLCs; Sub-decree on ELCs.

<sup>495</sup> Sub-decree on SLCs, articles 6, 8, 9 and 12-14; Sub-decree on ELCs, articles 4, 7, 10, 12-15, 20, 35 and 37.

<sup>496</sup> Land Law, article 59.

<sup>497</sup> *ibid.*, article 58.

<sup>498</sup> *ibid.*, article 61.

<sup>499</sup> *ibid.*, article 55.

<sup>500</sup> *ibid.*, article 18.

<sup>501</sup> Order on ELCs, clause 4.

<sup>502</sup> Naren, K. and Seiff, A., ‘Land concessions signed after Hun Sen ordered moratorium’, *The Cambodia Daily*, 15 June 2012, p 1; Petty, M. and Birsell, R., ‘Cambodia approves land concessions, despite ban’, *Reuters*, 26 June 2012.

signing of the Order on ELCs and therefore were not covered by the moratorium.<sup>503</sup> It is unclear how many other ELCs have received in principle approval and fall outside the scope of the Order on ELCs.

### *Domestic law concerning the land of Indigenous communities*

- 6.2.2.17 Indigenous communities in Cambodia may be granted collective ownership over their traditional lands, including the land where they have established their residences and carry out traditional agriculture.<sup>504</sup> Collective ownership may be granted over both State public property and State private property.<sup>505</sup> Indigenous communities enjoy the same rights and protections of ownership as are enjoyed by private land owners, however they do not have the right to dispose of collectively owned land which is also State public property.<sup>506</sup> No authority outside an Indigenous community may acquire any rights to land belonging to the community.<sup>507</sup>

### *Domestic law concerning land disputes*

- 6.2.2.18 A series of sub-decrees establishes a framework for the resolution of land disputes.<sup>508</sup> When disputes arise in relation to unregistered land in areas outside those which have been designated for systematic land registration the procedure is as follows:

- DCCs are responsible for investigating all disputes and conciliating those which it deems are appropriate for resolution at the district level. If settlement cannot be reached through unanimous agreement, or if after investigating the dispute the DCC determines that it is impossible to reach an equitable resolution of the dispute at the district level, the DCC will refer the dispute to the PCC for conciliation;
- the PCC may facilitate a conciliation but it has no power to determine a dispute if the parties do not settle by unanimous agreement. In the event that a settlement cannot be reached the PCC will refer the dispute to the National Cadastral Commission (**NCC**) for determination;
- the NCC has full jurisdiction to decide who is the lawful possessor or owner of the land in dispute;
- if the parties in dispute disagree with the decision of the NCC they have the right to request a review of the decision through a complaint to the court within 30 days of receipt of the decision. If no appeal is filed within 30 days, the decision of the NCC will be considered final; and
- the court may determine the case or remand it to the NCC on the grounds that proper procedures were not followed, there has been a conflict of interest or the NCC acted beyond its powers.<sup>509</sup>

<sup>503</sup> Naren, K., and Marks, S., 'Gov't denies flouting ban on concessions', *The Cambodia Daily*, 16-17 June 2012, pp 1-2; Sovuthy, K. and Naren, K., 'Hun Sen lauds land project, lashes media', 27 June 2012, *The Cambodia Daily*, p 1; Sokheng, V., 'PM defends ELC signings', *The Phnom Penh Post*, 27 June 2012, p 2.

<sup>504</sup> See Land Law, chapter 3 (part 2); Sub-decree on Indigenous Land.

<sup>505</sup> Sub-decree on Indigenous Land, article 6.

<sup>506</sup> Land Law, article 26.

<sup>507</sup> *ibid.*, article 28.

<sup>508</sup> These sub-decrees include: Sub-decree on the Cadastral Commission; Sub-decree on Sporadic Land Registration; Sub-decree on Systematic Land Registration; Sub-decree on Indigenous Land.

<sup>509</sup> Sub-decree on the Cadastral Commission, articles 6, 8-11, 13-17 and 19-23; Sub-decree on Sporadic Land Registration, article 8.

## State of Migration

### An overview of forced displacement in Cambodia

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- 6.2.2.19 When disputes arise in relation to unregistered land in areas which have been designated for systematic land registration the **Administrative Commission** is responsible for attempting to settle disputes at first instance. If a dispute cannot be settled by the Administration Commission it is submitted to the NCC for determination in accordance with the procedure set out above.<sup>510</sup>
- 6.2.2.20 Parties to the disputes set out in paragraphs 6.2.2.18 and 6.2.2.19 have the right to:
- appear in person and have a person or organisation assist them during the resolution of the dispute;
  - present relevant oral or documentary evidence related to the dispute which shall be considered as a part of the official record of the dispute; and
  - receive a written copy of the decision of the NCC accompanied by a report of the case and dispute resolution process supported by all reliable and substantial evidence that is part of the official record.<sup>511</sup>
- 6.2.2.21 Disputes which arise in relation to land which is claimed to be the land of an Indigenous community are settled under a different procedure carried out at the district and provincial levels.<sup>512</sup> Under this procedure the relevant government authorities resolve questions as to the location, size and boundaries of Indigenous land by conducting identification and mapping of State land. If disputes persist they may be forwarded to the NCC.
- 6.2.2.22 The **National Authority for the Resolution of Land Disputes (NARLD)** was established in February 2006 to take up cases or complaints that are “*beyond the competence*” of the Cadastral Commissions.<sup>513</sup> Amnesty International has observed that “*given the division of jurisdiction between the Cadastral Commission and court, NARLD’s mandate appears to overlap with existing structures.*”<sup>514</sup> The World Bank has noted “*legitimate concerns about the legal status of decisions of the NARLD*” given that it is an administrative or executive body which may purport to exercise judicial power.<sup>515</sup>
- 6.2.2.23 Disputes which arise in relation to the ownership of registered land or the transfer of privately owned land fall within the jurisdiction of the courts.

#### ***Domestic law concerning forced evictions***

- 6.2.2.24 Under the Land Law, persons occupying land which comprises State public property are deemed to be illegal occupants. If they do not cease their “*illegal occupation*” the relevant authorities may begin the process of evicting them from the land. They may also be liable to penalties for infringements against public property, including a fine of up to 50 million Riel and/or imprisonment for up to 5 years.<sup>516</sup>
- 6.2.2.25 Occupants of other types of land without title or with insufficient title can only be removed from land by the competent authorities acting on behalf of the State. Occupants who claim to have valid title can only be removed by court order upon a

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<sup>510</sup> Sub-decree on Systematic Land Registration, article 12.

<sup>511</sup> Sub-decree on the Cadastral Commission, article 27.

<sup>512</sup> See the Sub-decree on Indigenous Land, article 10.

<sup>513</sup> *Sub-decree no. 168 on the Composition of the National Authority for the Resolution of Land Disputes 2006.*

<sup>514</sup> Amnesty International, *Rights Razed: Forced Evictions in Cambodia*, 11 February 2008, p 9.

<sup>515</sup> Center for Advanced Study, *Justice for the Poor? An Exploratory Study of Collective Grievances over Land and Local Governance in Cambodia*, World Bank, Phnom Penh, October 2006, pp 75-76.

<sup>516</sup> Land Law, articles 19 and 259.



request by the person who claims to own the property.<sup>517</sup> If an eviction is likely to give rise to instability or to have serious social repercussions the competent authorities may request a temporary suspension of the execution of the order.<sup>518</sup>

- 6.2.2.26 If land is taken by violence or abuse of power by the authorities it becomes the property of the State unless the lawful possessor files a claim asserting that he or she was violently or improperly dispossessed of the property within three years of the dispossession.<sup>519</sup>
- 6.2.2.27 The Land Law establishes penalties for government and law-enforcement officers who abuse their power in the course of forced evictions.<sup>520</sup> In particular, law-enforcement officers and local authorities may face fines, administrative sanctions or imprisonment if they:
- abuse their power to seize land from peaceful occupants, including by using pressure or physical measures of eviction against these occupants;<sup>521</sup>
  - wrongfully acquire land in the areas where they are in charge of maintaining public order and security;<sup>522</sup> and
  - ignore or allow private individuals to act wrongfully against the rights of owners, possessors or peaceful occupants.<sup>523</sup>

***Domestic law concerning persons who seek to assert or defend human and property rights in the context of land disputes***

- 6.2.2.28 The Constitution affirms that the RGC must recognise and respect all human rights set out in the UDHR and other international human rights laws to which Cambodia is a State Party.<sup>524</sup> Many of these rights are also expressly recognised in the Constitution itself. Of particular relevance to persons who seek to assert or defend human and property rights in the context of land disputes in Cambodia are the Constitutional rights of all citizens<sup>525</sup> to:
- life, personal freedom and security;
  - participate actively in the political, economic, social and cultural life of the nation;
  - non-violent demonstration;
  - freedom from arbitrary prosecution, arrest or detention;
  - be considered innocent until a court has given final judgment on a case and to enjoy the right to defense through judicial recourse;

<sup>517</sup> *ibid.*, article 35.

<sup>518</sup> *ibid.*, article 36.

<sup>519</sup> *ibid.*, article 33.

<sup>520</sup> *ibid.*, chapter VII.

<sup>521</sup> *ibid.*, article 261.

<sup>522</sup> *ibid.*, article 262.

<sup>523</sup> *ibid.*, article 263.

<sup>524</sup> Constitution, article 31.

<sup>525</sup> Under the Constitution, many of these rights are granted to citizens only. Non-citizens affected by land disputes in Cambodia should in theory enjoy these same rights under the international human rights law which applies to Cambodia (see page ix).

## State of Migration

### An overview of forced displacement in Cambodia

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- denounce, make complaints or file claims against any State or social organ for breaches of the law committed during the course of their duties and to have complaints and claims settled by the courts; and
- freedom of expression, press, publication and assembly (except where the exercise of these rights infringe upon the rights of others, 'affect the good traditions of society' or violate public law and order and nationality security).<sup>526</sup>

### 6.2.3 Regional law

6.2.3.1 Cambodia is not bound by any regional law which relates directly to the issues of land disputes and forced evictions.

6.2.3.2 A number of initiatives have sought to stimulate discussion about Indigenous peoples and their rights (including land rights) within the ASEAN framework. In June 2012, a joint submission prepared by civil society organisations was presented to the AICHR for consideration in the drafting of the AHRD.<sup>527</sup> This submission calls attention to the lack of engagement with issues affecting Indigenous peoples in the current draft of the AHRD and proposes the inclusion of a provision which adopts some of the principles contained in the UNDRIP. The proposed provision reads:

*"Indigenous peoples and traditional communities have the right to own, use, develop and control the lands, territories, and resources which they have traditionally owned, occupied or otherwise used.*

*States and non-state actors shall consult and cooperate in good faith with Indigenous peoples and traditional communities through their own representative institutions in order to obtain their free, prior and informed consent before the approval of any project affecting their lands, territories and resources, particularly in connection with development or exploitation of natural resources."<sup>528</sup>*

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## 6.3 Land disputes and forced evictions in Cambodia

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***"There is little doubt that the appropriation of land in Cambodia has been a very positive development for the powerful individuals and private companies who have acquired prime real estate at little or no cost – as well as government officials who profited from the transactions. There is little evidence, however, that ordinary Cambodians are benefiting from the mass confiscation of their land."***

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– LICADHO<sup>529</sup>

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<sup>526</sup> Constitution, articles 32, 35, 37-39 and 41.

<sup>527</sup> Joint submission to the ASEAN Intergovernmental Commission on Human Rights on the ASEAN Human Rights Declaration by Civil Society Organisations and Peoples' Movements Participating in the Fifth Regional Consultation on ASEAN and Human Rights, 22 June 2012.

<sup>528</sup> *ibid.*

<sup>529</sup> LICADHO, *Land Grabbing & Poverty in Cambodia: The Myth of Development*, Phnom Penh, May 2009, p 1.

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***“Cambodian authorities are failing to protect – in law and practice – the population against forced evictions. By contrast, those with political or economic power are allowed to act with impunity in arbitrarily expropriating land. They do so by colluding with local authorities in ways that lead to the issuing of dubious land titles and eviction orders, and the misuse of the court system to prevent victims from acting to defend their rights.”***

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– Amnesty International<sup>530</sup>

### 6.3.1 Historical context of land disputes in Cambodia

- 6.3.1.1 Insecurity of land title and tenure are not new phenomena in Cambodia. Since the 1970s, civil war, genocide, radical land reform and political instability prompted successive cycles of mass displacement and transformed the legal and physical relationships between the population and land. During the civil war from 1970 to 1975, large portions of the population moved to escape conflict and violence. In 1975 the newly-established Khmer Rouge communist regime abolished the concept of private property, destroyed all land records and eliminated the administrative and judicial structures for determining and guaranteeing rights to land. The Khmer Rouge sought to implement a radical restructuring of Cambodian society whereby the entire urban population was forcibly displaced to the countryside to labour on State-owned land as a purely agrarian society. From 1979, as civil war continued after the fall of the Khmer Rouge, all land was deemed to be the sovereign property of the State. Millions of displaced Cambodians began to relocate back to the cities and their villages in a largely unregulated manner. Some land was ‘distributed’ by local authorities, certain communities were requested to settle in designated areas and others took possession of unoccupied land. Few families were able to reclaim the property they had owned prior to 1975. The State granted collective rights to occupy and use land to groups of families, but in practice land was often held and transferred informally without legal documentation and outside the strictures of governmental regulation.
- 6.3.1.2 As the civil war drew to a close in the late 1980s, the issue of land ownership resumed an important place in the public and political conscience. There was some concern that with peace might come conflicting claims to property between pre-Khmer Rouge landowners and families who had subsequently taken up possession of their land since 1979. To address these concerns, a series of laws and regulations were enacted from 1989 onwards which invalidated land ownership claims prior to 1979 and sought to secure private property rights for some Cambodian families.<sup>531</sup>
- 6.3.1.3 In 1993 the new Constitution formally recognised the right of all Cambodian citizens and legal entities to own land.<sup>532</sup> In practice, however, the property rights of the majority of the population remained unsettled, with most ‘ownership’ and transfers of land continuing to be based on informal possessory rights and customary ideas about the use and ownership of land.

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<sup>530</sup> Amnesty International (September 2008), *op. cit.* (note 432), p 1.

<sup>531</sup> *Sub-Decree No. 25 on Granting Ownership Rights over Houses to the People of the State of Cambodia* dated 22 April 1989; *Instruction No. 3 Enforcing Instruction of the Principles for the Management and Use of Lands* dated 3 June 1989; *Land Law 1992*.

<sup>532</sup> Constitution, article 44.

## 6.3.2 Current context of land disputes in Cambodia

### Overview

- 6.3.2.1 In Cambodia, a predominantly rural country with an important agricultural industry, natural resources are ripe for exploitation and land is a highly valuable asset. As land becomes an “*increasingly scarce resource*”<sup>533</sup> the value of this asset becomes more apparent. Extensive land-grabbing and the grant of land concessions over large tracts of land during the past two decades have rendered entire communities landless and are having a profound effect on the stability and development of both rural and urban societies. Land ownership rights are increasingly concentrated in the hands of a wealthy few and many ordinary citizens are uncertain about the strength of their claims to the land they reside on and cultivate. In 2005, the UN Special Rapporteur on Adequate Housing reported that there was “*a frenzy... across the country by the rich and powerful in Cambodia to acquire land.*”<sup>534</sup> The “*endemic*”<sup>535</sup> of land-grabbing and landlessness has continued to intensify, with 2011 seeing a surge in the number of land concessions granted by the RGC and nearly 11,000 additional Cambodian families newly affected by land conflicts.<sup>536</sup> There are reports that private companies now control 3.9 million hectares of land, comprising more than 22% of Cambodia’s total surface area.<sup>537</sup> Between 400,00 and 700,000 people are currently estimated to be involved in land disputes and more than a quarter of a million Cambodians are believed to be affected by land tenure insecurity and forced evictions.<sup>538</sup>
- 6.3.2.2 Land disputes and related issues are having a profound impact on Cambodian society and carry short- and long-term political, economic and environmental ramifications. Land disputes are a major source of social and political tension. On land over which large ELCs have been granted, large-scale mining, extensive logging and vast plantations have caused soaring deforestation rates, the contamination of waterways with pesticides and chemicals and the destruction of eco-habitats.<sup>539</sup> These problems have affected the health of local populations, livestock and wildlife and undermined efforts to increase development and reduce poverty.<sup>540</sup> The destruction of forests and natural resources also threatens the traditional culture and livelihoods of Indigenous populations who inhabit these regions.<sup>541</sup>

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<sup>533</sup> Supreme National Economic Council, *The Report of Land and Human Development in Cambodia*, 2007, p 10.

<sup>534</sup> Miloon Kothari (UN Special Rapporteur on Adequate Housing) quoted in De Launey, G., ‘Cambodia ‘suffering land crisis’’, *BBC News*, 2 September 2005.

<sup>535</sup> LICADHO (May 2009), *op. cit.* (note 529), p 1.

<sup>536</sup> LICADHO, *Five Shooting Incidents at Land Dispute Protests in the Past Two Months Show Alarming Increase in the Use of Lethal Force*, Media Statement, 26 January 2012; LICADHO, ‘Carving up Cambodia one concession at a time’, *The Cambodia Daily Weekend*, issue no. 730, 10-11 March 2012, pp 4-11, p 6.

<sup>537</sup> LICADHO (March 2012), *op. cit.* (note 536), p 6.

<sup>538</sup> *ibid.*, p 7; LICADHO (May 2009), *op. cit.* (note 529), p 5.

<sup>539</sup> See for example: LICADHO (March 2012), *op. cit.* (note 536), pp 7 and 10.

<sup>540</sup> Ghai, Y. (Special Representative of the Secretary-General for Human Rights in Cambodia), *Economic Land Concessions in Cambodia: a Human Rights Perspective*, June 2007, section 5.5.

<sup>541</sup> See for example: LICADHO (March 2012), *op. cit.* (note 536), p 10.

### *Three categories of land disputes*

6.3.2.3 Land disputes can be broadly grouped into three categories:

- *disputes over State public land:* these disputes arise between the RGC and communities living on land which the RGC claims to be State public land. As a result of the RGC classifying land as State public land, long-term residents – some of whom originally settled on the land at the request of local authorities up to two decades ago – have no legal right under the Land Law to transform their possession into a right of ownership. By law these residents are deemed to be illegally in possession of State land and can be evicted if they do not voluntarily relocate. In a number of disputes over State public land, the RGC classifies the land as public land (thereby extinguishing any potential claims to ownership on the basis of extraordinary acquisitive possession) and subsequently converts the land to State private land so that it can become the subject of the grant of a SLC or ELC. Some residents may be offered land at a relocation site or, in the case of the grant of a SLC, on part of the original land once residential buildings have been constructed.<sup>542</sup> Where land is converted to State private land and a land concession is granted before residents have relocated, private companies and other concessionaires can become embroiled in the dispute between the RGC and the community;
- *disputes over State private land:* these disputes usually arise between the RGC, private companies which have been granted a land concession and the communities living on the land the subject of the land concession. This category of dispute is similar to that set out above, except that in these disputes the RGC never claims that the land is State public land. Instead, land concessions are granted over State private land which is already inhabited and/or being cultivated by communities, many of whom should have a right to claim ownership of land on the basis of extraordinary acquisitive possession. Communities involved in these disputes may or may not be given compensation and/or the option of moving to a relocation site; and
- *disputes over privately-held land:* these disputes arise between communities and private individuals who claim to own the land on which the communities live and work. In a number of these cases communities claim to have owned the land in dispute since they moved there and/or it was given to them by local authorities as far back as the 1980s or 1990s. Despite these claims, private individuals have subsequently sought to seize the land as their own and have villagers declared to be “illegal squatters” and evicted. In a number of cases where these individuals have not been able to produce valid evidence of title to justify their claim they have nevertheless received support from local authorities and the courts. In these types of disputes the right of communities to transform their possession into a legally recognised right of ownership is frustrated by claims that the land cannot lawfully be possessed because it is already owned by somebody else. Most residents affected by this category of dispute are not provided with fair and adequate compensation for the loss of their land.

<sup>542</sup> For more information on the practice of moving populations to relocation sites see: Kothari, M., *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living: Addendum – Mission to Cambodia*, 21 March 2006, UN Doc E/CN.4/2006/41/Add.3, paras 30-43.

#### *The prevalence of a dual system for the recognition of land ownership*

6.3.2.4 The three abovementioned categories of land disputes arise in the particular context of Cambodian land ownership practices. Title based on legal proof of ownership has not been the norm in Cambodia since the Khmer Rouge abolished private property rights and land records in 1975. The existence and use of legal documents as evidence of title is not uniform across the country. Many Cambodians have not seen the need or cannot afford to seek confirmation of their title to land.<sup>543</sup> One study of over 1,800 large-scale land disputes in 2005 revealed that:

- the majority of persons alleging that they lost land had no documents to evidence their title “because they thought that the land they occupied belonged to them”;
- only 4% of complainants had applied for formal title registration;
- around 20% of complainants had a receipt of purchase to support an ownership claim; and
- 56% of complainants had occupied the land for five years or more by 2004 (and thus could arguably have obtained a right to apply for confirmation of title on the basis of extraordinary acquisitive possession).<sup>544</sup>

A subsequent study in 2007 reported that 60% of households surveyed had no documents to prove their rights to possess or own land.<sup>545</sup>

6.3.2.5 Instead of being based on formal legal mechanisms, ownership of land has traditionally been based on possession and use. Land has been transferred through informal processes and ownership has been mutually agreed between parties and approved by local authorities. Since 2001 the progressive implementation of a formal system for land registration has created a “dual system of ownership recognition.”<sup>546</sup> Some Cambodians rely on ‘soft title’ to establish their ownership of land (various forms of documentation issued by local authorities) whilst others rely on ‘hard title’ (registration of title in the Land Register). The use of soft title is particularly prevalent amongst those sectors of the population with the lowest rates of literacy, education and wealth: the rural, the isolated and the urban poor.<sup>547</sup> For these groups, their reliance upon soft title puts them in a weak position to assert rights to land in the event that their property becomes sought after for commercial development or agro-industrial exploitation.

6.3.2.6 Since the RGC has primary responsibility for guaranteeing private property rights as determined by the courts, the institutions of government and the judiciary have come under particular scrutiny for their failure to afford land tenure security to the communities most in need of it and to ensure that ordinary citizens are provided just and equitable treatment as the legal framework for land ownership under the Land Law is implemented.

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<sup>543</sup> Ghai (2007), *op. cit.* (note 540), section 2.1.

<sup>544</sup> Report published in Amnesty International (February 2008), *op. cit.* (note 514), p 8

<sup>545</sup> CDRI, *Cambodia Land Titling Rural Baseline Survey Report*, Phnom Penh, December 2007 < <http://www.cdri.org.kh/webdata/confpap/landtitlingrural.htm> > last accessed 30 June 2012.

<sup>546</sup> Grimsditch and Henderson, *op. cit.* (note 478), p 39.

<sup>547</sup> Leuprecht, P. (former Special Representative of the Secretary-General for Human Rights in Cambodia), *Land Concessions for Economic Purposes in Cambodia: a Human Rights Perspective*, November 2004, p 26.

### 6.3.3 Forced evictions and relocations

- 6.3.3.1 There has been a widespread trend over the past decade of using forced evictions to remove families living on disputed land. The communities affected by these evictions are often the poorest and most vulnerable groups within Cambodian society. They are evicted from land over which a land concession is granted or which has been ‘grabbed’ by private individuals. Some evictees are given the option of moving to a relocation site.
- 6.3.3.2 One of the most concerning features of these forced evictions is the level of violence employed by police, military police and the Royal Cambodian Armed Forces (RCAF). Human rights monitors have recorded a consistent practice over several years of law-enforcement officers using excessive and at times deadly force against unarmed civilians.<sup>548</sup> Misuse of firearms is a significant problem, with reports of police and soldiers opening fire on civilians or shooting into the ground and air to disperse people who resist removal from their homes. Civilians have been shot dead in a number of disputes and many more have been injured by gunfire and beatings with electric batons.<sup>549</sup> In June 2012 Defense Minister General Tea Banh denied that military armed forces had ever been used against protesters.<sup>550</sup>
- 6.3.3.3 Of further concern are reports that law-enforcement officers are acting as “*private security guards*” on behalf of companies.<sup>551</sup> In February 2010 the RGC signed a sub-decree which formalised an agreement with the private sector under which private companies can make financial contributions to support RCAF troops involved in the protection of their land interests.<sup>552</sup> Civil society organisations have repeatedly expressed dissatisfaction with any arrangement whereby the military are used to intervene against ordinary citizens on behalf of private commercial interests.
- 6.3.3.4 Other concerning features of these forced evictions include:
- that they violate Cambodian and international law concerning rights of evictees;
  - that law-enforcement officers have used excessive and lethal force with impunity and that in some cases force has been justified by alleging the existence of ‘secessionist’ movements or unlawful activity on the part of protesters;
  - that the legal system and judiciary have been misused to enforce questionable eviction orders and stifle dissent; and
  - the social and political unrest and instability which they cause.

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<sup>548</sup> See for example: CCHR, *Unlawful Use of Guns by Military Officials*, Fact Sheet, January 2012; LICADHO (January 2012), *op. cit.* (note 536); Grimsditch and Henderson, *op. cit.* (note 478); LICADHO (May 2009), *op. cit.* (note 529); Amnesty International (September 2008), *op. cit.* (note 432); Amnesty International (February 2008); *op. cit.* (note 514).

<sup>549</sup> See for example: Grimsditch and Henderson, *op. cit.* (note 478), p 12; LICADHO (May 2009), *op. cit.* (note 529), pp 8, 9 and 20; Amnesty International (September 2008), *op. cit.* (note 432), p 11; Amnesty International (February 2008), *op. cit.* (note 514), p 30.

<sup>550</sup> Peter, Z., ‘SRP seeks suspension of all US military aid to Cambodia’, *The Cambodia Daily*, 5 June 2012, p 21.

<sup>551</sup> See for example: LICADHO (January 2012), *op. cit.* (note 536); Human Rights Watch, *World Report 2012: Events of 2011*, 2012, p 309.

<sup>552</sup> Peter, *op. cit.* (note 550); LICADHO, *Cambodian Government formalizes private sector patronage system of Royal Cambodian Armed Forces (RCAF)*, 26 February 2010, < <http://www.licadho-cambodia.org/articles/20100301/113/index.html> > last accessed 30 June 2012.

## 6.4 Reasons for land disputes and forced evictions

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***“The Cambodian government’s policies and practices on land management have failed. Rather than contributing positively to the development of the country, they are swelling the ranks of the landless, the unemployed and the poverty-stricken.”***

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– LICADHO<sup>553</sup>

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***“The subordination of the prosecutors and courts to the will of the [RGC] has resulted in much injustice in land transactions and appropriations.”***

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– Yash Ghai, former Special Representative of the Secretary-General for Human Rights in Cambodia<sup>554</sup>

### 6.4.1 Reasons for land disputes

6.4.1.1 Land disputes arise as a result of uncertainty over who owns land and unfair practices which dispossess communities of their land. In Cambodia, these circumstances arise as a result of:

- the lack of records concerning land boundaries and ownership;
- the fact that large tracts of land are yet to be registered, especially in rural and contentious areas;
- uncertainty as to the classification of land, including uncertainty as to the boundaries of State land and which land is legally capable of being privately possessed (for the purpose of extraordinary acquisitive possession under the Land Law: see paragraph 6.2.2.10);
- traditional and ongoing reliance on informal processes for the transfer and ownership of land, especially amongst the poorest, least educated and most vulnerable sectors of society;
- reported corruption and collusion amongst government officials, law-enforcement officers, private companies and the judiciary which serves to protect certain private interests in land;
- significant disparities in power, wealth and knowledge of the law between different sectors of the population; and
- a failure to properly enforce and apply the Land Law by the relevant authorities, especially as regards the grant and regulation of land concessions.

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<sup>553</sup> LICADHO (May 2009), *op. cit.* (note 529), p 27.

<sup>554</sup> Ghai, Y., *Report of the Special Representative of the Secretary-General for human rights in Cambodia*, UN Doc. A/HRC/7/42, 29 February 2008, para 62.



## 6.4.2 Reasons for forced evictions

6.4.2.1 Disputes over property rights and the ownership of land do not necessarily need to result in forced evictions. When land disputes are managed properly, fair and more consensual solutions may be reached through cooperation between prospective evictees, those who have been granted ownership or concessions over land and the government. In cases where this does not occur, forced evictions are used as a means of 'resolving' land disputes. This practice occurs as a result of a combination of factors, including:

- the ineffectiveness of land dispute resolution processes and the courts in providing fair and effective remedies to all parties to land disputes;
- the relationship between private companies, the RGC and law-enforcement officers whereby private companies call upon the government to deploy police and soldiers to defend private and disputed land interests (rather than resolving disputes through an effective judicial process);
- broad failures to provide fair and adequate compensation to persons who lose their land and to provide relocation sites which are suitable for inhabitation; and
- the failure to conduct public consultations about land concessions before they are granted and to involve the public in these processes.

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## 6.5 The experience of land disputes and forced evictions

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***“The rich and powerful are increasingly using their leverage to silence their adversaries through the criminal justice system. As pressures on land and marginalised groups continue amidst land speculation and lack of rule of law, the space for the work of human rights defenders is shrinking. Police operations, arrests, detentions and charges are made in order to intimidate and punish the weaker party in land disputes or those opposing development projects rather than in the true interest of justice.”***

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– Amnesty International<sup>555</sup>

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***“Arresting one man is to threaten hundreds of thousands of people, scaring them from struggling and advocating again... I see this as an injustice for the Cambodian people.”***

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– wife of a community leader who was imprisoned for his role as a land activist in his village in Battambang province, 2006<sup>556</sup>

<sup>555</sup> Amnesty International (September 2008), *op. cit.* (note 432), p 2.

<sup>556</sup> Oeun Sarim, wife of informal community leader Chhea Ny who was unlawfully imprisoned for his role as a land activist within his village in Battambang province in 2006, quoted in Amnesty International (September 2008), *op. cit.* (note 432), p 16.

#### 6.5.1 Forcibly evicted communities<sup>557</sup>

##### *The eviction*

6.5.1.1 Forced evictions are often employed as a primary means of resolving land disputes rather than as an option of last recourse.<sup>558</sup> Human rights organisations and local media sources report that people who are forcibly evicted from their homes often experience the following:

- a lack of effective consultation about proposed developments and a lack of adequate notice of plans to evict families and destroy houses. The UN Special Rapporteur on Adequate Housing has reported that “*land transactions [are] made public long after the conclusion of the deals between the [RGC] and private companies*”;<sup>559</sup>
- the use of intimidation, excessive force, threats of criminal charges, malicious and unlawful arrests and detention by police, military police and RCAF soldiers to force families to leave their land and/or agree to unfair compensation deals;
- the demolition or burning down of houses before residents have had a reasonable opportunity to remove their belongings and salvage building materials. In one report villagers who tried to salvage their property were beaten with sticks and electric batons before their homes were set on fire;<sup>560</sup>
- law-enforcement officials looting eviction areas and stealing from evictees;
- a failure to pay fair and just compensation at market rates, especially for displaced communities in rural areas; and
- a lack of due process, including a lack of opportunity for affected communities to challenge eviction orders or assert their own claims to land in a fair and impartial court of law.

##### *The post-eviction experience*

6.5.1.2 The post-eviction experiences of affected communities are characterised by similarly harsh and unlawful practices. For example:

- relocation sites are often inappropriate and inadequate substitutes for the land which has been lost. Relocation sites have been established as far as 25 km away from the original homes, jobs, schools and health services of evicted families. Some relocation sites are flood-prone, isolated and lack basic infrastructure, sanitation facilities, electricity and drinking water. At sites which do not have enough houses to accommodate everyone some families are forced to live in

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<sup>557</sup> The experiences set out in the following section have been widely reported by a number of local and international human rights groups, see for example: CCHR, *The Continuing Borei Keila Tragedy*, CCHR Case Study Series, Vol. 5, May 2012; LICADHO (March 2012), *op. cit.* (note 585); HRW, *World Report 2012: Events of 2011*, USA, 2012; CCHR (January 2012), *op. cit.* (note 548); LICADHO (January 2012), *op. cit.* (note 536); Grimsditch and Henderson, *op. cit.* (note 478); LICADHO (May 2009), *op. cit.* (note 529); Amnesty International (September 2008), *op. cit.* (note 432); Amnesty International (February 2008), *op. cit.* (note 514); Ghai (2008), *op. cit.* (note 554); Ghai (2007), *op. cit.* (note 540); Kothari (2006), *op. cit.* (note 542).

<sup>558</sup> Kothari (2006), *op. cit.* (note 542), para 44.

<sup>559</sup> Kothari (2006), *op. cit.* (note 542), para 32.

<sup>560</sup> Grimsditch and Henderson, *op. cit.* (note 478), pp 12-13.

squalid and wretched conditions under temporary shelters. In some cases these conditions have been deemed to be the cause of illness and death;<sup>561</sup>

- many families are left landless and homeless, including:
  - families who are not prepared to move to isolated and inadequate relocation sites; and
  - families who are not provided with compensation or the possibility of relocation, including:
    - families who rented property on disputed land; and
    - persons of ethnic-Vietnamese origin and other groups who are considered by the authorities to be non-citizens and therefore ineligible for compensation or relocation (see Chapter 3);
  
- communities evicted from land in rural areas have lost their livelihoods and self-dependence, face increased poverty and food insecurity as a result of not being able to farm their land and have been forced to sell livestock to cover costs of living and because they cannot afford the penalties for livestock straying onto land the subject of a land concession. Land concessions in port areas and for mining have destroyed the income-earning capacity of fishing communities and artisanal miners. Families who were previously self-subsistent have become dependent upon charity from organisations for basic humanitarian assistance;
  
- communities evicted from land in urban areas have experienced a loss of income and other financial difficulties as a result of their eviction. Of particular concern are reports of endemic indebtedness in communities where people have turned to the informal credit sector as a way of meeting the costs of rebuilding their homes, commuting to the city center and meeting the shortfall from their diminished income-earning capacities in relocation sites. As a result of unscrupulous lending practices and lower incomes, many families who give their land ownership receipts as collateral for informal loans become heavily indebted and are at high risk of landlessness;<sup>562</sup> and
  
- children in evicted families have experienced disruptions to their schooling due to homelessness or relocation outside the city center and health problems as a result of unsanitary and inadequate living conditions.

## 6.5.2 Indigenous communities

- 6.5.2.1 Indigenous communities affected by land concessions have experienced encroachments on lands of cultural and spiritual significance which threaten their traditional livelihoods. Encroachments have been reported in Ratanakiri, Mondulakiri, Kratie, Oddar Meanchey, Stung Treng, Kompong Speu, Pursat and Preah Vihear provinces.<sup>563</sup> The RGC has expressly denied that any indigenous communities have been forcibly evicted from their land without compensation.<sup>564</sup>

<sup>561</sup> CCHR (May 2012), *op. cit.* (note 557).

<sup>562</sup> For more information see: Sahmakum Teang Tnaut (STT), *Losing the Plot: Rapid Assessment of Household Debt in Trapeang Anhchanh*, June 2012.

<sup>563</sup> Ghai (2007), *op. cit.* (note 540), sections 5.2, 5.4 and 6.

<sup>564</sup> Permanent Forum on Indigenous Issues, *Information Received by Government: Cambodia*, Ninth Session, New York, UN Doc. E/C.19/2010/12/Add.5, 16 February 2010, para 14.

**6.5.3 Persons who seek to assert or defend property and human rights in the context of land disputes<sup>565</sup>**

6.5.3.1 Persons who seek to assert or defend property and other rights in the context of land disputes have experienced intimidation, violence and misuse of the criminal justice system to suppress their activism. The allegations of these practices implicate government officials, police, military police, RCAF soldiers, prosecutors and judges in violations of the rights of land activists, community leaders, lawyers and local and international human rights monitors and defenders.

6.5.3.2 Of particular concern in relation to the experiences of these persons are reports that:

- police, military police and RCAF soldiers have misused firearms and used excessive force, threats, intimidation and arbitrary arrests without warrants to suppress persons attempting to exercise their rights to freedom of expression, association and peaceful assembly;
- prosecutors and judges have brought “*unethical*” and “*spurious*” charges against community leaders and other people who seek to assert and defend their rights. For example, people have been charged for offences against private property when the true ownership of land is yet to be determined;
- rights to due process and a fair trial have been denied. In one case police and the courts are reported to have prevented a defendant in custody from being present at his own trial by refusing to transfer him to the province where the trial was held.<sup>566</sup> Lawyers have also been denied access to the trials of their clients and judges have apparently warned villagers that if they mention government officials and ‘politicise’ their case or continue to protest they will be put in prison;<sup>567</sup>
- legal aid lawyers have been threatened with criminal prosecution for inciting people to commit a crime, fraud and defamation as a result of their work for victims of forced evictions and land disputes;
- human rights monitors have been prevented from accessing sites of current or potential forced evictions and persons who have been arrested and detained in connection with land disputes;
- journalists have received death threats as a result of their reporting on land issues; and
- human rights organisations have been prevented from holding meetings and events to discuss land issues.

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<sup>565</sup> The experiences set out in the following section have been widely reported by a number of local and international human rights groups, see for example: CCHR (May 2012), *op. cit.* (note 557); LICADHO (March 2012), *op. cit.* (note 585); HRW (2012), *op. cit.* (note 557); CCHR (January 2012), *op. cit.* (note 548); LICADHO (January 2012), *op. cit.* (note 536); Grimsditch and Henderson, *op. cit.* (note 478); LICADHO (May 2009), *op. cit.* (note 529); Amnesty International (September 2008), *op. cit.* (note 432); Amnesty International (February 2008); *op. cit.* (note 514); Ghai (2008), *op. cit.* (note 554); Ghai (2007), *op. cit.* (note 540); Kothari (2006), *op. cit.* (note 542).

<sup>566</sup> Amnesty International (September 2008), *op. cit.* (note 432), p 5.

<sup>567</sup> *ibid.*, p 10.

## 6.6 Particular issues affecting women and children

***“I cannot go to school because I miss my mother.”***

*– child of a woman who was arrested after peacefully protesting  
at the site of a land dispute at Boeung Kak Lake in Phnom Penh, 2012*

### 6.6.1 Women

6.6.1.1 Women are affected by land disputes both as persons who are forcibly evicted from their homes and as protesters who are targeted for expressing their dissent and seeking to assert their rights. The UN Special Rapporteur on Adequate Housing has identified a number of ways in which women may be specifically and disproportionately affected by land disputes and forced evictions in Cambodia.<sup>568</sup> Of particular concern are reports that:

- women who move to relocation sites or are made homeless as a result of forced evictions suffer disproportionately from a lack of adequate sanitary facilities and the need to use exposed areas for their personal hygiene;
- women in relocation sites or who are made homeless as a result of forced evictions are particularly vulnerable to violence and sexual abuse;
- women are more likely to be employed in the informal sector which requires them to be close to the center of town rather than in isolated relocation sites; and
- in some cases land certificates have been issued solely in the name of husbands which puts wives at greater risk of landlessness.

6.6.1.2 Women comprise a significant portion of the people arrested and detained for protesting the loss of their land. For example, in January 2012 twenty-four women and six children were arrested whilst protesting their eviction from the Borei Keila settlement in Phnom Penh and calling for the release of residents who had been arrested during the eviction.<sup>569</sup> In May 2012 thirteen women were arrested for peacefully protesting the land evictions at Boeng Keng lake (see page 181).

### 6.6.2 Children

6.6.2.1 Children have been particularly affected by forced evictions and the resulting poor living conditions in informal settlements and at relocation sites. Human rights organisations have attributed child deaths from dengue, malnutrition and other illnesses to squalid living conditions in these locations.<sup>570</sup> Children face disruptions to their education as a result of homelessness, relocation to a site far from their school, the loss of birth certificates during forced relocations (which are required for admittance to a new primary school) and, in rural areas, because they are required to stay home and ensure that livestock do not stray onto conceded land.<sup>571</sup>

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<sup>568</sup> Kothari (2006), *op. cit.* (note 542), paras 72-79.

<sup>569</sup> Housing Rights Task Force (HRTF) *et al.*, *Detained Borei Keila Residents Must Be Released from Prey Speu Center*, Joint Press Statement, 12 January 2012 < <http://www.licadho-cambodia.org/pressrelease.php?perm=268> > last accessed 30 June 2012.

<sup>570</sup> CCHR (May 2012), *op. cit.* (note 557); Amnesty International (February 2008), *op. cit.* (note 514), p 29.

<sup>571</sup> Amnesty International (February 2008), *op. cit.* (note 514), p 29; Ghai (2008), *op. cit.* (note 554), para 65.

## State of Migration

### An overview of forced displacement in Cambodia

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- 6.6.2.2 The children of parents who seek to assert their land rights witness acts of violence and intimidation against their parents and are separated from them when parents are arrested and detained. There are reports that some children have witnessed their parents being shot during violent land evictions and disputes.<sup>572</sup>
- 6.6.2.3 Children themselves have been compelled to protest for their own land rights or for the release of their parents who have been detained in the context of land disputes. In January 2012, 6 children were arrested whilst protesting their eviction from the Borei Keila settlement in Phnom Penh and calling for the release of residents who had been arrested during the eviction.<sup>573</sup> On 31 May 2012 the children of 13 women arrested for protesting at Boeung Kak Lake in Phnom Penh (see page 181) protested and sang for the release of their parents outside the Ministry of Justice in Phnom Penh.<sup>574</sup> On 27 June 2012, when the Court of Appeal reduced the sentence of these women and ordered their release, children comprised a large portion of the crowd who gathered in the streets near the Court of Appeal to celebrate.
- 6.6.2.4 Children can also get caught up in the generalised violence surrounding land disputes, as evidenced by the case of a 14-year old girl who was shot dead in her home during a land dispute in Kratie province in May 2012 (see below).

### Case Study

#### Teenage girl shot in land dispute -Kratie province, 2012<sup>575</sup>

Villagers in Chhlong district, Kratie province, have been engaged in a land dispute with Casotim, a private company and holder of an ELC which affects their land, since at least January 2012.

Villagers report that on the night of 15 May 2012, security forces surrounded the village and closed off access points. After assessing the situation early on the morning of 16 May, a group of villagers decided to leave the area and seek help from external organisations. Gunshots started as they were about to leave, and when a group of villagers went to investigate armed police and soldiers “opened fire” into the crowd. In the midst of the gunfire a group of unarmed villagers, including 14-year old Heng Chantha, took cover outside the girl’s house behind a pile of wood. When a soldier approached the wood Heng Chantha stood up to see what was happening. The soldier shot her in the stomach and she died on the way to hospital. Villagers also reported that they were ordered to strip naked, handcuffed and forced to stand in the hot sun for several hours.

Following the attack a number of villagers fled and human rights workers and journalists were denied access to the site. Government officials defended the use of force by claiming that the villagers were trying to establish a self-governing “autonomous zone” in the region and that the operation was launched to arrest the ringleaders of a “secessionist” plot.

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<sup>572</sup> LICADHO (May 2009), *op. cit.* (note 529), p 20.

<sup>573</sup> HRTF *et al.* (January 2012), *op. cit.* (note 568).

<sup>574</sup> For a photo montage of the event see: LICADHO, *Free the 15: Boeung Kak Lake children sing for the release of their parents*, 31 May 2012, < [http://www.licadho-cambodia.org/album/view\\_photo.php?cat=51](http://www.licadho-cambodia.org/album/view_photo.php?cat=51) > last accessed 30 June 2012.

<sup>575</sup> Titthara, M., ‘Security forces strip, handcuff women in Kratie amid eviction’, *The Phnom Penh Post*, 22 May 2012; Titthara, M. and Boyle, D., ‘Teenage girl gunned down by security forces in eviction’, *The Phnom Penh Post*, 17 May 2012, p 1; LICADHO, *LICADHO Calls for Investigation into Deadly Kratie Shooting*, Phnom Penh, 17 May 2012.

## 6.7 Compliance with international standards and enforcement of domestic law

***“Concessionaires are not managing land in an appropriate or sustainable manner, with reference to existing ecological systems, and there do not appear to be any tangible benefits for local communities... Instead of promoting development and poverty reduction, economic land concessions have compromised the economic, social and cultural rights of rural communities in Cambodia.”***

*– Yash Ghai, former Special Representative of the Secretary-General for Human Rights in Cambodia<sup>576</sup>*

***“Not a single [SLC] has been completed in accordance with the relevant laws – and perversely [they] have been used to steal land from the poor rather than provide it to them. The Cambodian military continues to be involved in evictions, in contravention of the law, as well as heavily implicated in land-grabbing for their own benefit. The Cambodian courts continue to act on behalf of rich and powerful interests, ignoring the evidence, the Land Law and other relevant legislation, enforcing eviction where ownership remains undecided and imprisoning those who dare to protest.”***

*– LICADHO<sup>577</sup>*

### 3.6.1 General enforcement of the Land Law and other relevant domestic legislation

3.6.1.1 In 2011 the World Justice Project ranked Cambodia 66 out of 66 countries for the strength of property rights.<sup>578</sup> This rank is mirrored by numerous and wide-ranging criticisms of the implementation and application of the Land Law and related sub-decrees by various stakeholders.<sup>579</sup> In both urban and rural disputes these criticisms run along common lines: the law is selectively applied or disregarded altogether, certain private individuals enjoy a privileged position in terms of treatment by local authorities and the courts, the RGC does not provide adequate protection to the poorest and most vulnerable communities affected by land tenure insecurity, the criminal justice system has been misused to suppress dissent and protect the economic interests of a wealthy few and physical force plays a more determinative role in land-ownership disputes than judicial processes.

3.6.1.2 Of particular concern are reports that the Land Law has been (wrongfully) implemented in such a way as to frustrate the right of many families to transform their possession into ownership of land through the process of extraordinary acquisitive possession.

<sup>576</sup> Ghai (2007), *op. cit.* (note 540), section 8.2.

<sup>577</sup> LICADHO (May 2009), *op. cit.* (note 529), p 2.

<sup>578</sup> Agrast, Botero and Ponce, *op. cit.* (note 12), p 29.

<sup>579</sup> See for example: CCHR (May 2012), *op. cit.* (note 557); LICADHO (March 2012), *op. cit.* (note 585); HRW (2012), *op. cit.* (note 557); CCHR (January 2012), *op. cit.* (note 548); LICADHO (January 2012), *op. cit.* (note 536); Grimsditch and Henderson, *op. cit.* (note 478); LICADHO (May 2009), *op. cit.* (note 529); Amnesty International (September 2008), *op. cit.* (note 432); Amnesty International (February 2008); *op. cit.* (note 514); Ghai (2008), *op. cit.* (note 554); Ghai (2007), *op. cit.* (note 540); Kothari (2006), *op. cit.* (note 542).

The right to access this process is extinguished by RGC declarations that disputed land is State public land, by a failure to recognise private property rights in practice and by competing claims of ownership by other private individuals.

3.6.1.3 Cambodians who base their land-ownership claims on ‘soft title’ (see paragraph 6.3.2.5) are at a particular disadvantage. A 2009 report on land titling states that: *“the recognition of possession rights in the 2001 Land Law, including the right to convert possession rights into full ownership rights through title, was intended as a mechanism to incorporate... pre-existing tenure system[s] into the formal centralised system. However, it has been observed that when people’s property becomes sought after, their possession rights (and soft titles) are denied and they are labeled “illegal” because they do not have ‘hard’ formal title. This accusation ignores the fact that many of these households have been wrongly excluded from the titling process, and therefore are unable to obtain hard title.”*<sup>580</sup> Thus, in practice, the Land Law appears only to operate as it was intended in areas which are not in dispute. Those in greatest need of protection by the law are unable to access those features of the legislation which were designed to help them.

3.6.1.4 There are also reports<sup>581</sup> that:

- courts and local authorities have awarded land to private individuals on the basis of invalid or sufficient title so as to extinguish the title of long-term residents who had competing claims to land-ownership;
- the investigative procedures adopted by the courts to ensure the legitimacy and legality of ownership titles are incomplete and “*insufficient*”;<sup>582</sup>
- individuals who protest against or lodge civil complaints about the loss of their land have been charged with criminal offences including defamation, the destruction of property or infringement upon private property (in cases where legal ownership of the land in question is yet to be determined). The purpose and effect of these criminal charges is reportedly to frustrate and deter civil complaints and pressure communities into accepting unfair and inequitable settlements; and
- communities affected by land disputes have been denied recognition of their legitimate land rights and access to an effective remedy through recourse to judicial processes in breach of both domestic and international law.

## 3.6.2 Land concessions

3.6.2.1 Enforcement of the Land Law and relevant sub-decrees has been particularly weak in relation to the grant of land concessions. The Ministry of Agriculture, Forestry and Fisheries has reported that it can be difficult to comply with the requirements of these laws due to pressure from investors seeking concessions.<sup>583</sup> Nevertheless, the exigencies of commercial reality should not justify a disregard for the legal and administrative procedures established by law for the grant and management of land concessions.

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<sup>580</sup> Grimsditch and Henderson, *op. cit.* (note 478), p 39.

<sup>581</sup> See note 579.

<sup>582</sup> See for example: Kothari (2006), *op. cit.* (note 542), para 45.

<sup>583</sup> Special Representative of the Secretary-General for Human Rights in Cambodia, *Economic Land Concessions in Cambodia: a Human Rights Perspective*, June 2007, section 4.1.



3.6.2.2 Of particular concern in relation to the grant of land concessions are reports<sup>584</sup> that:

- land concessions have been unlawfully granted:
  - over land which is not eligible for such a grant, including Indigenous lands, protected forest areas and land over which long-term residents may have acquired possessory or ownership rights;<sup>585</sup>
  - in gross excess of the 10,000 hectare limit (including an ELC of 100,852 hectares in Stung Treng province);
  - so as to violate roadways, transportation ways, waterways and water reserves used by the people in their daily lives;
  - without the necessary public consultations and social impact assessments; and
  - for illegitimate purposes. In particular, it is alleged that ELCs are providing no tangible economic benefit to the Cambodian population and that SLCs are being used as a means of ‘grabbing’ prime real estate in Phnom Penh for lucrative development projects rather than as a legal mechanism to provide land and housing to the poor;
- the RGC has made little concrete effort to enforce compliance with domestic law and land concession contracts in cases where ELC concessionaires fail to exploit their concession within twelve months of its issue;<sup>586</sup> and
- SLC concessionaires have been allowed to breach the terms of their land concession contract with impunity.<sup>587</sup>

### 3.6.3 Forced evictions

3.6.3.1 Forced evictions are frequently carried out in breach of Cambodia’s obligations to evictees under international human rights law and without due regard to the international guidelines which are in place to govern this type of displacement. The CESCR has stated that “*instances of forced eviction are prima facie incompatible with the requirements of the [ICESCR] and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law.*”<sup>588</sup> The UN Human Rights Committee has stated that forcible evictions may also constitute a violation of the right to freedom from arbitrary or unlawful interference with a person’s privacy and family.<sup>589</sup>

3.6.3.2 Human rights organisations report that forced evictions by Cambodian authorities are “*usually committed in flagrant contravention of their own laws.*”<sup>590</sup> Evictions have been carried out without court orders or due process. In some cases law-enforcement officers are perceived to be working against the Cambodian people on behalf of private

<sup>584</sup> See note 579 and LICADHO (March 2012), *op. cit.* (note 536).

<sup>585</sup> See for example: Roewn, V., ‘Land concessions granted in wildlife sanctuaries’, *The Cambodia Daily*, 26 June 2012, pp 1-2.

<sup>586</sup> Concessionaires have failed to exploit ELCs within 12 months of their issue without ramifications in at least Stung Treng, Kompong Chhnang and Pursat provinces: Ghai (2007), *op. cit.* (note 540), section 4.1.

<sup>587</sup> In 2012 the construction company Phanimex breached the terms of its SLC contract by renegeing on a requirement to build two additional buildings for residential housing, but was allowed to continue developing the land for its own commercial purposes without sanction: HRTF (January 2012), *op. cit.* (note 569); CCHR (May 2012), *op. cit.* (note 557).

<sup>588</sup> CESCR (1991), *op. cit.* (note 449), para. 18.

<sup>589</sup> United Nations Human Rights Committee, *Report of the Human Rights Committee: Concluding Observations on Kenya*, UN Doc. A/60/40 (Vol. I) (2004-5), para. 86 (22). See also: ICCPR article 17(1); UDHR, article 12.

<sup>590</sup> LICADHO (May 2009), *op. cit.* (note 529), p 1.

companies rather than the State.<sup>591</sup> The Land Law provides for the suspension of eviction orders which are likely to give rise to instability or have serious social repercussions, however in practice forced evictions are carried out regardless of their social impact.

3.6.3.3 A report on land evictions in November 2010 summarised a number of the ways in which forced evictions have been carried out in breach of Cambodia's international obligations and its own domestic law: *"victims of evictions are rarely given an opportunity for participation or consultation beforehand and any information which is provided to residents is often incomplete and inaccurate. When consultations with communities facing the threat of eviction do occur, they are often manipulative or coercive. Evictions are regularly conducted by armed Cambodian troops and police. The legal framework governing evictions is incomplete or unenforced, and remedial mechanisms are underdeveloped and corrupt... While the political and economic elite benefit from forced evictions, the victims are generally the most vulnerable members of Cambodian society."*<sup>592</sup> These sentiments have been echoed by the United Nations and a range of local and international human rights organisations and human rights monitors in Cambodia.

### 3.6.4 The role and conduct of law-enforcement officials

3.6.4.1 The conduct of law-enforcement officers carrying out forced evictions and/or suppressing dissent in the context of land disputes falls far short of the standards set out in the Law Enforcement Code of Conduct and the Basic Principles on the Use of Force and Firearms (paragraphs 6.2.1.12 and 6.2.1.13). Of particular concern are reports<sup>593</sup> that:

- police, military police and RCAF soldiers use excessive and lethal force against unarmed civilians;
- police, military police and RCAF soldiers enjoy impunity for their actions, even when they result in the injury or death of civilians;
- police and military police have attempted to clear land which is not the same as the land which is specified in court orders; and
- private security guards and RCAF soldiers have purported to arrest and detain civilians when they have no legal power to do so under domestic laws concerning land, criminal procedure and the military.

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<sup>591</sup> Amnesty International (February 2008), *op. cit.* (note 514),p 35; LICADHO (May 2009), *op. cit.* (note 529), pp 21 and 23; LICADHO (January 2012), *op. cit.* (note 536).

<sup>592</sup> CCHR, *Business and Human Rights in Cambodia: Constructing the Three Pillars – Report Summary*, Phnom Penh, November 2010, p 2.

<sup>593</sup> See for example: LICADHO (January 2012), *op. cit.* (note 536); HRTF (January 2012), *op. cit.* (note 569); LICADHO (May 2009), *op. cit.* (note 529), pp 21-22; Amnesty International (February 2008), *op. cit.* (note 514),p 33.

**Case Study**  
**Treatment of civilians who protest against the loss of their land**  
**Phnom Proek village, Battambang province<sup>594</sup>**

On 13 December 2011, over 100 villagers from Phnom Proek district in Battambang province gathered to protest against the measuring of land by officials and representatives of developer Suon Mean Sambath Company. As employees of the company were measuring a section of the land concession, a group of farmers began taking photographs with mobile phones. Lieutenant Colonel Chan Ry, a provincial military police official allegedly hired to act as private security personnel, confiscated one of the villagers' phones. When the villagers tried to take the phone back, Lieutenant Colonel Chan Ry used his pistol to shoot three of the farmers – each in the right leg – while two other military police officers with AK-47 assault rifles sprayed the ground and air with bullets.

### 3.6.5 Indigenous communities

3.6.5.1 There have been general failures to enforce the Land Law and relevant sub-decrees so as to protect the rights of Indigenous communities. Of particular concern are reports that Indigenous lands have been illegally sold or made the subject of a land concession.<sup>595</sup> These practices were especially prevalent in the period prior to the promulgation of the Sub-decree on Indigenous Lands in 2009 when large incursions were made into land over which Indigenous populations claimed to have cultural and customary property interests. This lack of enforcement of domestic legal protections is reported to have *“left Cambodia’s Indigenous minorities vulnerable to external interests who are increasingly attracted to exploiting the economic potential of the forests and fertile upland areas.”*<sup>596</sup>

### 3.6.6 Dispute resolution and the right to an effective remedy

3.6.6.1 The domestic framework for the resolution of land disputes is poorly implemented and has failed to provide protection to those communities who are most in need of it. The procedure for the resolution of disputes through the various levels of the Cadastral Commission is lengthy, involves several layers of conciliation and fails to protect communities against intimidation and forced evictions whilst they await a resolution. The courts have proven to be an ineffective mechanism for justice for communities who challenge the grabbing of their land by private individuals. Further, the costs associated with private court cases can be prohibitive for poor families.<sup>597</sup> The Cambodian Senate Committee on Human Rights and the NARLD have proven equally incapable of resolving land disputes in a timely, affordable, fair and balanced manner for all parties to the dispute.<sup>598</sup> Thus, communities who face forcible eviction from their land are denied the right to an effective remedy determined by competent judicial, administrative or legislative authorities in the event of violation of their property and human rights.<sup>599</sup>

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<sup>594</sup> This case study is quoted directly from CCHR (January 2012), *op. cit.* (note 548).

<sup>595</sup> See for example: Kothari (2007), *op. cit.* (note 439), paras 67-71.

<sup>596</sup> A MoP/UNDP report cited in Bugalski, N., Grimsditch, M. and Pred, D., *Land Titling in Cambodia: Lessons from the Land Management Administration Project*, April 2010, p 9.

<sup>597</sup> See for example: Supreme National Economic Council, *loc. cit.* (note 533).

<sup>598</sup> Amnesty International (February 2008), *op. cit.* (note 514), pp 34-38

<sup>599</sup> UDHR, article 8; ICCPR, article 2(3). See, for example: Ghai (2007) *op. cit.* (note 540), section 7.

## 3.7 Avenues for future action

***“The companies that have been granted economic land concessions but violated procedures and conditions by logging without developing the land, illegally encroaching on more land, keeping the land for resale, violating agreement conditions, infringing on the lands of individuals or communities, the Royal Government will revoke all those economic land concessions. To implement this spirit, local people, who have been living, either legally or illegally, in the areas of economic land concessions and economic forest concessions will be given land titles.”***

*– Prime Minister Hun Sen<sup>600</sup>*

### 3.7.1 Action concerning land tenure security

3.7.1.1 Ensuring land tenure security for all sectors of the population is the most effective way to reduce the frequency of land disputes and the social instability they create. Measures which would increase land tenure security in Cambodia include:

- classifying and registering all land as a matter of priority, in particular by identifying what land is State public land and systematically registering all disputed and contentious areas of land;
- addressing corruption which undermines just and fair decision-making in relation to land issues;
- increasing the capacity of law-enforcement and judicial officers to enforce the Land Law; and
- launching public-awareness campaigns to educate vulnerable sectors of the population about their land rights under the Land Law and the nature of legal ownership and formal procedures for acquiring and transferring land.

### 3.7.2 Action concerning land disputes and forced evictions

3.7.2.1 Urgent action is necessary to address the level of violence and displacement associated with land disputes and forced evictions. Measures which would assist to resolve disputes peacefully and in accordance with the law include:

- preparing clear guidelines for and providing specialised training to law-enforcement officers and local authorities on how to carry out forced evictions and engage with protesters in the context of land disputes. These guidelines could draw from the principles elaborated in the Basic Principles on Evictions and the Law Enforcement Code of Conduct;
- ending impunity for law-enforcement officers who act in abuse of their powers by thoroughly investigating and prosecuting all cases of misuse of firearms or abuse of authority which result in civilian injuries or deaths;

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<sup>600</sup> Prime Minister Hun Sen, *Keynote Speech at the Launching of the 2011 Mid-term Review Report on the National Strategic Development Plan Update 2009 – 2013*, Phnom Penh, 14 June 2012.

- improving the capacity of dispute resolution mechanisms to provide just, peaceful and efficient resolutions of land disputes;
- ensuring that all criminal charges against individuals for offences relating to State public land or the private property of other people are deferred until the underlying question of ownership of the land in question has been determined by final judgment of a court; and
- ensuring that relocation sites are fully equipped with sufficient and appropriate shelters and the basic infrastructure and sanitary facilities necessary for the dignity and well-being of all displaced persons.

3.7.2.2 In the period until these measures are implemented, the following steps could prevent an escalation of the conflict and violations of human rights abuses which have occurred in the context of land disputes to date:

- a moratorium on all forced evictions until minimum standards and guidelines which implement Cambodia's international obligations to evictees have been elaborated and disseminated;
- a continuance of the current moratorium on the granting of ELCs until a full government review of existing ELCs has been completed; and
- allowing local and international human rights monitors to observe forced evictions and other land disputes.

3.7.2.3 In all evictions, special regard should be had to the best interests of children and the special needs of women and mothers.

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## 3.8 Partners in Action

### 3.8.1 Royal Government of Cambodia

3.8.1.1 The MoLMUDC is responsible for land management and administration, which includes developing land policy, carrying out the registration, distribution and titling of land and managing State-owned land.

3.8.1.2 Other Ministries also have a role to play in land management and land disputes, including the Ministry of Agriculture, Forestry and Fisheries which is responsible for agriculture and economic land concessions and the MoI and the Ministry of Defence which are responsible for the actions of police and RCAF officers and soldiers involved in forced evictions.

3.8.1.3 The Cadastral Commissions, the NARLD and the courts have important roles to play in resolving disputes relating to registered and unregistered land.

### 3.8.2 United Nations agencies

3.8.2.1 Under its *Land and Housing Rights Programme*, the OHCHR in Cambodia works with the RGC, civil society organisations, private companies, communities, United Nations agencies and multilateral and bilateral development actors to monitor, promote and

## State of Migration

An overview of forced displacement in Cambodia

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implement the right to adequate housing and an adequate standard of living, prevent forced eviction and realise security of tenure.

### 3.8.3 Local and international organisations

- 3.8.3.1 A number of local and international rights groups are involved in monitoring land disputes and the treatment of persons who are arbitrarily arrested and detained in the context of land disputes, including LICADHO, CCHR, STT and other members of the HRTF.
- 3.8.3.2 The **HRTF** is a non-profit, non-partisan coalition of international and local organisations committed to promoting the right to adequate housing and ending the practice of forced evictions in Cambodia. As of July 2012 the HRTF has 10 members and its partners include Amnesty International, the Asian Development Bank, the UNDP and the World Bank.

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#### Case Study

##### Land dispute involving land of the Jarai Indigenous people Kong Yu and Kong Thom villages, Ratanakiri province<sup>601</sup>

In Kong Yu and Kong Thom villages, Ratanakiri province, the Jarai Indigenous people and lawyers from CLEC and Legal Aid of Cambodia claim that Indigenous land was seized unlawfully.

In 2004, during several meetings held in an ‘intimidating’ atmosphere, local officials asked the community to agree to sell some of their collective farm land. The officials reportedly threatened the local community that if they did not agree to the sale the land would be confiscated by the RGC. The community reluctantly agreed to give 50 hectares to disabled, demobilised soldiers. In July 2004, after an agreement was reached verbally, officials from the provincial and commune levels brought food and alcohol for the villagers and arranged a ceremony. Later that evening, an official is reported to have produced Khmer language documents for the villagers to thumbprint. One of the villagers told Amnesty International: *“They did not explain or read it out, but just asked us to put the thumbprints.”*

Village representatives told Amnesty International that they found out later that the thumbprinting amounted to permission to hand over *“hundreds of hectares”* of communal land to a middleman, who in turn sold the land on for a rubber plantation to a company directed by a business woman who is reported to be the sister of the Minister for Finance and the wife of a high-ranking official within the Ministry of Land Management.

In October 2008, the business woman’s employees began clearing the villagers’ farms and a burial forest located on the disputed land, in breach of a promise she had made to the Court not to clear further land until the dispute had been judicially resolved. On 28 October 2008 a judge of the Provincial Court issued an injunction to halt the clearing, however it was not implemented properly and the business woman’s employees continued to clear further land.

Villagers reported that as a result of the dispute they lost access to vegetation they had previously collected from the forest, had insufficient land for future use and were unable to leave their cattle free to roam in case they wandered onto the rubber plantation and were confiscated. Children were kept home from school in order to take care of the cattle.

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<sup>601</sup> This case study is comprised of extracts taken directly from Grimsditch and Henderson, *op. cit.* (note 478); Amnesty International (September 2008), *op. cit.* (note 432), pp 8-11; Ghai (2008), *op. cit.* (note 554), paras 65-67.

**Case Study**  
**Criminal trial of 13 women charged with various crimes after peacefully protesting at Boeung Kak Lake, Phnom Penh, 2012<sup>602</sup>**

The beginnings of a land dispute over the Boeung Kak Lake area in Phnom Penh began to develop in 2005. At that time, the residents of this area had been living on their land for up to 20 years and had been implicitly recognised as landowners by local authorities since the 1990s through the issuance of house numbers, family books, small infrastructure improvements and the witnessing of land sale contracts. Whilst some residents lived on State public land and thus, under the Land Law, were not able to transform their possession into ownership of land, some reports suggest that other residents could have acquired ownership rights over their properties.

In 2007 the RGC granted a land concession over Boeung Kak Lake to a joint venture between a Chinese company and Shukaku, a Cambodian company owned by senior CPP member Lao Meng Kim. Following the grant, approximately 4,200 families who had built their homes and livelihoods around the lake were forcibly evicted. On 11 August 2011, Prime Minister Hun Sen signed a sub-decree awarding 12.44 hectares of the Boeung Kak Lake area to the community. Whilst this step marked a win for the villagers who had been disputing the loss of their land since 2007, 85% of the community had already been displaced from the area by this time and not all the homes of those remaining in the area were included in this grant. A number of families had already accepted “*paltry*” compensation packages and been relocated to the outskirts of the city.

On 22 May 2012, a group of families returned to the sites of their former residences at Boeung Kak, equipped with wood and prepared to rebuild their homes. After police and military police intervened to prevent construction, the families and their supporters launched a peaceful demonstration involving singing and speeches. During the course of the demonstration police arrested 13 women from amongst the crowd (the “**Boeung Kak 13**”) and detained them without charge for two days.

On 24 May 2012 the Boeung Kak 13 were woken before dawn and, without prior notice to their lawyers or families, transported to the Phnom Penh Municipal Court. Police blockades were established to prevent community members, human rights observers and the media from accessing the area. By midday the women were informed that they had been charged with illegal occupation under the Land Law and the obstruction of public officials under the Penal Code. Human rights groups have claimed that these charges were “*spurious*” and baseless.

An hour after the charges were laid the trial began. All thirteen women were sentenced to two and a half years in prison. Human rights organisations deemed the trial to be illegal on a number of grounds. Requests by the women’s lawyers for a delay to allow them to prepare a defence, for access to the case file and evidence, to confer with their clients and to call witnesses were all denied. Naly Pilorge, Director of LICADHO, reported: “*the speed with which the trial began and ended, and the Court’s refusal to follow Cambodian law, reveals a complete disregard for the fundamental rights of Cambodian citizens. Under no circumstances should an individual be required to defend themselves against serious felony charges within an hour of them being filed. This was a travesty.*”

The case of the Boeung Kak 13 received widespread local and international attention and criticism. Considerable pressure was placed on the RGC to overturn the conviction. On 27 June 2012 the Phnom Penh Court of Appeal upheld the verdict of the Municipal Court, but converted the sentence to one month and three days, being time already served.

<sup>602</sup> STT, *Outside the Lines: Households Excluded from the 12.44Ha Boeung Kak concession*, June 2012; HRW (2012), *op. cit.* (note 557), pp 309-310; Grimsditch and Henderson, *op. cit.* (note 478), pp 59-61; Worrell, S. and Chakrya, K. S., ‘Freedom rings for Boeung Kak 13’, *The Phnom Penh Post*, 28 June 2012; HRTF *et al.*, *Joint Statement Condemning Baseless Convictions and Violence Against Human Rights Defenders*, 24 May 2012.

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