

Fax from Reginald Austin,
Former Head of UNTAC's
Electoral Component

As from the Phonecia Hotel, Malta
2 June 1995 (no. of pages including this one = 3)

Mr Sam Rainsy M.P.
National Assembly
PHNOM PENH, Cambodia (FAX NO: 855 23 28549)

Dear Mr Sam Rainsy

Re: Tenure of Elected Members of the Cambodian National Assembly

This is to acknowledge your fax of 1 June 1995, regarding the above, and the fact that your expulsion from the National Assembly is being sought on the grounds that you have been expelled from the political party whose Provincial List you headed in the 1993 United Nations organised election.

You have requested my legal opinion on this issue, and I set it out below:

1 (i) The Electoral Law drafted by the United Nations and enacted by the Special Representative in terms of the Paris Agreement, dealt with the possibility of a member being replaced after election on the Party List system. The Act provided for this in three situations, namely if the representative died, resigned or was unable to serve. Article 78(2).

(ii) This needs to be understood in the circumstances for which the law sought to provide. The Party List system had been chosen by the parties to the Paris Agreement, and indeed there was no alternative to it in the time-frame and in the circumstances. This system has been used quite frequently, and in the Cambodian case sought to combine the ideals of party representation with personal representation of each Provincial constituency. Hence the fact that each "constituency" (ie Province) was offered not only a political party to represent it, but a specified individual Member (or Members) of Parliament.

It needs to be appreciated that in the particular context of Cambodia the clear indication of the individual to be elected was regarded as critical. It was assumed, at the time of drafting the law, that the Party of Democratic Kampuchea (The Khmer Rouge) would participate. This meant that such individuals as its leader, Pol Pot, may well be elected. While the right of the Cambodian voters to choose whosoever they wished to represent them was a basic and accepted principle of the Paris Agreement, it was nevertheless seen as fundamental that those voting for the Khmer Rouge must know which individual (eg Pol Pot?) was to be their representative. In this sense they would regard the individual listed, especially at the top of the list, with specific interest.

Thus the system was most clearly a combination of representation by a political party with representation by known individuals. There should be no possibility of a "hidden candidate" being elected to the Assembly by the Party, by virtue of its expelling or otherwise removing an M.P. and replacing him or her with a person regarded as more appropriate by the Party, without reference to the voter.

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(iii) It would have been possible, as has been done in some laws (either Electoral or Constitutional), to provide **explicitly** for the political party to have complete control of representation. That however was not the case in the Electoral Law of Cambodia.

In the circumstances it is my opinion that the expulsion or resignation of an elected M.P. from the Party upon whose provincial list he was placed, is not a proper or sufficient ground for his replacement by the Parliament under the Electoral Law.

It may be noted that the dichotomy and separation between Party and government, or the Party and the elected legislators is important in contemporary democratic practice. The dominance of the Party's will over the individual conscience of the elected representative is seen as an undesirable remnant of the one-party system. It denies pluralism, and the presumption in interpreting a democratic law, such as the Electoral Law, would be in favour of freedom of conscience rather than the monolithic control of the party. If it was intended that Party's choice was to dominate, that contrary intention would need to be **explicitly** provided, as it is eg in the current law of South Africa, but was significantly **not** provided for in the Electoral Law of Cambodia. Other proportional representation systems in established pluralist democracies, eg Germany and Austria adopt this approach and would protect a dissident elected representative from expulsion.

2. The Regulations of the National Assembly itself are also relevant to this problem. As I understand these, it appears that the essential rationale of the Electoral Law was adopted by the National Assembly in creating its own regulations.

(i) It appears to have excluded from the grounds for replacing an elected representative, the fact that he has "lost the Party whip". Instead the regulations restrict the power of replacement to circumstances where the individual M.P. either

- : voluntarily removes himself from the Assembly (resigns), or
- : implies his voluntary removal, by long (3 months) unauthorised absence or
- : physically is removed, by his death.

In no case is it contemplated that an M.P. can be replaced by virtue of the exercise of the will of a Third person - the Party or anyone else.

(ii) In the circumstances I am of the opinion that the law of the National Assembly in this context provides no basis for removal merely because the political Party which placed an elected representative on its List, has parted company from the individual. The M.P.'s duty to represent those who elected him cannot be terminated by anyone other than the electors at the next election.

3. Finally, the Constitution of the Kingdom of Cambodia quite clearly follows the ideal of pluralist democracy evidenced in both the above-mentioned laws.

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(i) Article 95 of the Constitution, the main provision relating to replacing an M.P, reflects the emphasis upon the individual M.P's voluntary exclusion of himself as the major reason for replacement. It refers to death, resignation or dismissal. In this regard dismissable it must be assumed means dismissal for proper legal cause. The only causes for involuntary removal, according to law, is extended, unauthorised absence from the National Assembly.

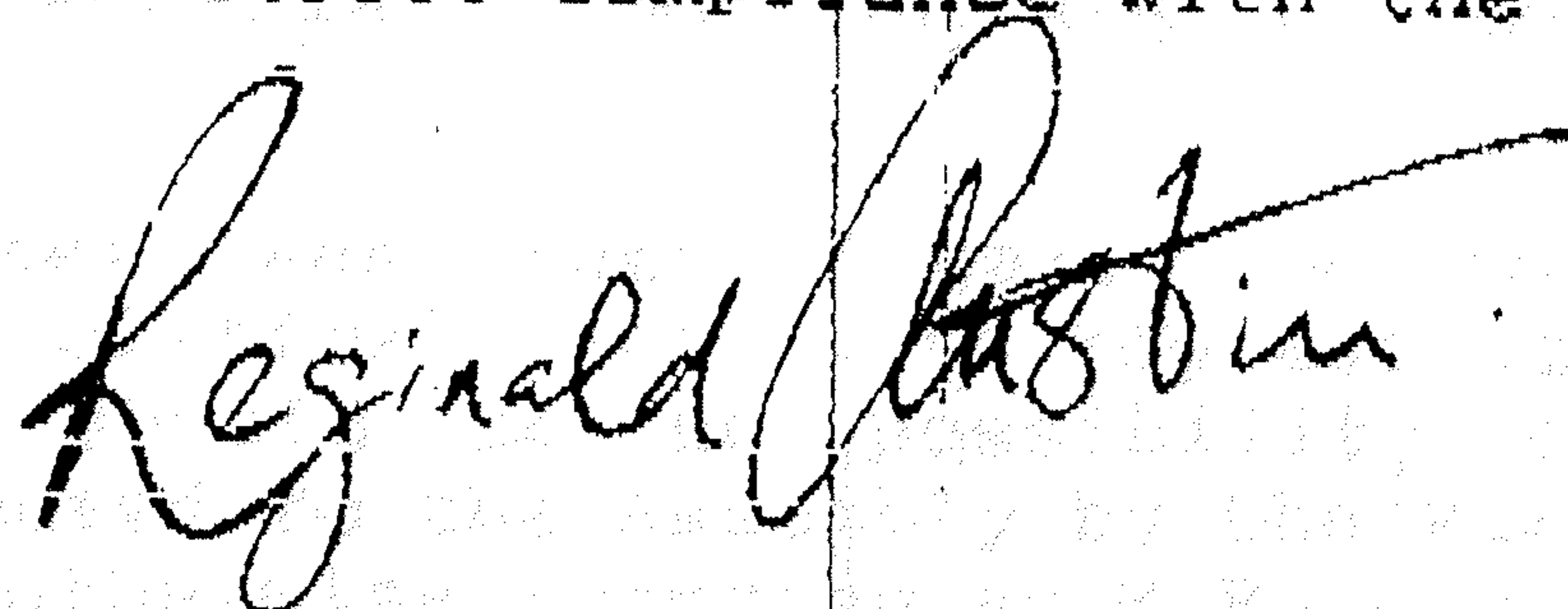
(ii) Thus, I am of the opinion that the Constitution confirms the basic principle that the elected representative is "of the people" and not "of the party", despite the important association of the candidate with party in the Party List system of proportional representation. Other clauses in the Cambodian Constitution tend to confirm that the representation is as at least as much based upon and provided by the individual M.P as by the Party.

4. Quite apart from this interpretation of the specific provisions of the laws relating to the issue of representation and the removal of elected members, I believe it is important to bare in mind the spirit of the laws in question, the historical context of their creation and the evil which they sought to remedy.

Cambodia had suffered traumatic injury to an unparalleled degree as a result of decades of extreme intolerance, authoritarianism and the rigid enforcement of the will of the dominant political party to the total exclusion of any degree of pluralism. To avoid the tragic practices of the recent past". The four Cambodian factions, including those closely involved in those intolerant practices and the assertion of the monolithic power of the Party, recognised in the Paris Agreement democracy as the sole instrument to end this cycle of tragedy. They agreed, in a unique act of self-sacrifice, to allow the United Nations to legislate for and implement a system of democratic pluralism based on an election.

That spirit of tolerance, respect for pluralism and belief in the right of voters to choose and rely upon a particular elected representative as well as a Party, to espouse their interests as constituents is basic. It requires an overall approach, as well as a legal interpretation, which is liberal and respectful of differences of view point, rather than an insistence upon disciplined and Party-controlled parliamentary puppets. If the individual representative is not satisfactory, it is, in my opinion, for the electors at the next free and fair election to replace him, not for the Party. His removal between elections by any other authority, such as the Assembly itself must only be done in strict compliance with the law.

Yours sincerely



R H F Austin
Director
Legal & Constitutional Affairs Division