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Implementation of the Rome Statute in Cambodian Law

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Introduction

This report was drafted in the framework of an FIDH programme promoting the ratification and implementation of the Rome Statute of the International Criminal Court (ICC). This programme received particular support from the European Union (European Initiative for Democracy and Human Rights – EIDHR).

The first action conducted in Cambodia in the context of this programme, in March 2005, was a round table over two days, on the topic of "Articulation between the International Criminal Court and the Khmer Rouge Tribunal: The Place of Victims". This round table, organised jointly with the two FIDH member organisations, the Cambodian Association for Human Rights and Development (ADHOC) and the Cambodian League for the defence of Human Rights (LICADHO), brought together participants from Cambodian civil society organisations as well as academics and some diplomatic representatives. Although the Cambodian authorities were invited to participate, including as speakers at the round table, in the end they did not participate.

The speeches and debates during the two day round table were published, including the resulting recommendations by the FIDH, ADHOC and LICADHO[1].

The initiative bore fruit since it was the first to place emphasis on the participation and protection of victims before the Khmer Rouge Tribunal, an issue that had not received much attention until then[2].

Following the round table, the FIDH decided to implement a second programme of action in Cambodia, relating to implementation of the Rome Statute of the ICC in Cambodian law. Two *chargés de mission* were chosen to conduct a study on the issue, in order to identify any changes needed to Cambodian law to bring it fully into line with the obligations under the Statute. In fact, Cambodia is the first (and one of the rare) States in the region to have ratified the Statute of the ICC. However, it has not yet adopted the legislative provisions needed to integrate the Statute's obligations into domestic law.

The Doctorate candidates who conducted the study, Messrs Rada SANN and Hisham MOUSAR, under the supervision of Dr. David BOYLE, spent three months in Cambodia (September to November 2005) working out of the ADHOC office. The FIDH would like to take this opportunity to thank ADHOC for their support. Beyond ADHOC and LICADHO, they were able to meet and present their work to H.E. Leng Peng Long, Secretary of State within the Council of Ministers and Secretary General of the Council of Jurists; Mr. Son Soubert, member of the Constitutional Council; H.E. Khieu San, President of the Legal Commission of the National Assembly; H.E Ouk Vanrith, President of the governmental Human Rights Commission; Mrs Helen Jarvis, counsellor in the Secretariat of the Task Force for the Khmer Rouge Tribunal within the Council of Ministers; Mr Manfred Hornung and Ms Alice Goodenough of the Cambodian Office of the UN High Commissioner for Human Rights, Mr Yvon Roe d'Albert, French Ambassador to Cambodia and Mr Laurent Lamarchand, the First Counsellor. The FIDH wishes to thank all of them for their availability and cooperation.

This Report is the fruit of the work conducted by the *charges de mission*. It is based on the draft Criminal Code and draft Code of Criminal Procedure currently under examination by the Royal Government of Cambodia. Indeed, after their meetings with the abovementioned persons and civil society representatives, it appeared important to the *charges de mission* to work on the basis of the texts that are currently being finalised, rather than proposing separate implementing legislation for the

[1] FIDH Report No. 420, June 2005, available at http://www.fidh.org.

[2] FIDH, ADHOC, LICADHO communiqué, 29 March 2005, available at http://www.fidh.org/ article.php3?id_article=2331.

ICC Statute. Indeed, this ongoing reform process offers an ideal opportunity to immediately integrate provisions in these draft Codes giving full effect to the Rome Statute, as ratified by Cambodia.

This Report does not in any way affect the general structure of the draft Codes, which are already an essential step towards bringing Cambodian criminal law into conformity with international instruments for the protection of human rights ratified by Cambodia. In addition, the rapid adoption of these Codes will provide greater judicial security, since they will replace a series of provisions relating to criminal law and procedure that overlap or even contradict each other. The FIDH considers that adoption of these Codes is urgent, as recalled by the 2004 meeting of the group of donors for Cambodia.

This Report suggests essentially technical modifications to the current drafts of the Criminal Code and Code of Criminal Procedure in such a way that their incorporation by the Cambodian authorities responsible for finalising these texts should not slow their adoption.

The work in this programme was undertaken in a spirit of cooperation with the Cambodian authorities and the FIDH hopes that they will take it into account. In this way, Cambodia would become not only the first country in the region to have ratified the Statute of the ICC, but also one of the rare States in the World to have implemented it in domestic law.

Part I – Cambodia's commitment to the International Criminal Court from 2000 to the present*

Introduction

The Kingdom of Cambodia signed the Rome Statute of the International Criminal Court (ICC) on 23 October 2000. It then ratified the Statute on 7 January 2002 and deposited its instrument of ratification with the Secretary-General of the United Nations on 11 April 2002. In accordance with Article 126, the Rome Statute came into force on 1 July 2002, from which date the Kingdom of Cambodia is bound to execute its obligations under the Statute in good faith. However, on 27 June 2003, the Royal Government also concluded a bi-lateral agreement with the U.S. Government excluding the Court's jurisdiction over United States and Cambodian nationals.

Chapter I – Ratification of the Rome Statute of the International Criminal Court

After Cambodia's signature of the Rome Statute, civil society, being fully conscious that the establishment of a permanent international criminal court was a decisive issue, took up the subject with a view to accelerating the ratification process.

On 30 and 31 May 2001, the Cambodian Association for Human Rights and Development (ADHOC) organized a workshop in cooperation with the International Coalition for the International Criminal Court (CICC) and with support from the government. Legal experts, attorneys, officials from the Ministry of Justice, members of the governmental Human Rights Commission, members of the government and lawmakers representing all major political parties (PPC, FUNCINPEC and SRP) all participated in this event[3].

Following the workshop, the Cambodian Prime Minister received a delegation of international experts headed by Messrs Thun Saray, President of ADHOC, and Somchai Homlaor, Secretary-General of Forum Asia (the Asian forum for Human Rights). During the meeting, the delegation presented its recommendations to the head of government, who stated that a draft law for ratification of the Rome Statute would rapidly be submitted to the National Assembly.

On 26 November 2001, the Assembly examined the draft ratification law and, the following day, the law was adopted unanimously by the lawmakers[4]. Finally, Mr Chea Sim, interim Head of State during the absence of the King in Peking, promulgated the law on 7 January 2002.

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* Translator's note: translations of extracts from the 1955 Criminal Code and the draft Criminal Code are our own.

[3] The results of this meeting were publicly communicated during a press conference, see: ADHOC and Forum Asia, *National Workshop on the International Criminal Court from 30 to 31 May 2001*, Hotel Sunway, Phnom Penh, 70 pages (available in Khmer).

[4] The Parliamentary debates were remarkably rapid and do not raise the issue of royal immunity, provided under Article 7 of the 1993 Constitution. Yet this raises the question of the compliance of such immunity with Article 27 of the Rome Statute. According to the MP Khieu San, who was a Senator at the time, there was no need to submit the question to debate, since the 1993 Constitution is perfectly clear, stating that the King of Cambodia reigns but does not exercise power and that his person is inviolable; placing the question on the agenda would thus have been, according to M, Khieu San, a violation of the Constitution. Nevertheless, regardless of its wording, Article 7 of the

Cambodia is only the second ASEAN member country, after Thailand, to have signed the Rome Statute, and the only member of this regional group to have ratified it.

Chapter II – The US-Cambodia bilateral agreement of 27 June 2003

After the Rome Statute came into force, the Cambodian government organized a conference on 9 and 10 October 2002, which was attended by representatives of twenty States. Remarkably, during the conference, the Royal Government publicly urged the other countries to follow the Cambodian example and ratify the ICC Statute[5].

However, the Cambodian government's attachment to the Rome Statute did not suffice to deter it from concluding an extremely controversial bilateral agreement with the American government on 27 June 2003. This agreement, regarding "the non-surrender of persons to the International Criminal Court" introduces a veritable immunity from jurisdiction with respect to the Court. It is part of the American campaign against the Rome Statute and was concluded directly after a visit to Cambodia by the American Secretary of State, Mr Colin Powell[6].

The Kingdom of Cambodia has thus joined the hundred States having signed such an agreement with the American government, among which more than a third are also State Parties to the Rome Statute[7].

The Cambodian Parliament ratified the US-Cambodia agreement in May 2005 [8], through a ratification law promulgated on 19 June of the same year[9].

A – Presentation of the bilateral agreement

The bilateral agreement stipulates that no persons, being "*current or former Government officials, employees (including contractors), or military personnel or nationals of one party*", present in the territory of the other, may, without the expressed consent of the first party:

- "be surrendered or transferred by any means to the International Criminal Court for any purpose, or
- be surrendered or transferred by any means to any other entity or third country, or expelled to a third country, for the purpose of surrender to or transfer to the International Criminal Court".

In other words, if the Cambodian government were to receive a request for the extradition, surrender or transfer to a third country of a person that the United States consider to come within the

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Constitution cannot impede the application of Article 27 of the Rome Statute. International case-law has indeed systematically formulated the principle of the superiority of international law over internal norms, even of constitutional value. In this respect, see PCIJ, 4 February 1932, *case relating to the treatment of the Polish nationals in Dantzig*, Series A/B, No. 44, p. 24; also the Arbitral Sentence of 26 July 1875, *Montijo* case between the United States and Colombia, R.A.I. V. III, p. 663: "*A treaty is superior the Constitution. The legislation of the Republic must adapt to the treaty, not the treaty to the law.*" (Moore, Arbitration, p. 1850); Article 6 of the ILC draft Articles relating to the responsibility of States, provides that "*[t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions…*"(Article 4(1) underlined).

[5] During the closing speech of the conference, the Minister of State presiding the Council of ministers, M. Sok An declared that, "*[b]y its signature of the Rome Statute on 23 October 2003, and its recent ratification this year, the Kingdom of Cambodia has solemnly asserted its determination to contribute to the promotion of human rights and international humanitarian law, according to the noble principles expressly declared in its Constitution [preamble, Articles 31 and 32]… We are convinced that this Conference will serve to motivate States that have not yet signed or ratified the Rome Statute to rejoin us as State Parties, and will encourage those who choose the International Criminal Court by continuing to devote their efforts to establishing a viable basis for the Court*" (Conference on the International Criminal Court, Intercontinental Hotel, Phnom Penh, 10 October 2002).

[6] "Cambodia to exempt US citizens from ICC prosecution", *ABC Radio Australia News*, 27 June 2003.

[7] See *infra*, Table 1, p. 12.

[8] The National Assembly adopted the ratification law on 18 May 2005, and the Senate on 30 May.

[9] *Krâm* No. NS/KR/0605/017.

abovementioned criteria, for purposes of surrender to the International Criminal Court, it should not accede to the request without the express consent of the US government. In the same way, if the US receives such a request concerning a person that Cambodia considers to satisfy the above criteria, the US government will not accede to the request without the express consent of the Cambodian Government.

Article 5 of the agreement stipulates that it shall remain in force for one year after the date upon which one of the parties notifies the other of its intention to put an end to it.

B – Critical analysis

The United States and Cambodia expressly justify their 27 June 2003 agreement, on the one hand, through an unfounded reference to Article 98 of the Rome Statute, which prohibits the International Criminal Court to continue with execution of a request for surrender or assistance "*which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity*" and, on the other hand, by asserting that the Court only has complementary jurisdiction, which prevents it from supplanting national jurisdiction.

Generally speaking, this attempt to justify the bilateral agreement by reference to the text of the Rome Statute, the object and purpose of which are substantially neutralized by the agreement, indicates the weakness of the legal arguments proffered by the parties.

Indeed, after having signed the Rome Statute, the United States publicly declared their intention not to ratify it[10], then led a worldwide campaign to deprive the Statute of its legal effect, through the conclusion of bilateral agreements excluding ICC jurisdiction[11] (thereby breaching its international obligation not to defeat the object and purpose of a signed treaty before it comes into force)[12].

Pursuant to Article 18 of the Vienna Convention on the Law of Treaties[13], a State that has signed a treaty must refrain from acts that would defeat the object and purpose of the treaty pending a decision

[10] On 6 May 2002, the US announced their decision not to ratify the Rome Statute and denounced their signature, "Secretary Rumsfeld Statement on the ICC Treaty", United States Department of Defense, News Release N° 233-02, 6 May 2002, available at http://www.defenselink.mil/releases/2002/b05062002_bt233-02.html.

[11] The world campaign has taken two forms up until now. The first consisted in obtaining, on 12 July 2002, a resolution of the Security Council allowing recourse to Article 16 of the Rome Statute to adjourn enquiries or prosecutions by the ICC against nationals of States that are not parties in relation with acts or omissions linked to operations established or authorized by the UN (Resolution 1422). The second consists of persuading States to conclude agreements on immunity of jurisdiction aiming to prevent those States from transferring American nationals accused of genocide, war crimes or crimes against humanity to the ICC, without providing for enquiries or prosecutions by the US or by another State. This second approach is linked to threats of suspension of military assistance to all State Parties to the Rome Statute that do not conclude such agreements with the US. During the first week of August 2002, the Department of State informed foreign ambassadors of US opposition to the ICC and warned them that Article 2007 of the Law on the protection of American armed force members, which came into force on 2 August 2002, prohibited the supply of any military assistance to State Parties to the treaty establishing the ICC while authorizing the President to renounce this prohibition if the concerned State concludes a jurisdictional immunity agreement with the US or if the President considers that such renunciation is in the national interest. For a detailed study of the American campaign against the International Criminal Court, see the FIDH report, "No to the American exception": www.fidh.org.

[12] The US have of course ceased to be bound by this obligation as signatories since 6 May 2002, when they announced their decision not to ratify the Rome Statute and denounced their signature.

[13] "*A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:*
(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or
(b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed." (Article 18 of the 1969 Vienna Convention on the Law of Treaties).

on its ratification. This obligation arises even before the treaty has entered into force[14] and also corresponds to the state of customary international law[15].

1) Concerning the complementary principle

The complementary principle, relied on by the US and Cambodia, cannot legally justify their agreement.

In reality, the aim of this principle is to give the International Criminal Court jurisdiction over the crimes set out in Article 5 of the Rome Statute, under the conditions laid down in Article 17 (lack of will or incapacity of the State to prosecute). The complementary principle also obliges State Parties to cooperate with the Court in accordance with their obligations under the Statute, especially Articles 86, 87, 89, 90 and 27. Denying the Court's jurisdiction, by cancelling all cooperation with it by a State Party, "*by any means*" or "*for any purpose*" in the words of the bilateral agreement, thus preventing the Court from prosecuting crimes coming within its jurisdiction, even in case of State failure to do so, is the exact opposite of the meaning of the complementary principle in the preamble and Articles 1 and 17 of the Rome Statute.

In concluding the 27 June 2003 bilateral agreement, Cambodia accepted an obligation not to cooperate with the International Criminal Court with respect to the US. It agreed not to surrender or transfer to the Court an American national or other person referred to in the agreement, nor surrender or transfer them to an organization or third country for the purposes of surrender to the Court, which amounts to a breach of its essential cooperation obligations under the Rome Statute.

As the USA is not a party to the Statute, it is not bound to cooperate with the Court. Thus they do not breach the Statute. In this light, however, it is extremely worrying that American law is far from allowing full repression of the crimes set out in Article 5 of the Rome Statute[16].

Accordingly, where the perpetrators of such crimes belong to the list of individuals mentioned in the 27 June 2003 bilateral agreement, they could be protected from all prosecution, since the failure of the American legislation to allow their prosecution does not lead to the capacity of the International Criminal Court to prosecute them through the Statute's cooperation obligations.

2) Concerning Article 98(2) of the Rome Statute

To justify their agreement, the US and Cambodia also invoke Article 98(2) of the Rome Statute, which provides that:

> "The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a *sending State* is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender." [italics added].

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[14] Ph. Cahier, "L'obligation de ne pas priver un traité de son objet et de son but avant son entrée en vigueur", *Mélanges Dehousse*, 1979, p. 31-37, in this sense, see also, *Restatement (Third) of the Foreign Relations Law of the United States*, American Law Institute, 1987, n. 7, section 312, par. 3: the signatory is bound to abstain from acts that would deprive the agreement of its object and purpose.

[15] According to the International Law Commission, this rule is generally accepted (ILC Annual Report, Vol. 2, 1969, pp. 169-202); see also, PICJ, *Certain German interest in Polish Upper Silesia* (question of jurisdiction) [1925] PCIJ 7, p. 30.

[16] Wide-ranging, worrisome gaps in American legislation make American courts incapable of prosecuting the perpetrators of many war crimes, such as they are defined in the Rome Statute, when committed abroad, since many of these crimes are not expressly defined by Federal law. Nor can they prosecute perpetrators of genocide committed abroad by members of the American armed forces or by foreign nationals referred to in the bilateral agreement of 27 June 2003. For details of the issue of American extraterritorial jurisdiction over war crimes, crimes against humanity, genocide and torture, see the Amnesty International study: *Universal jurisdiction*, forefinger index AI : IOR 53/002/01 at 53/018/01, Chapters 4, 6, 8 and 10, September 2001.

In this provision, the drafters of the Rome Statute were referring to status of armed forces agreements, since in International law the use of the term “sending state” usually designates a state whose forces are stationed in the territory of another state, the latter being the host state. A study of the *travaux préparatoires* for the Rome Statute, which the Vienna Convention on the Law of Treaties includes as a means of interpreting a treaty, confirms this interpretation[17].

Clearly, the 27 June 2003 bilateral agreement is not a status of forces agreement. Accordingly, the reference to Article 98(2) of the Rome Statute does not justify it.

Moreover, international practice relating to status of forces agreements shows that, in case of concurrent jurisdiction, states share the responsibility for investigation and prosecution between themselves. In no case do these agreements grant impunity to nationals of the sending state[18].

On the contrary, the 27 June 2003 agreement introduces veritable impunity for American nationals and other persons referred to in the agreement who commit genocide, crimes against humanity or war crimes, as defined in the Rome Statute, since American legislation does not fully provide for the prosecution of such crimes and the United States are not obliged to launch prosecutions under the agreement.

In addition, under Rule 195(1) of the ICC Rules of Procedure and Evidence (RPE), the Court has the exclusive power to decide whether responding to a request for surrender will require a State to act in breach of its obligations under an agreement referred to in Article 98(2) of the Rome Statute. Neither the sending State nor the requested State can impose it own decision, contrary to the provisions of the 27 June 2003 bilateral agreement.

In light of these findings, the 27 June 2003 bilateral agreement breaches the Rome Statute. It is incompatible with the object and purpose of the Statute, which Cambodia is bound to execute. Thus, the bilateral agreement, concluded after the ratification by Cambodia of the Rome Statute, is unlawful[19].

The FIDH recommends:

- that the Kingdom of Cambodia notify the USA of its intention to put an end to the 27 June 2003 agreement.

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[17] See Hans-Peter Kaul & Claus Kress, “Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises, in *Yearbook of International Humanitarian Law*, vol. 2, 1999, pp. 143-165; see also Christopher Keith Hall, “The First Five Sessions of the UN Preparatory Commission for the International Criminal Court”, *American Journal of International Law*, vol. 94, 2000, p. 786, which points out that Article 98-2 was added to cover existent status of forces agreements).

[18] “*NATO-type SOFAs do not provide immunity but only a primary right to exercise the jurisdiction of the sending state for certain crimes including crimes committed in the performance of official duties. This is very similar to the complementarity regime in the Statute. Such SOFAs should be interpreted in a manner similar to that prescribed by article 17 of the Statute: mock prosecutions with the sole purpose to shield the suspect from criminal responsibility are incompatible with the object and purpose of the jurisdictional provisions of NATO-type SOFAs. NATO-type SOFAs should pose no problem under article 98 (2) of the Statute.*” (Steffen Wirth,”Immunities, Related Problems, and Article 98 of the Rome Statute” 12 Criminal Law Forum, 2002).

[19] The case-law clearly recognises the principle that a multilateral Convention is the result of an agreement freely concluded and that correspondingly the contracting parties cannot destroy or compromise the object and purpose of the convention by unilateral decisions or specific agreements (ICJ, Advisory Opinion, 28 May 1951, Reserves to the Convention on the Prevention and Punishment of Genocide, Rep. 1951, p. 21); in the same sense, in the *Free Zones* case, the PCIJ refused to accept that specific agreements could derogate from its own Statute (19 August 1929, series A, No. 22, p. 12).

Table 1: List of States having ratified or adhered to the Rome Statute

As of 1 December 2005, 100 States had ratified or adhered to the Rome Statute, 42 of them (indicated by an asterisk) have concluded an impunity agreement with the United States[20].

Country	Date of signature	Date of ratification / accession (a)
Afghanistan *		10 February 2003 (a)
Albania *	18 July 1998	31 January 2003
Andorra	18 July 1998	30 April 2001
Antigua and Barbuda *	23 October 1998	18 June 2001
Argentina	8 January 1999	8 February 2001
Australia	9 December 1998	1 July 2002
Austria	7 October 1998	28 December 2000
Barbados	8 September 2000	10 December 2002
Belgium	10 September 1998	28 June 2000
Belize *	5 April 2000	5 April 2000
Benin *	24 September 1999	29 January 2002
Bolivia *	17 July 1998	27 June 2002
Bosnia and Herzegovina *	17 July 2000	11 April 2002
Botswana *	8 September 2000	8 September 2000
Brazil	7 February 2000	20 June 2002
Bulgaria	11 February 1999	11 April 2002
Burkina Faso *	30 November 1998	16 April 2004
Burundi *	13 January 1999	21 September 2004
Cambodia *	23 October 2000	11 April 2002
Canada	18 December 1998	7 July 2000
Central African Republic	7 December 1999	3 October 2001
Colombia *	10 December 1998	5 August 2002
Congo (Brazzaville) *	17 July 1998	3 May 2004
Costa Rica	7 October 1998	7 June 2001
Croatia	12 October 1998	21 May 2001
Cyprus	15 October 1998	7 March 2002
Democratic Republic of the Congo *	8 September 2000	11 April 2002
Denmark	25 September 1998	21 June 2001
Djibouti *	7 October 1998	5 November 2002
Dominica *		12 February 2001 (a)
Dominican Republic *	8 September 2000	12 May 2005
East Timor *		6 September 2002 (a)
Ecuador	7 October 1998	5 February 2002
Estonia	27 December 1999	30 January 2002
Fiji *	29 November 1999	29 November 1999
Finland	7 October 1998	29 December 2000
France	18 July 1998	9 June 2000
Gabon *	22 December 1998	21 September 2000
Gambia *	7 December 1998	28 June 2002
Georgia *	18 July 1998	5 September 2003
Germany	10 December 1998	11 December 2000
Ghana *	18 July 1998	20 December 1999
Greece	18 July 1998	15 May 2002
Guinea *	7 September 2000	14 July 2003
Guyana *	28 December 2000	24 September 2004
Honduras *	7 October 1998	1 July 2002
Hungary	15 December 1998	30 November 2001
Iceland	26 August 1998	25 May 2000

[20] Sources, Web Site of Amnesty International and the Coalition for the International Criminal Court (last consulted 10 February 2006).
- http://web.amnesty.org/pages/icc-signatures_ratifications-eng
- http://www.iccnow.org/?mod=bia.

Ireland	7 October 1998	11 April 2002
Italy	18 July 1998	26 July 1999
Jordan *	7 October 1998	11 April 2002
Kenya	11 August 1999	15 March 2005
Korea, Republic of	8 March 2000	13 November 2002
Latvia	22 April 1999	28 June 2002
Lesotho	30 November 1998	6 September 2000
Liberia *	17 July 1998	22 September 2004
Liechtenstein	18 July 1998	2 October 2001
Lithuania	10 December 1998	12 May 2003
Luxembourg	13 October 1998	8 September 2000
Macedonia, Former Yugoslav Republic *	7 October 1998	6 March 2002
Malawi *	3 March 1999	19 September 2002
Mali	17 July 1998	16 August 2000
Malta	17 July 1998	29 November 2002
Marshall Islands *	6 September 2000	7 December 2000
Mauritius *	11 November 1998	5 March 2002
Mexico	7 September 2000	28 October 2005
Mongolia *	29 December 2000	11 April 2002
Namibia	27 October 1998	25 June 2002
Nauru *	13 December 2000	12 November 2001
Netherlands	18 July 1998	17 July 2001
New Zealand	7 October 1998	7 September 2000
Niger	17 July 1998	11 April 2002
Nigeria *	1 June 2000	28 September 2001
Norway	28 August 1998	16 February 2000
Panama *	18 July 1998	21 March 2001
Paraguay	7 October 1998	14 May 2001
Peru	7 December 2000	10 November 2001
Poland	9 April 1999	12 November 2001
Portugal	7 October 1998	5 February 2002
Romania *	7 July 1999	11 April 2002
St. Vincent and the Grenadines		3 December 2002 (a)
Samoa	17 July 1998	16 September 2002
San Marino	18 July 1998	13 May 1999
Senegal *	18 July 1998	2 February 1999
Sierra Leone *	17 October 1998	15 September 2000
Slovakia	23 December 1998	11 April 2002
Slovenia	7 October 1998	31 December 2001
South Africa	17 July 1998	27 November 2000
Spain	18 July 1998	25 October 2000
Sweden	7 October 1998	28 June 2001
Switzerland	18 July 1998	12 October 2001
Tajikistan *	30 November 1998	5 May 2000
Tanzania, United Republic of	29 December 2000	20 August 2002
Trinidad and Tobago	23 March 1999	6 April 1999
Uganda *	17 March 1999	14 June 2002
United Kingdom	30 November 1998	4 October 2001
Uruguay	19 December 2000	28 June 2002
Venezuela	14 October 1998	7 June 2000
Yugoslavia, Federal Republic of	19 December 2000	6 September 2001
Zambia	17 July 1998	13 November 2002

Part II – In-depth study of the Cambodian Legal System

Introduction

During the second half of the 20th Century, Cambodia was subjected to serious political and constitutional upheavals[21].

It has now become very difficult to have a clear view of the Cambodian legal system, after this succession of events which incessantly challenged the country's constitutional and political order.

At first view, the current Constitution does not allow any definitive responses to fundamental issues affecting the state of Cambodian law.

The determination of the criminal law in force and the issue of the legal status of international treaties in domestic law are critical. The difficulty in apprehending the manner in which Cambodian law covers the crimes set out in Article 5 of the Rome Statute in the context of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea is but one example.

Chapter I – The Law in Force

Article 158 of the 1993 Constitution of Cambodia (former Article 139) provides that:

> "Laws and regulations in Cambodia that safeguard state property, rights, freedom, and legal private property and are in conformity with the national interests, shall continue to be effective until altered or abrogated by new acts, except those provisions that are contrary to the spirit of this Constitution."

The text of the Article seems unambiguous. Nevertheless, many eminent Cambodian jurists (magistrates from lower courts, attorneys, legal counsellors to the government) have adopted a daring, if not political interpretation of Article 158, under which, this Article does not recognize laws and regulations adopted before 1979; *i.e.* those of the first constitutional monarchy of 1953, the Republic of 1972 and the Democratic Kampuchea regime from 1975 to 1979.

This interpretation is surprising, because, on the one hand, it goes beyond the letter of Article 158, which makes no mention of such a limitation to post 1979 provisions and, on the other hand, the Constitutional Council has not handed down any decision corroborating or even suggesting such an approach. It should be remembered that the Constitutional Council is the sole body with power to interpret the Constitution (Article 136 of the Constitution) and that only its decisions are definitive (Article 142).

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[21] There was a first "constitutional upheaval", in 1972 following the dismissal of Prince Norodom Sihanouk as President of the executive by the National Assembly on 18 March 1970. In the period disturbed by the Vietnam war and the growth of communism, the newly proclaimed Republican regime was unable to legislate, its activity being mainly turned to the war against the communists (Khmer Rouge). The fall of Phnom Penh to the communists on 17 April 1975 introduced a "constitutional revolution" that dived the country through a totally new communist legal system. The regimes that followed communists of Pol Pot, one established on 7 January 1979 in Phnom Penh with the assistance of the Vietnamese army and the other in exile in Peking, placed Cambodia in a very uncertain legal situation for over 12 years, ended by the Peace Agreement signed in Paris on 23 August 1991, the two regimes agreeing to allow the adoption on 21 September 1993 of the Constitution currently in force.

Mr Son Soubert, a member of the Constitutional Council, whom we questioned on this subject, expressed his consternation concerning this interpretation of Article 158. In his opinion, this Article clearly refers to all laws and regulations prior to 1993, without any limitation to those adopted after 1979, to the exception of those laws contrary to "*the spirit of the Constitution*". The laws and provisions adopted by the Democratic Kampuchea regime from 1975 to 1979 must be placed in this category, as they are contrary to the constitutional protection of human rights (Title 3 of the Constitution).

The FIDH considers that:

- in accordance with the text of Article 158 of the Cambodian Constitution, all laws and regulations within the meaning of the Article, predating the current Constitution, without limitation to those adopted since 1979, remain in force until a new text modifies or abrogates them, excepting those provisions which are contrary to the spirit of the present Constitution.

In the absence of a binding decision of the Constitutional Council concerning the interpretation of Article 158 of the Constitution and any legislative provisions expressly abrogating or supplanting prior laws, the texts that may be applicable in whole or in part to criminal matters are as follows.

- Royal Ordinance No. 4, 5 February 1925,
- the Code of Military Justice promulgated by *Krâm* (Royal decree) No. 849/NS, 12 February 1954,
- the 1955 Criminal Code promulgated by *Krâm* No. 933/NS, 21 February 1955,
- the Code of Procedure in Criminal Matters promulgated by *Krâm* No. 104-CE, 17 August 1962,
- Decree-Law No. 1, 1979,
- Decree-Law No. 2 on criminal procedure, 1980,
- Decree-Law No. 3 on criminal procedure, 1989,
- the Provisions dated September 10, 1992 Relating to the Judiciary and Criminal Law and Procedure applicable in Cambodia during the Transitional Period (the "Transitional Provisions") adopted by the Supreme National Council on 10 September 1992,
- the Law dated 8 February 1993 on Criminal Procedure, adopted by the State of Cambodia, and all other *Krâm* and related circulars (Circular of 18 November 1993 relating to application of the Law dated 8 February 1993 on criminal procedure, *Krâm* No. 0899/09 dated 26 August 1999 on temporary detention period, *Krâm* No. 0102/005 of 10 January 2002 amending Articles 36, 38, 90 and 91 of the Law dated 8 February 1993 on criminal procedure),
- the Law dated 8 February 1993 on the Organization of the Courts,
- the Law dated February 29, 1996 on Suppression of the Kidnapping, Trafficking and Exploitation of Human Persons,
- the Law on aggravating circumstances for sentencing in criminal matters promulgated on 7 January 2001,
- the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, 10 August 2001, promulgated by *Krâm* NS/RKM/0801/12, and revised by *Krâm* NS/RKM/1004/006, promulgated on 27 October 2004,
- Ministerial Decree No. 217 of 31 March 1998 on prison management.

Chapter II – The Status of International Treaties

Cambodia is in a unique situation in Asia, particularly among ASEAN countries, as the only State to have ratified almost all the relevant international Human Rights conventions.

That is not enough, however, for citizens to invoke the ensuing rights and freedoms before Cambodian courts.

Indeed, the legal status of international treaties within the Cambodian legal system has not been clearly established.

A – The need for legislative implementation

Article 31 of the 1993 Constitution recognises the importance of human rights, as expressed by Cambodia through its international commitments, in declaring that:

> "The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human rights, *the covenants and conventions related to human rights, women's and children's rights*." [italics added].

The Constitution thus grants constitutional, supra-legislative, status to all human rights conventions, seemingly resolving the question whether these conventions are superior to the law or not. They clearly are under Article 31 of the Constitution.

However, the constitutional status of human rights does not authorise Khmer citizens to exercise their rights and freedoms. Indeed, Article 31 of the Constitution also provides that:

> "The exercise of such [individual] rights and freedoms shall be in accordance with the law."

In others words, the parties to legal proceedings can only invoke their rights and freedoms before the domestic courts on the basis of a legislative provision.

The Universal Declaration on Human Rights, the Standard Minimum Rules for the Treatment of Prisoners, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, the UN Basic Principles on the Independence of the Judiciary, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials "*is applicable law in Cambodia*" by virtue of Article 74 of the Transitional Provisions. That is, these texts and international treaties have force of law and can thus be raised in proceedings before Cambodian courts.

Unfortunately, beyond these eight international instruments, the legislator has not yet legislated to incorporate the dozen or so remaining instruments.

In practice, in the absence of legislation implementing Cambodia's international human rights obligations, citizens are not able to rely on their most fundamental rights and freedoms before the domestic courts.

Therefore, legislative implementation of all international human rights conventions ratified by Cambodia (or to which Cambodian has consented to be bound through other means such as

accession), especially the Rome Statute instituting the ICC[22], is needed before the resulting rights and freedoms may be fully exercised.

The FIDH recommends:

- that the Kingdom of Cambodia adopt legislative provision implementing individual rights and freedoms, as provided for in all relevant international human rights conventions having constitutional status under Article 31 of the Constitution.

B – The superiority of human rights treaties over new laws

The general question of the hierarchy of norms between international treaties and the law also arises when existing legislative provisions contravene international conventions.

There are no specific constitutional provisions governing the relation between international conventions and domestic law, as compared with Articles 26 and 55, which appear to dictate the hierarchy of norms between international conventions and the Constitution[23]. Neither the constitutional Council nor the lower courts have laid down any precedents on the question.

1) The specificity of human rights instruments

M. Say Bory, a former member of the Constitutional Council, has suggested giving treaties and international agreements the same status as the law, since they are incorporated into domestic law by means of legislative ratification. Accordingly, this former member of the Constitutional Council argues that, in cases of conflict between domestic law and an international text incorporated by a ratification law, one should apply the temporal rules of conflicts law, the new law abrogating the earlier, incompatible law[24].

However, as regards human rights, such reasoning cannot apply. Indeed, as noted above, all international conventions on this subject have constitutional status under Article 31 of the Constitution.

Consequently, in this area, when a later law is incompatible with the ratification law for an international convention, the law having constitutional status will prevail, and the later law is unconstitutional.

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[22] In the contrary case, Cambodia could be considered incapable by the International Criminal Court and thus lose its jurisdiction over the crimes within the Rome Statute (Article 17 of the Rome Statute), see *infra* Part VII.

[23] Article 26 of the Constitution provides that treaties and international agreements have to be ratified by the King after approval by Parliament. In other words, these texts must be ratified by law, which may be subjected to constitutional review. Furthermore, Article 55 states that treaties and agreements that are incompatible with the independence, sovereignty, territorial integrity, neutrality and national unity of the Kingdom of Cambodia shall be abrogated. The hypothesis of abrogation again implies review of compliance with constitutional principles. These elements consequently appear to found the thesis of the superior rank of the Constitution over treaties and international agreements.

[24] S. Bory, *Droit administratif général*, 2nde édition, Blossum Lotus, 2001.

2) The role of individuals in judicial review

Article 141(1) of the Constitution provides that:

> "After a law is promulgated, the King, President of the Senate, President of the National Assembly, Prime Minister, one-forth (1/4) of the Senate, a tenth of National Assembly members, *or the court* may ask the Constitutional Council to examine the constitutionality of that law." [italics added].

This Article does not provide for direct application to the Constitutional Council by citizens.

They can only appeal against the constitutionality of law through the National Assembly members, the President of the National Assembly, the Senators or the President of the Senate (Article 141(2) of the Constitution), which is an extremely complicated option for citizens. They may also raise the constitutionality of an applicable law during a trial, under Article 141(1) of the Constitution read with Article 19 of the *Krâm* of 8 April 1998 on the Organization and the Functioning of the Constitutional Council, which provides as follows:

> "A party to a trial, who considers that a law enforced by a court or a decision of an institution violates *his fundamental rights and liberties*, may raise the unconstitutionality of this Law upon the court. The court, *where it finds the request grounded*, shall submit the case to the Supreme Court within 10 days.
>
> The Supreme Court shall examine and submit the law to the Constitutional Council in a maximum period of 15 days, *except if (sic) request is judged inadmissible*." [italics added].

However, even where a law may breach fundamental individual rights and freedoms, nothing guarantees that the Constitutional Council will actually undertake judicial review of the law as requested. Indeed, Article 19 of *Krâm* gives the Trial and Supreme Courts the capacity to reject the claim and refuse to transfer the matter to the Constitutional Council.

This provision thus reduces Article 31 of the Constitution to a declaration of principle, since citizens cannot fully invoke their individual rights and freedoms in legal defence before the courts.

The FIDH recommends:

- that the Cambodian authorities remove the expression "*where it finds the request grounded*" and "except if (*sic*) request is judged inadmissible" from Article 19 of the Krâm of 8 April 1998 on the Organization and Functioning of the Constitutional Council, which would then read as follows:

> ***"A party to a trial, who considers that a law enforced by a court or a decision of an institution violates his fundamental rights and liberties, may raise the unconstitutionality of this Law upon the court. The court shall submit the case to Supreme Court within 10 days.***
>
> ***The Supreme Court shall examine and submit the law to the Constitutional Council in a maximum period of 15 days."***

Chapter III – Harmonising Cambodian law and the definition of crimes under the Statute of the International Criminal Court

After difficult negotiations, an international agreement was concluded between the United Nations and the Royal Government of Cambodia[25] on 6 June 2003, concerning the establishment of the Extraordinary Chambers in the Courts of Cambodia to try crimes committed during the Democratic Kampuchea period (the "Extraordinary Chambers").

The agreement was ratified by Cambodia on 19 October 2004.

Before this agreement was concluded, Cambodia adopted a Law for the establishment of the Extraordinary Chambers, which was promulgated on 10 August 2001 [26]. The law was later amended by another law, promulgated on 27 October 2004[27], in order to ensure its conformity with the 6 June 2003 agreement.

The Extraordinary Chambers, as provided for in the 2003 agreement and the Law of 10 August 2001 (as modified), are "hybrid", exceptional courts established to try crimes committed during the Democratic Kampuchea regime, from 17 April 1975 to 6 January 1979, including genocide, crimes against humanity and war crimes.

The prevention of such crimes is also at the heart of the Rome Statute, Articles 5 to 8 of which contain a generally wider definition of these crimes.

Although there are some similarities between the International Criminal Court and the Extraordinary Chambers, the jurisdiction of the ICC does not cover that of the Extraordinary Chambers. Indeed, Article 11(1) of the Rome Statute stipulates that:

> "The Court has jurisdiction only with respect to crimes committed *after the entry into force of this Statute*." [italics added],

Thus, the International Criminal Court has no jurisdiction over crimes committed during the Democratic Kampuchea period.

On the other hand, the jurisdiction of the Extraordinary Chambers is expressly limited to the prosecution and trial of crimes committed during the period from 17 April 1975 to 6 January 1979 (Article 1 of the Agreement between the UN and the Royal Government of Cambodia dated 6 June 2003; Articles 1 and 2 of the Law of 10 August 2001 as amended on 27 October 2004).

The *ratione temporis* jurisdiction of the Extraordinary Chambers and that of the International Criminal Court are therefore clearly distinct. Apart from this difference, there are other fundamental differences.

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[25] *Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian Law of crimes committed during the period of Democratic Kampuchea*, 17 March 2003, AG Res. 57/228 B, 22 May 2003.

[26] *Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea*, adopted by the National Assembly on 2 January 2001 and approved fully by the Senate on 15 January 2001, promulgated by *Kram* No. NS/RKM/0801/12, 10 August 2001.

[27] *Law on the Amendments to Article 2, Article 3, Article 9, Article 10, Article 11, Article 14, Article 17, Article 18, Article 20, Article 21, Article 22, Article 23, Article 24, Article 27, Article 29, Article 31, Article 33, Article 34, Article 35, Article 36, Article 37, Article 39, Article 40, Article 42, Article 43, Article 44, Article 45, Article 46 and Article 47 of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea*, adopted by the National Assembly on 5 October 2004, and approved in its entirety by the Senate on 8 October 2004, promulgated by *Krâm* NS/RKM/1004/006 on 27 October 2004.

A – Similarities between the Extraordinary Chambers and the International Criminal Court

1) Characterisation of offences

The characterisation of offences under the amended Law of 10 August 2001 is a fairly faithful copy of the Rome Statute.

a) The crime of genocide

Article 4 of the 2001 Law on establishment of the Extraordinary Chambers defines the crime of genocide as follows:

> "Article 4
>
> The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed the crimes of genocide as defined in the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, and which were committed during the period from 17 April 1975 to 6 January 1979.
>
> The acts of genocide, which have no statute of limitations, mean any acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group such as:
>
> - killing members of the group;
> - causing serious bodily or mental harm to members of the group;
> - deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> - imposing measures intended to prevent births within the group;
> - forcibly transferring children from one group to another group.
>
> The following acts shall be punishable under this Article:
>
> - attempts to commit acts of genocide;
> - conspiracy to commit acts of genocide;
> - participation in acts of acts of genocide.

Thus, the definition of genocide under Article 4 is quasi-identical to that in Article 6 of the Rome Statute, which incorporates the definition in the 1948 Convention.

Article 4 also provides for the punishment of attempt, complicity in genocide and the co-authors of offences. However, the amended Law of 10 August 2001 is much less satisfactory than the Rome Statute in this respect.

Indeed, the definition of complicity set out in Article 29 of the Cambodian law is less precise than that in Article 25(3)(b), (c), and (e) of the Rome Statute.

Furthermore, the amended 2001 Law does not define attempt, conspiracy and joint commission of the offence by numerous authors, simply referring to them in Article 4. Article 25 of the Rome Statute, on the contrary, precisely defines these concepts in paragraph 3(a)(d) and (f). Similarly, Article 4 does not include the inchoate crime of direct and public incitement to commit genocide, defined in Article 25(3)(e).

b) Crimes against humanity

Article 5 of the amended 2001 Law provides for the prosecution of crimes against humanity in the following terms:

> "Article 5
>
> The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed crimes against humanity during the period 17 April 1975 to 6 January 1979.
>
> Crimes against humanity, which have no statute of limitations, are any acts committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious grounds, such as:
>
> - murder;
> - extermination;
> - enslavement;
> - deportation;
> - imprisonment;
> - torture;
> - rape;
> - persecutions on political, racial, and religious grounds;
> - other inhumane acts."

Article 5 only partly reproduces Article 7(1) of the Rome Statute[28]. In the first place, the chapeau of the definition, taken from the Statute of the International Criminal Court for Rwanda, requires that all attacks directed against the civilian population be committed "on national, political, ethnical, racial or religious grounds", whereas Article 7 of the Rome Statute only requires such motives for acts of persecution [paragraph 1(h)].

Secondly, Article 5(2) of the Cambodian law includes extermination, enslavement, deportation, persecutions and other inhumane acts as constitutive elements of crimes against humanity without any definition of these terms, either in the Article itself or any other provision of the law.

The Rome Statute contains more details in this respect. Extermination, enslavement, deportation and persecutions are defined respectively in Article 7(2)(b), (c), (d) and (g). Other inhumane acts are defined as "*intentionally causing great suffering, or serious injury to body or to mental or physical health*". [Article 7(1)(k) of the Rome Statute]. Furthermore, the amended 2001 Law does not use the definition of torture set out in Article 7 of the Rome Statute. The only reference is to the definition of torture in Article 500 of the 1955 Cambodian Criminal Code (Article 3 of the 2001 Law)[29].

Finally, the drafting of Article 5 of the amended 2001 Law omits some material acts included in Article 7: enforced disappearances, sexual violence other than rape and the crime of Apartheid are not included in the Cambodian definition, nor in any other provision of the amended law.

c) War crimes

War crimes are prohibited by Article 6 of the amended the Extraordinary Chambers law, which provides that:

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[28] For a full reproduction of Article 7 of the Rome Statute, see *infra* p. 32.

[29] For a comparison of Article 500 of the 1955 Criminal Code and the definition of torture under Article 7 of the Rome Statute, see *infra* p. 35.

> "Article 6.
>
> The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed or ordered the commission of grave breaches of the Geneva Conventions of 12 August 1949, such as the following acts against persons or property protected under provisions of these Conventions, and which were committed during the period 17 April 1975 to 6 January 1979:
>
> - wilful killing;
> - torture or inhumane treatment;
> - wilfully causing great suffering or serious injury to body or health;
> - destruction and serious damage to property, not justified by military necessity and carried out unlawfully and wantonly;
> - compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
> - wilfully depriving a prisoner of war or civilian of the rights of fair and regular trial;
> - unlawful deportation or transfer or unlawful confinement of a civilian;
> - taking civilians as hostages."

This provision is comparable to the first paragraph of Article 8 of the Rome Statute. Yet again, however, it is only a partial reproduction.

Indeed, Article 8(2)(d) of the Statute, which codifies international custom in this area, enumerates a certain number of constitutive acts of war crimes that do not appear in the Extraordinary Chambers law.

2) The non-applicability of statutory limitations on crimes

As with Article 29 of the Rome Statute, Articles 4 and 5 of the amended 2001 Law exclude statutory limitations for genocide and crimes against humanity.

However, contrary to Article 29 of the Statute, Cambodian law does not exclude such limitations for war crimes.

B – Fundamental differences between the Extraordinary Chambers and the International Criminal Court

1) The "hybrid" court is part of the Cambodian legal system

Although the Extraordinary Chambers are "hybrid" in nature, they formally remain courts established "within" the Cambodian courts.

While they are of mixed composition, with international and Cambodian judges, the numerical superiority of the latter expresses the Extraordinary Chambers' belonging to the national judicial system.

Although Article 12 of the 2003 Agreement and Article 33 of the amended 2001 Law lay down the principle of superiority (rather than primacy) of international standards over domestic procedural rules, it may reasonably be feared that these standards might not be fully respected due to the lack of Cambodian judges with relevant experience[30], impartiality and independence[31].

[30] The current Cambodian legal system is arising slowly from the decadence provoked by the Khmer Rouge regime. The Royal School of the Magistracy was only opened in 2002.

Since the *ratione temporis* jurisdiction of the Extraordinary Chambers is clearly distinct from that of the Hague-based ICC[32], even if the Extraordinary Chambers failed to respect the standards set out in Article 17 of the Rome Statute (see *infra.* the complementary principle), the International Criminal Court would not have any jurisdiction to try crimes coming within the jurisdiction of the Extraordinary Chambers.

2) The sovereignty of the Cambodian Extraordinary Chambers and the ICC complementary principle

The Extraordinary Chambers are the only courts with jurisdiction to investigate and punish crimes committed during the Democratic Kampuchea regime. Even within the Cambodian legal system, they have sole jurisdiction over such crimes, since the domestic law currently in force does not incriminate genocide, crimes against humanity and war crimes. The statutory limitations for domestic crimes, such as homicide and torture, have had to be prolonged by thirty years in order to prosecute the Khmer Rouge (Article 3 of the amended 2001 Law).

The repressive regime established by the Rome Statute is different. As mentioned above, it works according to the complementary principle. States retain priority for prosecuting the crimes referred to in Article 5 of the Rome Statute. Paragraph 10 of its preamble declares that:

> "…the International Criminal Court .. shall be complementary to national criminal jurisdictions".

Article 1 confirms that it:

> "shall be *complementary* to national criminal jurisdictions" [italics added].

It is only in cases of State failure to act that the International Criminal Court has jurisdiction under Article 17 of the Statute, which stipulates that:

> "1. Having regard to *paragraph 10 of the Preamble and article 1*, the Court shall determine that a case is inadmissible where:
> (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, *unless the State is unwilling or unable* genuinely to carry out the investigation or prosecution;
> (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, *unless the decision resulted from the unwillingness or inability* of the State genuinely to prosecute;
> (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted *under article 20, paragraph 3* [33];
> (d) The case is not of sufficient gravity to justify further action by the Court." [italics added].

The International Criminal Court only has jurisdiction in cases where the State is unwilling or unable to conduct investigations and prosecutions.

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[31] M. Peter Leuprecht, former Special Representative of the UN Secretary-General for human rights in Cambodia, has noted the lack of impartiality and independence of the Cambodian legal system as well as political influence on judges: "*The past decade has seen the continuation of executive control over the judiciary and other key legal institutions… A principal obstacle to establishing judicial independence is that the courts have continued to function as an arm of the executive, a practice that characterized the administration of justice in Cambodia in the 1980s, and has become deeply entrenched…*", in Situation of Human Rights in Cambodia, Report of the special Representative of the Secretary-General for human rights in Cambodia, Peter Leuprecht, 20 December 2004, E/CN.4/2005/116, par. 21).

[32] See *supra* p. 19.

[33] Article 20(3) reads as follows [italics added]:
"No person who has been tried by another court for conduct also proscribed under articles 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:
(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
(b) Otherwise were not conducted independently or impartially *in accordance with the norms of due process recognized by international law* and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.".

Unwillingness, within the meaning of Article 17(2) of the Statute, refers to legal guarantees recognized by international law, such as international standards guaranteeing fair trials. Unwillingness may thus be constituted by excessively long proceedings or proceedings that are not conducted in an independent and impartial way [sub-paragraphs (b) and (c)].
Inability is defined as the consequence of the total or substantial collapse or unavailability of the national judicial system for the conduct the proceedings [Article 17(3)].

Furthermore, even if a person has already been tried by the domestic courts for crimes under Article 5 of the Rome Statute, the International Criminal Court may deal with the case, by derogation from the principle *non bis in idem*, for example, when it is shown that the conduct of proceedings before the domestic courts did not respect guarantees established at international law [Article 20(3)].

3) Restrictions on the persons subject to prosecution by the Chambers

The amended 2001 Law strictly limits the field of prosecution and trial by the Extraordinary Chambers to "*senior leaders of Democratic Kampuchea and those who were most responsible for the crimes...*" (Article 2). This restriction was motivated by concern to preserve the country's institutional and political stability.

The Rome Statute, on the contrary, contains no restriction on the persons able to be investigated and tried by the International Criminal Court, except for persons who were less than 18 years old at the time of the alleged crimes (Article 26).

Beyond this exception, the ICC can try all persons who have committed a crime coming within its jurisdiction, whether as author, co-author, accomplice or for having attempted to commit one these crimes (Article 25 of the Rome Statute[34].

The criminal responsibility of military commanders and persons exercising effective military authority is also provided for before the International Criminal Court (Article 28 of the Statute)[35].

No immunity based on official status may be relied upon before the International Criminal Court, whether as head of State or government, as member of the government or parliament, or as representative or agent of the State. Moreover, domestic and international law immunities based on official status cannot prevent the Court from exercising jurisdiction with regard to a person (Article 25 of the Rome Statute)[36].

These provisions of the Rome Statute contribute to the profound differences between the International Criminal Court and the Cambodian Extraordinary Chambers.

The FIDH underlines and recalls:

- that the Cambodian Extraordinary Chambers established to prosecute crimes committed during the Democratic Kampuchea period and the International Criminal Court are fundamentally different, the former aiming to end the impunity of the perpetrators of past crimes, whereas the latter aims to prevent and punish international crimes committed after the entry into force of the Statute for the State in question.

[34] See *infra* p. 30.
[35] See *infra* p. Part IV, Chapter III.
[36] See *infra* p. 30.

Part III – Harmonising Cambodian law and the definition of crimes under the Statute of the International Criminal Court

Introduction

Article 5 of the Rome Statute lists four crimes coming within the jurisdiction of the International Criminal Court: genocide, crimes against humanity, war crimes and the crime of aggression.

During drafting of the Statute, the States participating in the Rome conference felt that it was important, given current international political events, to include the crime of aggression. However, they were not able to agree on a definition of this crime or the conditions for exercise of the Court's jurisdiction. Continuing discussions within the Assembly of States Parties should lead to the adoption of a definition to be adopted during the Review Conference set for 2009, seven years after its entry into force (Articles 5(2), 121 and 123 of the Statute).

The Rome Statute does not expressly oblige State Parties to introduce the crimes within the jurisdiction of the International Criminal Court into domestic law. In practice, however, in the context of exercise of the complementary principle set out in Article 1 of the Statute, their international commitment to the Court implies the need to define these crimes in domestic law in order to cooperate with the Court in their prevention and punishment[37].

Beyond the specific case of prosecution of the former Khmer Rouge leaders, Cambodian criminal law does not currently incriminate the crimes covered by the Rome Statute. Neither the 1955 Criminal Code, nor the Transitional Provisions, which together make up the applicable substantive law, expressly prohibit these crimes.

It is up to the Cambodian authorities to introduce a text into positive law that defines the crimes coming within the Rome Statute, so that the State will be in a position to exercise its own jurisdiction over them. If such legislation fails to be adopted, the International Criminal Court will be the only court with jurisdiction in this area and Cambodia will not be able to invoke its jurisdictional primacy.

Aware of this gap in Cambodian criminal law, the Royal Government has launched a major law reform project. A new Criminal Code is currently being drafted and should soon be submitted to the lawmakers for adoption. The draft goes some way towards prohibiting the crimes covered by the Rome Statute.

Chapter I – The crime of genocide

The definition of the crime of genocide was laid down for the first time in the Convention for the Prevention and Punishment of the Crime of Genocide. After the Second World War, the international community already felt the need to prohibit genocide, despite the fact that it was not possible to

[37] See *supra* Part III and *infra* Part V.

establish a permanent international criminal court at that time. The Kingdom of Cambodia deposited its ratification instrument with the UN Secretary-General on 14 October 1950.

The definition of genocide in Article 6 of the Rome Statute is an exact copy of that in the 1948 Convention. This definition was also adopted in the Statutes of the two *ad hoc* International Criminal Courts. Article 6 of the Rome Statute reads as follows:

> "Article 6. Genocide
>
> For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) Imposing measures intended to prevent births within the group;
>
> (e) Forcibly transferring children of the group to another group."

The drafters of the Rome Statute have also introduced the principles laid down in Article 3 of the 1948 Convention, by prohibiting direct and public incitement to commit genocide. Indeed, Article 25(3)(e) of the Rome Statute provides that:

> "3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: …
>
> e) In respect of the crime of genocide, directly and publicly incites others to commit genocide".

The concept of direct and public incitement to commit genocide appeared for the first time in 1945, during the trial of Nazi war criminals before the International Military Tribunal at Nuremberg. The crime was invented by the judges, as a form of crime against humanity, in order to condemn Julius Streicher, the author of many violently anti-Semitic articles. Three years later, the Convention for the Prevention and Punishment of the Crime of Genocide gave the prohibition of direct and public incitement to commit genocide the same importance as that of genocide, conspiracy, attempt and complicity in genocide. The Statutes of the *ad hoc* International Criminal Tribunals for the former Yugoslavia and Rwanda have confirmed the prohibition of such incitement. Indeed, a number of judgments handed down by these tribunals are largely based on this offence[38]. In addition, consistent case-law on the definition of direct and public incitement to commit genocide stresses the autonomous, inchoate nature of this "*form of criminal participation*"[39].

A - The crime of genocide

As noted above, Cambodian positive law does not prohibit the crime of genocide. The draft Criminal Code solves this problem by proposing an identical definition to that contained in Article 6 of the Rome Statute.

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[38] ICTR, *The Prosecutor v. Georges Ruggiu*, Case No. ICTR-97-32-I, Judgement, 1 June 2000, confirmed on appeal; ICTR, *The Prosecutor v. Ferdinand Nahimana, Hassan Ngeze and Jean-Bosco Barayagwiza*, Judgement, 3 December 2003, Case No. ICTR-99-52-T (Media Case), currently on appeal.

[39] ICTR, *Akayesu* case, para. 552: incitement is "*…a particular form of criminal participation, punishable as such*".

1) The positive law

Although Cambodian general criminal law does not prohibit the crime of genocide, except in the limited context of the Extraordinary Chambers established to try former Khmer Rouge leaders, it contains a series of provisions allowing the domestic courts to prosecute those suspected of genocide.

Two main legal sources allowing such prosecution: the Transitional Provisions of 10 September 1992 and the 1955 Criminal Code which, subject to the abovementioned reserves[40], form the applicable positive law.

Both the Transitional Provisions and the Criminal Code define some of the constitutive material elements of genocide, for example, premeditated murder, intentional homicide, torture, rape and serious bodily harm.

The Transitional Provisions cover several crimes, such as homicide with premeditation (Article 31), intentional homicide (Article 32), and rape and sexual violence (Article 33). The 1955 Criminal Code includes other crimes, notably torture (Article 500) and attacks on religion, such as the killing or murder of religious persons (Articles 209 to 218). These provisions, which are not contrary to "*the spirit of the Constitution*", remain in force (Article 158 of the 1993 Constitution). They strengthen the application of the Constitution by guaranteeing the freedom of religion in accordance with Article 43, as well as punishing acts of torture in accordance with Article 38 of the Constitution.

The most serious applicable punishment for these crimes is life imprisonment, as is the case under Article 77 of the Rome Statute.

Although these provisions do not cover all of the constitutive acts of the crime of genocide, they may serve as a basis for its punishment. The amended 2001 Law establishing the Extraordinary Chambers to try crimes committed during the Democratic Kampuchea period includes these Articles as the basis for the indictment of the perpetrators of crimes within a systematic, widespread criminal context.

Although the 1955 Criminal Code and Transitional Provisions prohibit a certain number of crimes such as murder, torture, rape, theft and destruction, they do not fully grasp the specific characteristics of the crime of genocide.

Indeed, under Article 2 of the Convention for the Prevention and Punishment of the Crime of Genocide and Article 6 of the Rome Statute, genocide is characterized by the intention to destroy, in whole or in part, a national, ethnical, racial or religious group, by means of the above material acts.

Formally, the Cambodian criminal law in force only permits the prosecution of individual, isolated acts. There is no provision defining the *mens rea* characterizing the crime of genocide within the meaning of Article 6 of the Rome Statute.

In addition, the uncertainty concerning application of the 1955 Criminal Code in Cambodia should not be forgotten, due to an unfounded interpretation of Article 158 of the Constitution[41].

Cambodian lawmakers should thus provide for the *mens rea* of genocide in domestic law, as set out in Article 6 of the Statute.

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[40] See *supra* Part II, Chapter 2.
[41] See *supra* Part II, Chapter 1.

Definition in the draft Cambodian Criminal Code (Article L.2111-1) *[our translation]*	**Rome Statute (Article 6)**
Genocide is constituted by each of the acts enumerated below, when they are committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: 1° Killing members of the group; 2° Causing serious bodily or psychic harm to members of the group; 3° Inflicting on members of the group conditions of life likely to bring about the destruction of the group in whole or in part; 4° Imposing measures intended to prevent births within the group; 5° Forcibly transferring children of the group to another group.	For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

2) The draft law

Article L.2111-1 of the new Criminal Code currently being drafted by the Cambodian Government provides a near identical definition of genocide to that in Article 6 of the Rome Statute.

The commentary by the editors of the draft Code on Book 1, which inserts Article L.2111-1, states that "*[t]he punishment of the most serious crimes - genocide, crimes against humanity and war crimes – makes up the first Book of the second Part, entitled 'Offences against persons', thus showing the will of Cambodian lawmakers to give specific importance to the provisions of the 1998 Rome Treaty establishing the International Criminal Court*".

The commentary notes, moreover, that the concept of the intention to destroy a group was inspired by Article II of the Convention for the Prevention and Punishment of the Crime of Genocide. Article 6 of the Rome Statute adopts the letter and spirit of the definition in Article 2 of the 1948 Convention, and the definition in the draft Criminal Code is essentially identical to that in Article 6.

It should be noted, however, that the 1948 Convention adopts the criterion of stability to characterize protected groups (an objective concept). Indeed, during preparatory discussions for the Convention, a certain number of States wished to introduce the concept of "groups determined for political reasons". This was rejected at the initiative of the Soviet Union, on the basis that it would be incompatible with the stability that characterizes the protected groups. The real reason was the fear that the fight against subversive elements by "legitimate" governments might be incriminated. This fear was very strong for authoritative regimes and one party States. The International Criminal Tribunal for Rwanda supported the principle of stability in the *Akayesu* judgement:

> "it appears that the crime of genocide was allegedly perceived as targeting only "stable" groups, constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of the more "mobile" groups which one joins through individual voluntary commitment."[42]

[42] ICTR, 2 September 1998, case No. ICTR-96-4-T, *The Prosecutor v. Jean Paul Akayesu*, judgement para. 511.

This objective approach to groups is insufficient. Indeed, it is nearly impossible to show the membership of a particular group without referring to subjective elements. This difficulty was actually demonstrated in the same *Akayesu* decision, then in the *Jelisic* judgement handed down by the International Criminal Tribunal for the former Yougoslavia[43]. These decisions basically stated that the membership of a group necessarily implies the subjective will of each element of the group: the will of each individual to belong to the group.

Furthermore, membership of a group often arises out of a subjective vision of elements that are external to the so-called group. In other words, behind the allegedly objective determination of the group, often if not always hides the political will of those responsible for genocide. Punishment of the crime of genocide thus appears insufficient if one freezes the definition of victim groups, by reference to Article 2 of the 1948 Convention and Article 6 of the Rome Statute, without taking account of the subjective, arbitrary element that allows the perpetrator of genocide to justify the membership of a specific individual in a target group. Besides, this objective approach actually marginalises the objectively determined group. All groups, however constituted, when determined on the basis of an arbitrary, essentially political criterion, with the underlying intention to exterminate, in whole or in part, should receive the same level of protection as that granted to the groups protected by Article 2 of the 1948 Convention and Article 6 of the Rome Statute.

The difficulty in characterising the crimes committed in Cambodia during the Democratic Kampuchea period (1975-1979) as acts of genocide within the meaning of Article 2 of the 1948 Convention illustrates the limits of a definition based on the principle of stability.

In this respect, it is worth mentioning the example of French law, which responds to this reality through a more satisfactory definition of the nature of victim groups than those in the 1948 Convention and the Rome Statute. The definition of the protected groups is widened to include arbitrary, subjective criteria, allowing the protection of other groups based on political, economic, professional, social or even sexual criteria. Article 211-1 of the new French Criminal Code provides that:

> "Genocide is committing or causing to be committed, in the execution of a concerted plan tending to lead to the total or partial destruction of a national, ethnic, racial or religious group, *or a group determined on the basis of any other arbitrary criterion*, any of the following acts against members of the group:
>
> - voluntary homicide;
> - causing serious bodily or mental harm;
> - inflicting conditions of life likely to bring about the destruction of the group in whole or in part;
> - imposing measures intended to prevent births;
> - enforced transfer of children." [italics added].

Thus, French law includes all groups "*determined on the basis of any other arbitrary criterion*" in the definition of the protected groups. This definition is more likely to achieve just punishment of the crime of genocide.

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[43] ICTY, 14 December 1999, Case No. IT-95-10-T, *The Prosecutor v. Goran Jelisic*, para. 70: "*Although the objective determination of a religious group still remains possible, to attempt to define a national, ethnical or racial group today using objective and scientifically irreproachable criteria would be a perilous exercise whose result would not necessarily correspond to the perception of the persons concerned by such categorisation. Therefore, it is more appropriate to evaluate the status of a national, ethnical or racial group from the point of view of those persons who wish to single that group out from the rest of the community. The Trial Chamber consequently elects to evaluate membership in a national, ethnical or racial group using a subjective criterion. It is the stigmatisation of a group as a distinct national, ethnical or racial unit by the community which allows it to be determined whether a targeted population constitutes a national, ethnical or racial group in the eyes of the alleged perpetrators95. This position corresponds to that adopted by the Trial Chamber in its Review of the Indictment Pursuant to Article 61 filed in the Nikolic case.*"

The definition of the crime of genocide proposed in the draft Criminal Code follows the definition in Article 6 of the Rome Statute.

However, it remains unsatisfactory as regards the principle of stability adopted in the original definition of genocide and retained for the draft Code, and the need to punish perpetrators who commit such a crime for unavowed political reasons. Nothing in the Rome Statute forbids Cambodia from adopting a wider definition of the crime of genocide. On the contrary, the introductory terms of Article 6 of the Statute, "*(f)or the purpose of this Statute, 'genocide' means*", expressly leaves open the possibility of variations in its definition.

The FIDH recommends:

- that the Cambodian authorities modify the text of Article L.2111-1 of the draft Criminal Code, as indicated above, by adopting the following text:

> ***"Article L.2111-1 constitutive elements of genocide***
>
> ***Genocide is constituted by each of the acts enumerated below, when they are committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, or a group determined on the basis of any other arbitrary criterion, as such:***
>
> ***1° Killing members of the group;***
>
> ***2° Causing serious bodily or psychic harm to members of the group;***
>
> ***3° Inflicting on members of the group conditions of life likely to bring about the destruction of the group in whole or in part;***
>
> ***4° Imposing measures intended to prevent births within the group;***
>
> ***5° Forcibly transferring children of the group to another group."***

B - Direct and public incitement to commit genocide

Article 25 of the Rome Statute defines individual criminal responsibility. Under this Article, the International Criminal Court has jurisdiction to investigate and try individuals responsible for crimes referred to in Article 5 of the Statute, their accomplices, persons having attempted to commit such crimes, and conspiracy with a view to committing them. Cambodian legislation also incriminates attempt (Articles 31, 32, 33 and 34 of the Transitional Provisions and Articles 77 to 81 of the 1955 Criminal Code) and complicity (Article 69 of the Transitional Provisions and Articles 83 to 88 of the 1955 Criminal Code)[44].

Article 25(3)(e) of the Statute also lays down the prohibition of direct and public incitement to commit genocide, thus confirming the specificity of this offence: this form of incitement is incriminated as such, without any need to determine whether it has been put into effect.

1) The Cambodian legislation on the subject

The Transitional Provisions incriminate incitement to commit crimes and misdemeanours as a general rule (Articles 59, 60 and 61).

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44 See *infra*.

Articles 225 and 300 of the 1955 Criminal Code specifically incriminate incitement to hatred and contempt between different social or religious groups as well as incitement to civil war.

There is no specific positive law incrimination of direct and public incitement to commit genocide.

a) Current Cambodian law

Positive law distinguishes between incitement and complicity. Article 59 of the Transitional Provisions, relating to incitement leading to the commission of a felony:

> "Punishment as accomplices to an action classified as a crime by the present text will apply to those who, by oration, shouts or threats made in public places, or by writings, printings, drawings, engravings, paintings, emblems, films or any other mode of writing, speech, or film which is sold, distributed, offered for sale or displayed in public places, either by signs or posters shown to the public, or by any other means of audiovisual communication, directly provokes perpetration of an aforesaid action, if the action has consequences."
>
> This shall also be the case when the provocation is followed merely by an attempted crime."

The transitional Provisions thus distinguish between two forms of incitement: incitement leading to crimes and incitement to crimes or misdemeanours that are not given effect. The first is considered to be a crime or attempted crime and the perpetrator incurs the same sentence as the principle author. The second is considered to be a misdemeanour and its author is open to five years imprisonment (Article 60 of the Transitional Provisions).

On the other hand, complicity is defined in Article 69 of the Transitional Provisions in the following terms:

> "Whoever has provided the means by which an offence is committed, ordered that the offence be committed, or facilitates commission of the offence shall be considered an accomplice and punished with the same punishment applicable to the principle offender."

Consequently, in Cambodian law, general incitement to commit a crime is an independent offence from complicity, as only attempted implementation is required.

The Transitional Provisions seem to adopt an autonomous approach to the offence of incitement. Given the particular gravity of the crime of genocide, it would be appropriate, in this respect, to specifically incriminate incitement to commit genocide, as under the Rome Statute, as a distinct offence from that of committing domestic crimes.

b) The draft Criminal Code

Article L.4133-2 of the draft Criminal Code incriminates incitement under the concept of "provocation". Article L.4133-2 provides as follows:

> "Directly provoking commission of a crime through one of the means enumerated in Article L.4133-1 shall be punished:
>
> 1° By six months to two years imprisonment and a fine of 1,000,000 to 4,000,000 Riels if the provocation does not lead to crimes
>
> 2° Subject to the provisions of Article L.1121-4 of the present Code, two to five years imprisonment and a fine of 4,000,000 to 10,000,000 Riels if the provocation is followed by crimes".

Article L.4133-1, referred to in Article L.4133-2 reads as follows:

> "Article L.4133-1 conditions for the existence of provocation
>
> For the application of the present chapter, provocation is punishable when it is committed:

> 1° by words of any nature, pronounced in a public place or at a public meeting;
>
> 2° in documents or drawings of any nature, distributed in public or exposed to public regard;
>
> 3° by any audiovisual communication destined for the public".

The draft Criminal Code deems provocation to be a misdemeanour without distinguishing cases where it is followed by crimes or not. The draft is thus less severe than the law in force.

Given the gravity of the crime of genocide, it would be appropriate to punish such incitement more severely by deeming it to be a crime and not a misdemeanour, but such an offence would have to be specific to the crime of genocide, and be set out in a separate Article from the provocation provision.

Moreover, given the text of Articles 17(1)(d) and 25 of the Rome Statute, one may wonder whether direct and public incitement to commit genocide that does not give rise to crimes (commission of genocide or attempted genocide) would be investigated by the ICC, which may consider that it is not sufficiently serious. Indeed, Article 17(1)(d) states that:

> "1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where: …
>
> (d) The case is not of sufficient gravity to justify further action by the Court."

Consequently, it is all the more important that Cambodia be in a position to prosecute direct and public incitement to commit genocide, in accordance with its obligations under the 1948 Convention, even when it is not put into effect.

In summary, although Cambodian law recognizes incitement to commit a crime and incriminates it as an independent offence, neither positive law nor the text of the draft Criminal Code prohibits direct and public incitement to commit genocide as a specific, sufficiently serious crime.

The FIDH recommends:

- the insertion in the draft Criminal Code, of a new Article L.4133-3 relating to direct and public incitement to commit genocide[45], as follows:

> ***"Article L.4133-3 provocation to commit genocide***
>
> ***Directly provoking the commission of a crime of genocide through one of the means enumerated in Article L.4133-1 shall be punished:***
>
> ***1° By a maximum of 30 years imprisonment if the provocation is put into effect;***
>
> ***2° By two to five years imprisonment and a fine of 1,000,000 to 4,000,000 Riels if the provocation is not followed by crimes."***

Chapter II – Crimes against humanity

Crimes against humanity are included in Article 7 of the Rome Statute as crimes within the jurisdiction of the International Criminal Court. It is thus important for State Parties to the Statute to introduce the definition of crimes against humanity into domestic law so as to be in a position to protect its primary jurisdiction over their punishment.

[45] Due to the proposed insertion of new Article L.4133-3, initial Article L.4133-3 of the draft Criminal Code concerning "provocation to discrimination" would become Article L.4133-4; Article L.4133-4 concerning "provocation by the media" would become Article L.4133-5; and Article L.4133-5 concerning "complementary sentences, nature and duration" would become Article L.4133-6.

Current Cambodian criminal law does not prohibit crimes against humanity. Although these crimes are not incriminated as such, domestic law provides for the punishment of some of their constitutive acts, such as murder (Article 32 of the Transitional Provisions), rape (Article 33 of the same text), enforced prostitution (Article 3 of the Law dated February 29, 1996 on Suppression of the Kidnapping, Trafficking and Exploitation of Human Persons and Articles 45 and 46 of the 1993 Constitution) and torture (Article 500 of the 1955 Criminal Code and Article 38 of the Constitution).

However, these offences are not sufficient to satisfy Article 7 of the Rome Statute, which provides that:

> "Article 7. Crimes against humanity
>
> 1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
>
> (a) Murder;
>
> (b) Extermination;
>
> (c) Enslavement;
>
> (d) Deportation or forcible transfer of population;
>
> (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
>
> (f) Torture;
>
> (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
>
> (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, *in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court*;
>
> (i) Enforced disappearance of persons;
>
> (j) The crime of apartheid;
>
> (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to *mental or physical health*.
>
> 2. For the purpose of paragraph 1:
>
> (a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;
>
> (b) *"Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population*;
>
> (c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
>
> (d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;
>
> (e) *"Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions*;
>
> (f) "Forced pregnancy" means the unlawful confinement, of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of

international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h) *"The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime*;

(i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above." [italics added].

The drafters of the new Criminal Code propose filling this gap in positive law by defining crimes against humanity in Article L.2121-1. The French experts add, in commentary on this Article, that it "*is a transcription of Article 7 of the Rome Statute establishing the International Criminal Court*". Nevertheless, a close examination reveals omissions in this transcription. In particular, the expressions "*…or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court*" [Article 7(1)(h)] and "*mental or physical health*" [Article 7(1)(k)] do not appear in Article L.2121-1, which reads as follows:

"Crimes against humanity means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population:

1. Murder;

2. Extermination;

3. Enslavement;

4. Deportation or forcible transfer of population;

5. Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

6. Torture;

7. Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

8. Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious or gender;

9. Enforced disappearance of persons;

10. The crime of apartheid;

11. Any other inhumane act causing great suffering, or serious injury to body".

Moreover, the meaning of extermination, persecutions and apartheid, as referred to in Article 7(1) of the Rome Statute, which is specified in Article 7(2)(b), (g) and (h) respectively, is not included in the draft Cambodian law, and the definition of torture set out in Article 7(2)(e) of the Rome Statute is wider than under Article 500 of the 1955 Criminal Code, the application of which remains uncertain.

A - Injury to mental and physical health

Article 7 of the Rome Statute includes inhumane acts causing great suffering or serious injury "*to mental or physical health*" as constitutive elements of crimes against humanity.

The Statute thereby widens the definition of crimes against humanity to give serious injury to mental or physical health identical legal status with attacks on physical integrity.

Indeed, injury to mental or physical health does not have the same meaning as injury to physical or psychic integrity, which is not included in Article L.2121-1 of the draft Criminal Code. Injury to mental health may occur without any injury to physical integrity and, similarly, injury to physical integrity may occur without injury to physical health.

The drafters of the new Criminal Code failed to integrate serious injury to mental or physical health in their draft of Article L.2121-1 as constitutive elements of crimes against humanity. This failing results in limitation of the incrimination of crimes against humanity as compared with the definition in the Statute. It would thus be appropriate to reintegrate these acts in the text of Article L.2121-1.

B - The need to specify the meaning of certain constitutive acts of crimes against humanity in the draft Criminal Code

Cambodian criminal law does not define extermination, persecution and apartheid despite the fact that they are constitutive elements of crimes against humanity, the definition of which is necessary by virtue of the principle of legality of offences.

It is thus appropriate to specify the meaning of these acts in the draft Criminal Code, specifically in Article L.2121-1, following the model of Article 7(2) of the Rome Statute, which defines the meaning of these acts at international law. Article 3 of the Statute of the International Criminal Tribunal for Rwanda and Article 5 of the Statute of the International Criminal Tribunal for the former Yugoslavia also go in this direction.

Furthermore, Article 7 of the Rome Statute widens the motives for persecution beyond those in earlier international texts (Article 6(c) of the Statute of the Nuremberg International Military Tribunal and Articles 3 and 5 of the abovementioned Statutes of the *ad hoc* International Criminal Tribunals). It would thus be appropriate to integrate these wider motives in the Cambodian definition. However, Article 7 of the Rome Statute provides that persecution must have been committed "*in connection with any act referred to in [Article 7(1) of the Rome Statute] or any crime within the jurisdiction of the Court.*" In others words, the act of persecution as such is not sufficient to be characterised as a crime against humanity within the jurisdiction of the Court. It must be linked to another constitutive act of the crime against humanity or another crime within the jurisdiction of the Court. Article L.2121-2 of the draft Criminal Code does not include this condition. This is a positive choice.

Similarly, concerning torture, although some elements of the definition in Article 7 of the Rome Statute are wider than the definition in Article 1 of the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, and Article 500 of the 1955 Criminal Code, other aspects are more restrictive.

The definition in Article 7 differs from Article 1 of the 1984 Convention, which limits the author of such acts to public servants or other persons acting un an official capacity, at State instigation or with its express or tacit consent.

Furthermore, the definition in Article 7(2)(e) is wider than Article 500 as regards torture, since the latter requires that torture be perpetrated for the purpose of obtaining information. Article 500 provides that:

> "Article 500. Any person who commits acts of torture against others, either to obtain the revelation of useful information for perpetration of a crime or misdemeanour, or by spirit of reprisals or barbarity, through the application of pain, shall be punished by criminal sentencing in the third degree".

However, the Rome Statute is more restrictive than Article 500 as regards the author, since under Article 7(2)(e) the victim must be under his guard or control.

It should also be recalled that application of the definition in Article 500 of the 1955 Criminal Code remains uncertain, due to an unfounded interpretation of Article 158 of the Constitution[46].

The FIDH thus recommends:

- the amendment of Article L.2121-1 of the draft Criminal Code in order to include inhumane acts causing great suffering, or serious injury to mental or physical health as a constitutive element of crimes against humanity, and

- the insertion of a second paragraph in the text of Article L.2121-1 of the draft Criminal Code defining the meaning of the terms "extermination", "torture", "persecution" and "apartheid", based on international law as expressed in Article 7(2) of the Rome Statute.

Article L.2121-1 of the draft Criminal Code would thus read as follows:

> ***"Article L.2121-1 (Constitutive elements of crimes against humanity)***
>
> ***Crimes against humanity means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population:***
>
> ***1. Murder;***
>
> ***2. Extermination;***
>
> ***3. Enslavement;***
>
> ***4. Deportation or forcible transfer of population;***
>
> ***5. Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;***
>
> ***6. Torture;***
>
> ***7. Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;***
>
> ***8. Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law;***
>
> ***9. Enforced disappearance of persons;***
>
> ***10. The crime of apartheid;***
>
> ***11. Any other inhumane act of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health".***

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[46] See *supra* Part II, Chapter 1.

For the purposes of the preceding paragraph:

1. "Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

2. "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

3. "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

4. "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime."

Chapter III - War crimes

"War crime" is a general term used to describe grave breaches of the laws and customs of war. They are prohibited in many international instruments, especially the 1949 Geneva Conventions and the first additional Protocol of 1977.

Article 8 of the Rome Statute defines the war crimes coming within the jurisdiction of the International Criminal Court and State Parties as regards the alleged authors of such crimes, according to the complementary principle.

As with genocide and crimes against humanity, Cambodian law would provide for the prosecution of war crimes before domestic courts in accordance with Cambodia's international obligations.

However, Cambodian positive law does not currently provide for the punishment of these crimes as such.

Article L.2131-1 of the draft Criminal Code expressly incriminates war crimes. This is a positive development.

Nevertheless, the draft Code does not include all of the constitutive elements of the war crimes set out in Article 8 of the Rome Statute.

A - War crimes under Cambodian positive law

1) Cambodian sources

Three different Cambodian laws provide for incomplete criminalisation of war crimes: the Transitional Provisions, the 1955 Criminal Code and the 1954 Code of Military Justice. The latter two texts remain partially in force under a strict interpretation the Article 158 of the 1993 Constitution[47].

As for the other international crimes, however, these provisions only allow prosecution of a certain number of constitutive acts of war crimes, such as murder, torture and serious bodily harm.

[47] See *supra* Part II, Chapter 1.

The 1954 Code of Military Justice defines a number of other offences, such as violence against wounded soldiers, and stealing from or looting wounded or dead soldiers[48].

2) Comparison with the Rome Statute

These provisions of Cambodian positive law do not cover all the constitutive acts of war crimes as defined in the Rome Statute. Furthermore, most of the offences, such as homicide, torture, murder, rape, violence and destruction prohibited by the domestic law do not allow for specific characterization as war crimes, which are committed in the context of, and in relation with, an armed conflict. These acts are committed by the soldiers of one party against opposing soldiers or civilians of another party to the conflict, or more precisely, against "protected" persons or property within the meaning of the 1949 Geneva Conventions and additional Protocols of 1977.

The applicable Cambodian law, therefore, only prohibits isolated acts, and do not cover the whole range of constitutive acts of war crimes. They provide no means of specifically characterizing war crimes and providing appropriate punishment.

The International Criminal Court was not established to try individual, isolated acts. It has jurisdiction over war crimes "when committed as a part of a plan or policy or as part of a large–scale commission of such crimes" [Article 8(1) of the Rome Statute].

It would, thus, be appropriate to amend Cambodian law in order to allow Cambodia to retain jurisdiction over war crimes that would come before the International Criminal Court in case of State failure to prosecute.

B - war crimes in the draft Criminal Code

Articles L.2131-1 and L.2131-2 of the draft Criminal Code define and punish some war crimes. These Articles provide as follows:

> "Article L.2131-1 *Constitutive elements of war crimes*
>
> "War crimes" means any of the following acts against persons or property protected under the provisions of the Geneva Conventions of the 12 August 1949:
>
> 1. Wilful killing;
> 2. Torture or inhuman treatment, including biological experiments;
> 3. Wilfully causing great suffering, or serious injury to body or health;
> 4. Extensive destruction *or* appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
> 5. Compelling a prisoner of war *or a civilian* to serve in the forces of a hostile Power;
> 6. Wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
> 7. Unlawful deportation or transfer or unlawful confinement;
> 8. Taking of hostages."

> Article L.2131-2 *Other constitutive elements of war crimes*

[48] Article 184 of the Code of Military Justice incriminates violence against a soldier who is wounded, invalid or unable to defend himself, committed by a soldier or a civilian; Article 202 of the same text incriminates deprivations committed by soldiers or civilians against a soldier who is wounded, invalid or deceased or committed with violence against a wounded or invalid soldier; Articles 203 and 205 also incriminate equally theft of goods belonging to the army or inhabitants who lodge or quarter them. Common Law provisions concerning violence (Articles 495 to 500 of the 1955 Criminal Code), murder (Article 32 of the Transitional Provisions), premeditated murder (Article 31 of the same text), theft (Articles 34 and 43 of the same text) and attempts (Articles 31, 32, 34 and 43 of the Transitional Provisions and Articles 77 to 81 of the 1955 Criminal Code) are applicable to the cases envisaged in these Articles.

> "War crimes" also means any of the following acts, committed during an international or non-international armed conflict:
>
> 1. Employing toxic arms or other arms of a nature to cause unnecessary suffering;
>
> 2. Deliberately attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
>
> 3. Deliberately attacking persons or equipment used in humanitarian missions in accordance with the United Nations Charter;
>
> 4. Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival;
>
> 5. Utilizing the presence of a civilian to render certain points, areas or military forces immune from military operations;
>
> 6 Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, and works of art or science;
>
> 7 Causing widespread, long–term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
>
> 8 Looting public or private property." [italics added].

The drafters of the new Code affirm that Articles L.2131-1 and L.2131-2 adopt respectively the definition of war crimes in Articles 8(2)(a) and (b) of the Rome Statute.

However, upon examination of these provisions, nuances and gaps appear in the transposition.

1) Comparison of Article L.2131-1 of the draft Criminal Code with Article 8(2)(a) of the Rome Statute.

a) The expression "destruction or appropriation of property"

This expression distinguishes between destruction and appropriation. The two terms do not cover the same acts. Appropriation is not necessarily followed by destruction, and the latter prevents any appropriation.

The use of the term "or" gives this Article a wider reach than under Article 8(2)(a) of the Rome Statute, which uses the term "and".

This is a positive change for the punishment of war crimes.

b) Use of the term "civilian" in Article L.2131-1 of the draft Criminal Code and the term "protected person" in Article 8(2) of the Statute.

The term "protected person" as used in Article 8(2) of the Rome Statute refers to persons protected by the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, the Geneva Convention relative to the Treatment of Prisoners of War, and the Geneva Convention relative to the Protection of Civilian Persons in Time of War, all dated 12 August 1949.

These conventions protect, in particular, any person not participating directly in hostilities, including: members of the armed forces who have laid down their arms and persons who have been placed *hors de combat* by sickness or injury; civilians who, as the result of an international armed conflict or of occupation, find themselves in the hands of a party of which they are not nationals; as well as all

medical and religious personnel belonging to the armed forces of parties to the conflict; or who are received or interned in the territory of a neutral State.

However, Article L.2131-1 sometimes uses the term "civilian" in place of "protected person" under the Geneva Conventions when implementing Article 8(2)(a) of the Rome Statute. This results in restrictions on some of the constitutive acts of war crimes compared with the Rome Statute.

The FIDH thus recommends:

- that the Cambodian authorities amend Article L.2131-1 of the draft Criminal Code by replacing the term "civilian" by the expression "person protected under the Geneva Conventions".

2) Comparison between Article L.2131-2 of the draft Criminal Code and Article 8(2)(b) of the Rome Statute

a) Article 8(2)(b) of the Rome Statute

Article 8(2) of the Statute distinguishes between war crimes committed during international and non-international armed conflicts. It provides a detailed list of constitutive acts of war crimes committed during international armed conflict in paragraph (b), whereas those committed during armed conflict not of an international character are set out in paragraphs (c) and (e).

In cases where a State Party to the Rome Statute does not fully incorporate war crimes within the meaning of Article 8(2) of the Rome Statute, the International Criminal Court will be able to take up the case, according to the complementary principle, since the State Party will not be able to oppose its jurisdiction in this respect. Accordingly, State Parties should fully incorporate the Rome Statute definition of war crimes.

b) Article L.2131-2 of the draft Criminal Code

As mentioned above, the drafters of the new Criminal Code have noted that Article L.2131-2 contains the definition of crimes under Article 8(2)(b) of the Rome Statute.

Nevertheless, after examination, it appears that this incorporation is very limited. A large number of constitutive acts of war crimes set out in Article 8(2)(b) of the Rome Statute are not mentioned in Article L.2131-2 of the draft Criminal Code, such as *inter alia*: "*Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities*"[49]; "*Intentionally directing attacks against civilian objects, that is, objects which are not military objectives*"[50]; "*Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion*"[51]; "*Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury*"[52]; "*The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the*

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[49] Article 8(2)(b)(i).
[50] Article 8(2)(b)(ii).
[51] Article 8(2)(b)(vi).
[52] Article 8(2)(b)(vii).

territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory"[53]; "*Declaring that no quarter will be given*"[54]; "*Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party*"[55]; "*Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war*"[56]; "*Employing poison or poisoned weapons*"[57]; "*Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions*"[58]; "*Employing weapons, projectiles and material and methods of warfare ... which are inherently indiscriminate in violation of the international law of armed conflict*"[59]; "*Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions*"[60]; "*Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law*"[61]; "*Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities*"[62].

Such acts are also prohibited by the Geneva Conventions and are in no way contrary to the spirit of Cambodian law in force, which already criminalises some of the constitutive acts of war crimes, such as rape, sexual slavery, enforced pregnancy, enforced prostitution, enforced sterilization and other serious forms of sexual violence.

On another level, Article L.2131-2 of the draft Criminal Code prohibits war crimes committed "*committed during an international or non-international armed conflict*".

However, despite referring to the prohibition of war crimes committed during non-international armed conflict, Article L.2131-2 does not include the relevant constitutive acts, listed in Article 8(2)(c) and (e) of the Rome Statute. It would thus be appropriate to add these acts to the text of Article L.2131-2.

The FIDH recommends:

- given the above points, the amendment of Article L.2131-2 of the draft Criminal Code to include all the constitutive acts of war crimes set out in Article 8(2)(b)(c) and (e) of the Rome Statute that are no already set out in the current draft. Article L.2131-2 would then appear as follows:

"Article L.2131-2 Other constitutive elements of war crimes

"war crimes" mean each of the following acts, committed during an international armed conflict:

53 Article 8(2)(b)(viii).
54 Article 8(2)(b)(xii).
55 Article 8(2)(b)(xiv).
56 Article 8(2)(b)(xv).
57 Article 8(2)(b)(xvii).
58 Article 8(2)(b)(xix).
59 Article 8(2)(b)(xx).
60 Article 8(2)(b)(xxii).
61 Article 8(2)(b)(xxiv).
62 Article 8(2)(b)(xxvi).

1. Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

2. Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

3. Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

4. Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

5. The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or part of the population of the occupied territory within or outside this territory;

6. Declaring that no quarter will be given;

7. Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

8. Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

9. Employing poison or poisoned weapons;

10. Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

11. Employing weapons, projectiles and material and methods of warfare … which are inherently indiscriminate in violation of the international law of armed conflict;

12. Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2(f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions";

13. Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

14. Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities;

15. Employing toxic arms or other arms of a nature to cause unnecessary suffering;

16. Deliberately attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

17. Deliberately attacking persons or equipment used in humanitarian missions in accordance with the United Nations Charter;

18. Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival;

19. Utilizing the presence of a civilian to render certain points, areas or military forces immune from military operations;

20. Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, and works of art or science;

21. Causing widespread, long–term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

22. Looting public or private property."

In case of non-international armed conflict, "war crimes" mean each of the following acts, committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

1. Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

2. Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

3. Taking of hostages;

4. The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

In case of non-international armed conflict, "war crimes" also means each of the following acts:

1. Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

2. Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

3. Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the law of armed conflict;

4. Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

5. Pillaging a town or place, even when taken by assault;

6. Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

7. Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

8. Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

9. Killing or wounding treacherously a combatant adversary;

10. Declaring that no quarter will be given;

11. Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

12. Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict."

Chapter IV - Observations concerning the exercise of complementary jurisdiction

There are two main obstacles in Cambodian positive law to the exercise of the complementary jurisdiction principle: amnesty laws and the nature of sentences provided for the crimes referred to in Article 5 of the Rome Statute.

A - Amnesty, a potential obstacle to the exercise of the principle of complementary jurisdiction in Cambodia

Article 17(1)(a) of the Rome Statute excludes the jurisdiction of the International Criminal Court when a "*case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution*".

The very nature of the crimes covered by the ICC implies the exclusion of any amnesty measures, in order to ensure that prosecutions before the Cambodian courts are effective. If not, the State may be deemed unable or unwilling to try the case, thus giving the International Criminal Court jurisdiction by virtue of Article 17(1)(a).

1) The state of Cambodian law

a) Amnesty

Amnesties have enduring effect since they retroactively divest the acts in question of their criminal nature. They extinguish public prosecution and erase sentences.

Article 90(4) of the Cambodian Constitution provides that:

> "The National Assembly shall adopt the law of general amnesty."

Thus, only the National Assembly has the power to adopt general amnesty laws.

There are a series of provisions on amnesties in Articles 195 to 197 of the 1955 Criminal Code. Article 195 provides that:

> "Amnesty is granted by Law. It has the effect of extinguishing public action with respect to the offences specified in the amnesty law and definitively cancelling related principle and secondary sentences, as set out in the law. However, the amount of any fine that has already been paid shall not be refunded.
>
> Amnesty only covers offences committed and sentences handed down prior to the enactment of the amnesty law in question."

Amnesties only affect the public action they extinguish and primary or secondary sentences they cancel. Thus, they have no incidence on civil responsibility[63]. The victims of an amnestied offence can still take action before the criminal courts in order to obtain recognition and reparation of their injury, even though the author of the offence is not subject to any criminal conviction or sentence.

Articles L.1253-1, L.1253-2 and L.1253-3 of the draft Criminal Code also provide for amnesties. They read as follows:

> "Article L.1253-1 - *Effects of amnesty*

[63] Article 196 of the 1955 Cambodian Criminal Code.

Amnesty, as provided for in Article 90 of the Constitution as amended, cancels convictions concerned by the amnesty law.

Sentences shall not be executed.

If necessary, the execution of any ongoing sentence shall cease.

Nevertheless, fines and judicial expenses that have already been paid shall not be reimbursed by the State.

Article L.1253-2 - *Amnesty and revocation of suspended sentences*

Where a suspended sentence has been revoked by the effect of a later conviction, any amnesty of the later conviction re-establishes the benefit of the suspended sentence.

Article L.1253-3 - *Damages for the victim's injury in case of amnesty*

Except as provided in the law, an amnesty does not obstruct the right of victims to obtain damages for their injury".

In summary, although amnesty does not affect damages, it still prevents the punishment of crimes.

Given the extreme gravity of genocide, crimes against humanity and war crimes, it would thus be appropriate to adopt a provision in Cambodian positive law excluding any amnesty for such crimes.

b) Pardon

Although pardons have less radical consequences than amnesties, they can put an end to execution of all or part of a sentence or substitute a lesser sentence.

In Cambodia, pardons are granted at the King's discretion. In this respect, Article 27 of the 1993 Constitution provides that:

> "The King shall have the right to grant partial or complete [pardons]."

The legal regime of pardons is clarified by Decree No. 28, dated 20 June 1988, relating to the conditions for pardons and the reduction of sentences, and Circular No. 282, dated 24 February 1994.

The draft Criminal Code also provides for pardons in Articles L.1252-1 and L.1252-2, which read as follows:

"Article L.1252-1 - *Effects of pardons*

Pardons, as provided for in Article 27 of the Constitution as amended, put an end to the execution of a sentence.

Article L.1252-2 - *Damages for the victim's injury in case of pardon*

Except as provided in the Royal Decree, a pardon does not affect a victim's right to obtain damages for his or her injury".

As with amnesty, it would be appropriate to add a provision to Cambodian criminal law excluding any pardon for genocide, crimes against humanity and war crimes.

2) Comparison with the Rome Statute

The Rome Statute does not define amnesty or other comparable measures and makes no express reference to this issue, which is highly political. The term "amnesty" itself is absent from the Statute.

Nevertheless, reading together Articles 17(2)(a) and 20(3) of the Statute, which were the result of political compromise during the drafting process, it appears reasonable to consider that States intended to address this issue without naming it.

Article 17(2) of the Rome Statute stipulates that:

> "2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
>
> (a) The proceedings were or are being undertaken or the *national decision was made for the purpose of shielding the person concerned from criminal responsibility* for crimes within the jurisdiction of the Court referred to in article 5;…" [italics added].

This provision confirms that, in case of State unwillingness, especially when the latter has claimed jurisdiction with the sole aim of allowing the accused to escape justice, the International Criminal Court will be able to exercise jurisdiction.

In the same vein, Article 20(3) of the Statute states that:

> "No person who has been tried by another court for conduct also proscribed under articles 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:
>
> (a) Were for the purpose of *shielding the person concerned from criminal responsibility* for crimes within the jurisdiction of the Court;…" [italics added].

It is not unreasonable to consider that the adoption of an amnesty law or comparable measure is often proof of a lack of State willingness, ao a will to shield criminals from their criminal responsibility.

The FIDH thus recommends:

- the amendment of Articles 27 and 90 of the 1993 Constitution in order to exclude pardons and amnesty laws in case of genocide, crimes against humanity and war crimes. Articles 27 and 90 of the 1993 Constitution would thus read as follows:

> ***"Article 27***
>
> ***Subject to the following paragraph, the King has the right to grant reduced sentences and pardons.***
>
> ***In case of genocide, crimes against humanity and war crimes, neither reduced sentences nor pardons shall be granted.***
>
> ***Article 90***
>
> ***The National Assembly is the organ which has legislative power and performs its duties as provided for in the Constitution and the laws in force.***
>
> ***The National Assembly shall approve the national budget, state planning, loans, financial contracts, and creation, modification, and annulment of taxes.***
>
> ***The National Assembly shall approve the administrative accounts.***
>
> ***Subject to the following paragraph, the National Assembly shall adopt the law of general amnesty.***
>
> ***No amnesty law shall be adopted in case of genocide, crimes against humanity or war crimes.***
>
> ***The National Assembly shall adopt or repeal treaties or international conventions.***
>
> ***The National Assembly shall adopt the law on the declaration of war.***

> ***The adoption of the above-mentioned laws shall be decided by an absolute majority vote of the entire National Assembly membership.***
>
> ***The National Assembly shall pass the vote of confidence in the Royal Government with the two-third majority of its members."***

- the amendment of Articles L.1252-1 and L.1253-1 of the draft Criminal Code in order to exclude any pardon or amnesty in case of genocide, crimes against humanity and war crimes. Articles L.1252-1 and L.1253-1 would then read as follows:

> ***"Article L.1252-1 - Effects of pardons***
>
> ***Subject to the following paragraph, pardons, as provided for in Article 27 of the Constitution as amended, put an end to the execution of a sentence.***
>
> ***In case of genocide, crimes against humanity and war crimes, no pardon shall be granted."***
>
> ***"Article L.1253-1 - Effects of amnesty***
>
> ***Subject to the last paragraph of the present Article, amnesty, as provided for in Article 90 of the Constitution as amended, cancels convictions concerned by the amnesty law.***
>
> ***Sentences shall not be executed.***
>
> ***If necessary, the execution of any ongoing sentence shall cease.***
>
> ***Nevertheless, fines and judicial expenses that have already been paid shall not be reimbursed by the State.***
>
> ***In case of genocide, crimes against humanity and war crimes, no amnesty shall be granted".***

B - The issue of penalties

When a person is found guilty of genocide, crimes against humanity or war crimes before the International Criminal Court, he or she is punished in accordance with Article 77 of the Rome Statute, which provides that:

> "Article 77 - Applicable penalties
>
> 1. Subject to article 110, the Court may impose one of the following penalties on a person convicted of a crime under article 5 of this Statute:
>
> (a) *Imprisonment for a specified number of years, which may not exceed a maximum of 30 years*; or
>
> (b) *A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.*
>
> 2. In addition to imprisonment, the Court may order:
>
> (a) A fine under the criteria provided for in the Rules of Procedure and Evidence;
>
> (b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties." [italics added].

At present, as we have seen, Cambodian criminal law does not incriminate genocide, crimes against humanity and war crimes. Only some of the constitutive acts of such crimes are prohibited. The applicable penalties range from 20 years to life imprisonment for a domestic crime committed with

one or more aggravating circumstances, as provide in the law relating to aggravating circumstances in criminal matters[64].

The draft Criminal Code prohibits genocide, crimes against humanity and war crimes and imposes a maximum penalty of life imprisonment (Articles L.2111-2, L.2121-2, L.2131-3) and a fine ranging from 50,000,000 Riels to 500,000,000 Riels (Articles L.2111-5, L.2121-5, L.2131-6). Supplementary penalties may also be imposed (Articles L.2111-4, L.2121-4, L.2131-5 for physical persons and Articles L.2111-5, L.2121-5, L.2131-6 for legal entities).

The FIDH considers:

- that the applicable penalties for genocide, crimes against humanity and war crimes, as set out in Articles L.2111-2, L.2111-4, L.2111-5, L.2121-2, L.2121-4, L.2121-5, L.2131-3, L.2131-5 and L.2131-6 of the draft Criminal Code are compatible with Article 77 of the Rome Statute, and supports their adoption by Cambodian lawmakers.

[64] Law on aggravating circumstances in criminal proceedings, 7 January 2001.

Part IV - General principles of law

Introduction

The general principles of law are "t*he legal translation of a superior obligation considered as predating the legal norm*"[65].

They inspire positive rules, complete them and sometimes even counter them. These principles most often relate to criminal procedure, and the best known of them are defence rights, which will be considered below[66].

Although they were originally unwritten in criminal justice systems, national case-law has strived to express them and national lawmakers have often introduced them into domestic legislation.

However, as a general rule, case-law is inexistent in Cambodia, particularly as regards international crimes. Moreover, the country's legislation is quite lacking on the subject. It is often necessary therefore, to refer to the Statute of the International Criminal Court for these crimes, since its lays down a certain number of general principles of international law in Chapter 3.

In particular, Articles 25 to 33 of the Rome Statute lay down the rules governing individual criminal responsibility and the motives for exoneration of criminal responsibility.

Nevertheless, gaps and incoherencies remain, even in the rules stated in the Rome Statute, which the lawmakers must complete or rectify, in the absence of national case-law.

Chapter I - Individual criminal responsibility: Article 25 of the Rome Statute

A - The absence of criminal responsibility of legal entities

Article 25(1) of the Rome Statute stipulates that:

> "The Court shall have jurisdiction over natural persons pursuant to this Statute".

The criminal responsibility of legal entities is not provided for in the Statute, as requested by certain States during drafting[67].

Article 9 of the Charter of the International Military Tribunal in Nuremberg acknowledged the principle of the criminal responsibility of criminal organizations.

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65 H. Motulsky, "Le droit naturel dans la pratique jurisprudentielle : le respect des droits de la défense en procédure civile" [natural law in case-law: respect for defence rights], *Mélanges Roubier*, 1961, pp. 175 *et seq*.

66 See *infra* Part VII.

67 For example, France had wanted legal entities to be open to prosecution, especially private trading companies, but excluding public State organizations, nongovernmental and non-profit organisations.

However, the drafters of the Rome Statute rejected this principle, because such responsibility is not accepted by all major legal systems, often for economic and political reasons.

The absence of such criminal responsibility from the Rome Statute should, however, be seen in perspective, since the same criteria for the offence of membership and conspiracy were retained to allow the conviction of individuals acting within groups corresponding to criminal organizations.

The Cambodian criminal law in force does not provide for the criminal responsibility of legal entities either. Indeed, neither the Transitional Provisions nor the 1955 Criminal Code refer to it. Article 1 of the 1955 Criminal Code expressly refers only to individual criminal responsibility, as follows:

> "The law provides that some *human* acts constitute offences and punishes them with sentences, due to the social turmoil that results from them" [italics added].

However, Articles L.1123-1 and L.1123-2 of the draft Cambodian Criminal Code, prepared by the legal Commission in association with a team of French lawyers (of generally French inspiration), provides for the criminal responsibility of legal entities. Article L.1123-1 provides that:

> "In cases provided for by law, legal entities, except for the State, may be declared criminally responible for offences committed, on their behalf, by their representative bodies."[68].

Based on this Article, Articles L.2111-5, L.2121-5 and L.2131-6 of the draft Criminal Code provide expressly for the criminal responsibility of legal entities in case of genocide, crimes against humanity and war crimes.

It is thus appropriate, on this point, to underline the progressive position taken in the draft Criminal Code.

The FIDH considers:

- that it is positive for the draft Criminal Code (Articles L.1123-1, L.2111-5, L.2121-5 and L.2131-6) to provide for the criminal responsibility of legal entities in case of genocide, crimes against humanity and war crimes, even though the Rome Statute does not mention this, and supports the adoption of these Articles by the Cambodian legislative authorities, as drafted.

B - The different forms of participation in the commission of international crimes

Sub-Articles 25(2) and (3) of the Rome Statute lay down the different forms of participation in the commission of international crimes that lead to individual criminal responsibility.

1) Complicity

A person who commits a crime prohibited by the Rome Statute, whether as an individual, jointly with another or through another person, is criminally responsible under Article 25(3)(a) of the Rome Statute.

Ordering, soliciting or inducing the commission of such a crime and aiding, abetting, or otherwise assisting for the purpose of facilitating its commission are considered to be forms of complicity that

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[68] Article L.1123-1 of the draft Cambodian Criminal Code summarizes the text of Article 121-2 of the new French Criminal Code, which provides that "*[l]egal entities, excluding the State, are criminally responsible according to Articles 121-4 to 121-7 and in the cases provided by law or regulation, for offences committed, on their behalf, by their bodies or representatives*".

also involve criminal responsibility under Article 25(3)(b) and (c). All of these provisions take account of the prior case-law of the two International Criminal Tribunals for Rwanda and the former Yugoslavia.

The Cambodian definition of complicity, under Article 69 of the Transitional Provisions, provides as follows:

> "Whoever has provided the means by which an offence is committed, ordered that the offence be committed, or facilitates commission of the offence shall be considered an accomplice and punished with the same punishment applicable to the principle offender."

Articles 83 to 88 of the 1955 Criminal Code complete the definition and the legal regime of complicity, especially the intentional element.

Articles L.1121-4 and 1121-5 of the draft Criminal Code adopt this definition, although they distinguish between the instigator and the accomplice: the former being someone who gives instructions to commit a crime or misdemeanour or provokes it through gifts, promises or threats, or by misusing authority or power; and the latter being defined as "*knowingly*" facilitating an attempt or realization of a crime or misdemeanour by providing aid or assistance. This distinction is compatible with that adopted in Article 25(3) of the Rome Statute.

The draft Criminal Code thus offers magistrates and those subject to trial a complete definition of complicity in conformity with the Rome Statute.

It is all the more important to adopt Articles L.1121-4 and L.1121-5 in Cambodian positive law since the current definition of complicity requires the intentional element to be sought in the 1955 Criminal Code. Moreover, this text is of uncertain legal application[69].

The FIDH recommends:

- consequently, that the Cambodian authorities adopt Articles L.1121-4 and L.1121-5 of the draft Criminal Code, as drafted.

2) Attempt

A person who attempts to commit a crime prohibited by the Rome Statute, by taking action that commences its execution by means of a substantial step, also engages his or her individual criminal responsibility, even if the crime does not occur because of circumstances independent of the person's will (Article 25(3)(f) of the Rome Statute).

Nevertheless, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime is not liable for punishment of the attempt if that person completely and voluntarily gave up the criminal purpose (Article 25(3)(f) of the Rome Statute).

The Cambodian definition of attempt is set out to in Articles 77 to 79 of the 1955 Criminal Code, which provide as follows:

> "Art. 77. The authors of attempted offences are only punishable if the attempt, demonstrated by commenced execution, fails for reasons independent of his or her will.

[69] See *supra* Part II, Chapter 1.

Art. 78. Preparatory acts do not constitute commenced execution,

Art. 79. An attempted crime is considered to be the crime itself."

These provisions are substantially the same as those adopted in Article 25(3)(f) of the Rome Statute.

Article L.1121-3 of the draft Criminal Code adopts the definition of attempt under the 1955 Criminal Code.

The FIDH recommends:

- consequently, that the Cambodian authorities adopt Article L.1121-3 of the draft Criminal Code, as drafted.

Chapter II - Immunity: Article 27 of the Rome Statute

The aim of immunities is to prevent a national court from establishing jurisdiction over a given case, or to prevent it from imposing measures of constraint.

There is, however, a distinction between internal and international immunity: the former resulting from a provision of national law and thus being only before national courts; and the latter resulting from international law and thus binding on all national legal systems.

Accordingly, the issue of national immunity only concerns persons enjoying some form of immunity pursuant to Cambodian law: the King, members of Parliament and members of government. International immunity, on the other hand, protects foreign leaders and diplomats against prosecution in Cambodia.

The Rome Statute covers the question of immunities in Articles 27 and 28, but does not stipulate expressly that this issue must be dealt with in national implementation laws.

In principle, no immunity, whether national or international, may be invoked before the International Criminal Court (Article 27 of the Rome Statute). Consequently, in cases where a person enjoys immunity before national courts, the ICC would exercise a form of primary jurisdiction over that person by default.

However, such an approach would appear contrary to the spirit of the Rome Statute, which is clearly based on complementarity between national courts and the ICC[70]. Thus, it is simply not sufficient to authorize transfer to the International Criminal Court, in cases where a person enjoys immunity before a national court. Moreover, it is difficult to imagine a government authorising the transfer to the ICC of a person enjoying internal constitutional immunity, such as the King of Cambodia, who is "*inviolable*" (Article 7 of the 1993 Constitution), thus breaching the country's sovereign norm.

In the interests of international criminal justice it is, thus, important that, in the case of the crimes defined in the Rome Statute, domestic and international immunities should not be invoked before national courts.

[70] Paragraph 10 of the Preamble to the Rome Statute and Article 1 of the Statute; see also *supra* (pp. 5 and 19).

A - Internal immunities

1) The immunity of the monarch

Article 7 of the 1993 Constitution provides that "*[t]he King shall be inviolable*", which means that he enjoys total immunity.

Cambodian jurists generally justify this immunity by reference to the first sentence of Article 7, which provides that "*[t]he King of Cambodia shall reign but shall not govern*".

Under this interpretation, which has not been confirmed by the Constitutional Council, if the King were to commit a crime prohibited by the Rome Statute, he would enjoy absolute immunity[71].

As with other monarchies, the amendment of the Constitution thus appears indispensable in order to exclude any immunity of the monarch for crimes coming within the jurisdiction of the International Criminal Court.

The FIDH recommends:

the amendment of Article 7 of the 1993 Constitution, as follows:

> ***"Article 7.***
>
> ***The King of Cambodia shall reign but shall not govern.***
>
> ***The King shall be the Head of State for life.***
>
> ***Except as provided below, the King shall be inviolable.***
>
> ***The King shall incur criminal responsibility in case of crimes coming within the Rome Statute of the International Criminal Court".***

2) Parliamentary immunity

Article 80 of the 1993 Constitution reads as follows:

> "The deputies shall enjoy *parliamentary immunity*.
>
> No assembly member shall be prosecuted, detained or arrested because of opinions expressed during the exercise of his (her) duties.
>
> The accusation, arrest, or detention of an assembly member shall be made only with the permission of the National Assembly or by the Standing Committee of the National Assembly between sessions, except in case of *flagrante delicto*. In that case, the competent authority shall immediately report to the National Assembly or to the Standing Committee for decision.
>
> The decision made by the Standing Committee of the National Assembly shall be submitted to the National Assembly at its next session for approval by a 2/3-majority vote of the assembly members.
>
> In any case, detention or prosecution of a deputy shall be suspended by a 3/4-majority vote of the National Assembly members." [italics added].

Article 104 contains provisions relating to Senators, as follows:

> "Senators shall enjoy *parliamentary immunity*.
>
> No Senator shall be prosecuted, arrested, stopped, or detained because of opinions and statements expressed during the exercise of his/her duties. The accusation, arrest, stopping, or detention shall be

[71] Such an interpretation was expressed by MP Khieu San, see *supra* note 4.

> made only if approved by the Senate or the Senate's Standing Committee between the Senate's meetings, except in the case of *flagrant delicto*. In that case, the relevant ministry shall immediately report to the Senate or to its Standing Committee for a decision.
>
> The decision of the Standing Committee of the Senate shall be submitted to the next Senate meeting for approval by a two-third-majority vote of all senators.
>
> In any case above, the detention or prosecution of any senator shall be suspended if there is an approval by a three-quarter-majority vote of all senators." [italics added].

These constitutional provisions exclude the prosecution of a member of parliament without the preliminary authorization of their House, or of the competent permanent committee. For example, this would include the case of direct and public incitement to commit genocide committed during a parliamentary debate.

A decision of parliamentary peers, by a two-thirds majority, is thus necessary in order to authorize prosecution, whereas in cases of *flagrant delicto*, a vote of three-quarters of the House in question is needed to stop their prosecution before the Cambodian courts.

In the interests of justice, it is thus necessary to amend these constitutional provisions.

The FIDH recommends:

- the amendment of Articles 80 and 104 of the 1993 Constitution, as follows:

> ***"Article 80.***
>
> ***Except as provided in this Article, the deputies shall enjoy parliamentary immunity.***
>
> ***No assembly member shall be prosecuted, detained or arrested because of opinions expressed during the exercise of his (her) duties.***
>
> ***Except as provided in this Article, the accusation, arrest, or detention of an assembly member shall be made only with the permission of the National Assembly or by the Standing Committee of the National Assembly between sessions, except in case of flagrant delicto. In that case, the competent authority shall immediately report to the National Assembly or to the Standing Committee for decision.***
>
> ***The decision made by the Standing Committee of the National Assembly shall be submitted to the National Assembly at its next session for approval by a 2/3-majority vote of the assembly members.***
>
> ***Except as provided in this Article, in the abovementioned cases, detention or prosecution of a deputy shall be suspended by a 3/4-majority vote of the National Assembly members.***
>
> ***In the case of a crime prohibited by the Rome Statute of the International Criminal Court, the criminal responsibility of National Assembly members shall be incurred without applying any of the conditions set out in this Article."***
>
> ***"Article 104.***
>
> ***Except as provided in this Article, Senators shall enjoy parliamentary immunity.***
>
> ***No Senator shall be prosecuted, arrested, stopped, or detained because of opinions and statements expressed during the exercise of his/her duties.***
>
> ***Except as provided in this Article, the accusation, arrest, stopping, or detention shall be made only if approved by the Senate or the Senate's Standing Committee between the Senate's meetings, except in the case of flagrant delicto. In that case, the relevant***

ministry shall immediately report to the Senate or to its Standing Committee for a decision.

The decision of the Standing Committee of the Senate shall be submitted to the next Senate meeting for approval by a two-third-majority vote of all senators.

Except as provided in this Article, in the abovementioned cases, the detention or prosecution of any senator shall be suspended if there is approval by a three-quarter-majority vote of all Senators.

In the case of a crime prohibited by the Rome Statute of the International Criminal Court, the criminal responsibility of Senators shall be incurred without applying any of the conditions set out in this Article."

3) The absence of any immunity for members of the government

Article 126 of the 1993 Constitution provides that:

> "Each member of the Royal Government shall be punished for any crimes or misdemeanours that he has committed in the course of his duty.
>
> In such cases and when he has committed serious offences in the course of his duty, the National Assembly shall decide to file charges against him with a competent court.
>
> The National Assembly shall decide on such matters through a secret and majority vote thereof."

Thus, members of the Cambodian government do not enjoy any jurisdictional or personal immunity (as recognised in France, for example, through the Court of Justice of the Republic)[72].

Article 126 of the Constitution supplements domestic law procedures by the capacity of the National Assembly to seize the domestic courts in case of crimes, misdemeanours or serious faults committed in the exercise of their duties.

The FIDH considers:

- that the lack of any jurisdictional or personal immunity for members of the government is a positive development.

B - International immunities

The law of international immunities is governed by a number of conventions, mainly concerning diplomatic law, such as the 1961 Vienna Convention on Diplomatic Relations and the 1969 Vienna Convention on Special Missions, but also by customary international law. This area of law has evolved considerably since 1945, towards the lack of any immunity when the prosecution involves the category of international crimes[73].

Indeed, as regards international crimes, the principle of individual criminal responsibility is essential. The principle was first recognized in the case-law of the International Military Tribunal at Nuremberg,

[72] In January 2004, the Head of the Sam Rainsy Party, M. Sam Rainsy filed a complaint against the Prime Minister, M. Hun Sen, for complicity in murder in the context of a grenade attack during a street march organized by his party in March 1997. The Phnom Penh Municipal Court rejected the claim. Sam Rainsy appealed. The Court of Appeal, followed by the Supreme Court, confirmed the trial judgment on 14 June 2005. One of the appeal judges sitting on the case declared after the hearing that, "*[t]he decision of the Municipal Court was justified. The complaint filed by the lawyer [for Sam Rainsy] does not contain sufficient evidence*" to justify prosecution. This shows that such complaints are theoretically admissible before the courts.

[73] See *The FIDH Letter*, No. 32, special issue "International Justice", 14 February 2000, p. 24.

and then confirmed by the UN General Assembly and the UN International Law Commission. Customary international law is, thus, firmly established in this respect.

This principle implies the absence of any immunity for all public agents, Heads of State and Government and ministers, in case of international crimes.

Article 27 of the Rome Statute recognizes the absence of any jurisdictional immunity. However, Article 98(1) provides for immunity from the execution of requests for cooperation that would require the requested State to act inconsistently with its obligations under international law with respect to State or diplomatic immunity of a person or property of a third state, unless the court can first obtain the cooperation of that third state for the waiver of the immunity.

However, Article 98(1) has no effect whatsoever on decisions concerning prosecution before the International Criminal Court. It simply recognizes that the Court cannot request States to execute an act of constraint against persons protected by a conventional provision. Thus, there is no immunity from jurisdiction, but only from execution.

This should be clearly implemented in domestic legal systems. Such implementation is needed for proper application of the complementary principle between the International Criminal Court and domestic courts, as it is indispensable for the prosecution, before such courts, of the perpetrators of crimes prohibited by the Rome Statute.

In the current state of Cambodian law, although the constitutional value of human rights as defined by international law is recognised in Article 31 of the 1993 Constitution, Cambodian citizens cannot invoke these provisions of international law directly before for the national courts unless the legislator intervenes to incorporate Cambodia's international obligations in the area (Article 31 of the Constitution)[74].

As regards the absence of immunity, the only exception is Article 29 of the amended 2001 Law which provides, in the limited context of former Khmer Rouge leaders, that "*[t]he position or rank of any Suspect shall not relieve such person of criminal responsibility or mitigate punishment*".

General legislative implementation of international law rules on the absence of immunity in cases of international crimes, and particularly in the case of crimes prohibited by the Rome Statute, is thus necessary in order to allow Cambodian citizens to prosecute their perpetrators.

It thus appears necessary to add provisions relating to the absence of immunity to the existing provisions of the draft Criminal Code. The most appropriate solution would be to insert a new provision in Part 2, Book 1 of the draft Code, concerning offences against persons.

This Book prohibits genocide, crimes against humanity and war crimes. It comprises three titles, the first relating to genocide, the second to crimes against humanity, and the third to war crimes.

We propose, therefore, that the Cambodian authorities insert provisions relating to the absence of immunity in case of the crimes prohibited by the Rome Statute as a fourth Title ("The absence of immunity in case of genocide, crimes against humanity and war crimes") Part 2, Book 1. Within this new title, we propose two Articles L.2141-1 and L.2141-2, numbered according to the system used in the draft Code.

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[74] See *infra* Part II, Chapter 2.

The FIDH recommends:

- **the insertion, in Part 2, Book 1 of the draft Criminal Code, a fourth title containing two Articles, L.2141-1 and L.2141-2, clearly providing, on the one hand, for the absence of any jurisdictional immunity for genocide, crimes against humanity and war crimes as defined in the Rome Statute and, on the other hand, the absence of any immunity from execution for the purposes of the arrest and/or transfer of individuals to the international Criminal Court, except as provided in a contrary conventional provision, the sovereign appreciation of which remains with the ICC. The proposed Title and Articles are as follows:**
-

"Title 4. ***The absence of immunity in case of genocide, crimes against humanity and war crimes***

Chapter 1.

Article L.2141-1. ***Absence of jurisdictional immunity***

There shall be no immunity for genocide, crimes against humanity or war crimes, before Cambodian courts.

Article L.2141-2. ***Absence of immunity from execution***

No immunity shall be invoked in order to obstruct any act of constraint against a person prosecuted before the Cambodian courts for one of the offences listed in Article L.2141-1, or contained in a request from the International Criminal Court, except as expressly stipulated in a contrary conventional obligation towards another State, the sovereign appreciation of which remains with the International Criminal Court".

Chapter III – The responsibility of military leaders and other superiors: Article 28 of the Rome Statute

A – Preliminary remarks

The commission of genocide, crimes against humanity and war crimes generally implies the participation of political, military or media organizations with hierarchical structures. The existence and strength of such links between the authorities and the commission of these crimes give rise, alongside the perpetrator, to a specific kind of offender, the military or civilian superior.

Article 28 of the Rome Statute provides for the criminal responsibility of military and other superiors under the title of command responsibility. As regards the criminal responsibility of military commanders, this provision is directly inspired by the 1907 Hague Convention, Article 7 of the Charter of the Nuremberg International Military Tribunal and Articles 86(2) and 87 of Protocol I to the 1949 Geneva Conventions. As for the responsibility of other superiors, the Statute adopts the provisions in the Statutes of the two *ad hoc* international criminal tribunals[75], as enriched by their case-law.

[75] Article 7(3) of the ICTY Statute and 6(3) of the ICTR Statute.

B – The scope of Article 28 of the Rome Statute

Article 28 of the Statute applies to situations of inaction by commanders, whether positive (tolerance for the acts of subordinates) or negative (negligence, whether deliberate or not, with knowledge of the acts of subordinates), with respect to crimes perpetrated by their subordinates.

This provision thus provides for criminal responsibility in a situation where the only link between the commander and the subordinate perpetrator of an international crime is the hierarchical relationship. The commander cannot be deemed to be responsible or co-responsible for the offence simply because a likelihood exists. Yet this provision requires the commander to punish the subordinate or prevent the commission of international crimes[76].

This duty of vigilance and action differs depending on the military or civilian position of the commander.

The responsibility of non-military commanders is more difficult to prove than that of military commanders, whose responsibility is more widely defined due to the structure of military organizations and the need to maintain military discipline. Military commanders are thus held responsible for crimes committed by their soldiers if they "*knew or, owing to the circumstances at that time, should have known*" that these crimes were going to be committed and if they failed to take all necessary and reasonable measures to prevent or repress their commission (Article 28(1)(a) of the Rome Statute).

Non-military commanders are held responsible for crimes committed by their subordinates when such crimes: are related to the activities under their control; they knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes; and they failed to take all necessary and reasonable measures within their power to prevent or repress their commission or to submit the matter to the competent authorities (Article 28(1)(b) of the Rome Statute). The required standard of proof is higher, since one must establish that the commander had knowledge of the commission of the crime or deliberately ignored its existence.

C – The interest of Article 28 of the Rome Statute

Both civilian and military commanders already engage their general, individual criminal responsibility when they "*order, solicit or induce the commission of.. a crime*" (Article 25(3)(b) of the Statute). One may, thus, by legal analogy, characterise the positive inaction (tolerance) of a civilian or military commander as implicit inducement to commit crimes giving rise to individual criminal responsibility.

This reasoning was acknowledged and confirmed by the *ad hoc* International Criminal Tribunals, which have stated on a number of occasions[77] that the principle of individual criminal responsibility must prevail, in such cases, over the principle of military or civilian command responsibility.

Moreover, positive inaction may be assimilated to positive complicity (Article 25(3)(c) of the Rome Statute), also incurring the individual criminal responsibility of civilian or military commanders.

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[76] The duty of the superior to act to prevent the commission of a crime by his subordinates has often been stated by national courts. One example of such reference is the *Yamashita* judgement, during which it was declared that the laws of war place a military officer in a command position under a positive duty to take all measures in his power and appropriate in the circumstances to control subordinates under his command in order to prevent acts that would breach the laws of war: *Yamashita* Case, US Supreme Court, 4 February 1946, I.L.R. Vol. 13. No. 115, pp, 269 *et seq*.

[77] ICTY, *Karadzic and Mladic* case, No. IT-95-5-R61 and No. IT-95-18-R61 dated 11 July 1996, paras. 82-83: "*The conditions for the responsibility of superiors under Article 7(3) of the Statute, that is those constituting criminal negligence of superiors, have unquestionably been fulfilled… The Trial Chamber does consider, however, that the type of responsibility incurred is better characterized by Article 7(1) of the Statute*" relating to individual criminal responsibility.

Article 28 should, thus, only be used when direct individual criminal responsibility is impossible to establish. Such impossibility, although rare, may arise in the case of negative inaction of a civilian commander.

D – Cambodian legislation

Under Cambodian law, individual criminal responsibility is provided for in Article 76 of the 1955 Criminal Code, which provides that:

> "any person who is healthy in mind and capable of perception shall be criminally responsible for offences, crimes or misdemeanours that he commits or to which he is an accomplice, and for attempts to commit certain crimes or misdemeanours as provided for by Law".

We have already studied the definitions of complicity and attempt under positive law[78].

1) Military Command responsibility

The command responsibility of military superiors is expressly laid down in Articles 237, 238 and 242 of the 1955 Criminal Code[79]. These Articles provide as follows:

> "Art. 237. Any official or representative of public authority who uses the forces at his disposal, against the execution of laws, regulations, legal decisions, judicial mandates and generally against any legal order emanating from the legitimate authorities, shall be sentenced to a first degree criminal punishment.
>
> Art. 238. Provisions of the preceding two Articles are only applicable to officials or representatives of public authority under the conditions set out in Article 100[[80]], although the guilty person must justify their action or inaction as being in execution of orders emanating from hierarchical superiors to whom they owe obedience. In this case, sentences may only be handed down against the superior responsible for the order in question.
>
> Art. 242. When an official or representative of public authority who is guilty of an arbitrary act, shows that in so acting, he was simply following the orders of hierarchical superiors to whom he owes obedience and if, in addition, the order in question dealt with a matter within their authority, the sentences referred to in Article 240 shall be applied to the persons giving the order and those who execute it under the conditions of responsibility set out in Article 100".

These provisions incriminate military commanders for the positive commission of specific offences, but leave open the question of criminal responsibility in case of omission.

However, omissions by commanders may give rise to criminal responsibility by virtue of Article 69 of the Transitional Provisions and Articles 83 to 88 of the 1955 Criminal Code, as forms of complicity.

As noted above[81], whoever "…*facilitates commission of the offence shall be considered an accomplice*..." (Article 69 of the Transitional Provisions). A commander who tolerates, abstains or omits to take appropriate measures to prevent or punish the commission of crimes by subordinates, may thus be considered to have facilitated the commission of the offence.

On the contrary, the negative inaction (or negligence) of a military commander is not punishable under Cambodian positive law. Nor is it included in the current draft of the Criminal Code. This is all the

78 See *supra* p. 50.

79 See also Articles 226, 228, 230 and 238 of the 1955 Criminal Code.

80 Article 100 of the 1955 Criminal Code provides as follows: "*In the case of illegal orders commanded by the legitimate authorities, the court shall appreciate, on a case by case basis, the criminal responsibility of the agents of execution*".

81 See *supra* p. 50.

more regrettable since this situation corresponds to the practical reality of operations, especially as concerns war crimes.

Consequently, it would be apt to take inspiration from the drafting of Article 28 of the Rome Statute in order to establish the criminal responsibility of military commanders under Cambodian law.

2) The civilian superior

Just as for military commanders, the positive inaction (tolerance) of a civilian superior may be characterised as complicity.

Nevertheless, in the absence of any penal provisions to that effect, such negative inaction (deliberate negligence), as in the case of the military superior, is not punishable under either positive law or the draft Criminal Code.

Despite the difficulty invoking the criminal responsibility of civilian hierarchical superiors on the basis of Article 28 of the Rome Statute, as discussed above, this provision is still more satisfactory than Cambodian positive law.

The FIDH recommends:

- given the gravity of the crimes prohibited by the Rome Statute and the important reform of criminal law under way in Cambodia, supplementing the existing provisions in the draft Criminal Code with two Articles (L.2151-1 and L.2151-2) relating to the criminal responsibility of military and civilian superiors, the drafting of which would be inspired by Article 28 of the Rome Statute.

The proposed Articles, which would be included in a new Title 5 within Part 2, Book 1 of the draft Criminal Code, entitled "The criminal responsibility of hierarchical superiors in case of genocide, crimes against humanity or war crimes", read as follows:

"Title 5. The criminal responsibility of hierarchical superiors in case of genocide, crimes against humanity or war crimes

Chapter 1.

Article L.2151-1: the criminal responsibility of military commanders

A military commander or person effectively acting as a military commander shall be criminally responsible for genocide, crimes against humanity and war crimes committed by forces under his or her effective command and control, or effective authority and control, as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

- that military commander or person knew, or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

- that military commander or person failed to take all reasonable and necessary measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Article L.2151-2: criminal responsibility of civilian hierarchical superiors

A civilian superior shall be criminally responsible for genocide, crimes against humanity and war crimes committed by subordinates under his or her effective

authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

- the superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

- the crimes concerned activities that were within the effective responsibility and control of the superior; and

- the superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution".

Chapter IV – The non-applicability of limitation periods for genocide, crimes against humanity and war crimes: Article 29 of the Rome Statute

Introduction

International law does not recognize any statute of limitations concerning international crimes. Accordingly, when the State implements its international obligations concerning international offences in domestic law, it must adopt the same legal regime.

Under international law, the absence of any limitation period for war crimes, crimes against humanity and genocide was first affirmed in the UN Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity, which was adopted in New York on 26 November 1968 by the UN General Assembly in Resolution 2391 (XXIII), and came into force on 11 November 1970, then included in Article 29 of the Rome Statute.

A – The 1968 UN Convention

1) Presentation of the Convention

Article 1 of the Convention provides as follows:

> "Article 1
> No statutory limitation shall apply to the following crimes, *irrespective of the date of their commission*:
>
> (a) War crimes as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations, particularly the "grave breaches" enumerated in the Geneva Convention of 12 August 1949 for the protection of war victims;
>
> (b) Crimes against humanity whether committed in time of war or in time of peace as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945 and confirmed by resolutions 3(I) of 13 February 1946 and 95(I) of 11 December 1946 of the General Assembly of the United Nations, eviction by armed attack or occupation and inhuman acts resulting from the policy of *apartheid*, and the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, even if such acts do not constitute a violation of the domestic law of the country in which they were committed." [italics added].

In specifying that war crimes, crimes against humanity and genocide are covered "*irrespective of the date of their commission*", the 1968 Convention confirms the retrospective nature of its provisions.

2) Scope of the Convention in Cambodian law

Cambodia has not ratified the 1968 UN Convention. The Convention came into force on 11 November 1970, and currently counts forty-three State Parties, of which the Russian Federation is the only permanent member of the UN Security Council.

Nevertheless, the mitigated success of the Convention does not necessarily mean that the principle it lays down is not a customary rule of international law.

3) The non-applicability of statutory limitations, a customary international rule?

The silence of the major post-war international instruments concerning this issue opens the path to interpretation. It may thus be argued that recognition of the non-applicability of statutory limitations for genocide, crimes against humanity and war crimes has crystallized within the international community as a customary international rule.

The Statutes of the International Military Tribunals in Nuremberg and Tokyo did not make any provision in this area. Even the 1948 Convention on the prevention and punishment of the crime of genocide does not contain any relevant provisions.

Only the German Control Council Law No. 10, dated 20 December 1945, alludes to the subject in Article 2(5), which states that persons accused of a crime defined in the law cannot benefit from any statute of limitations concerning the period from 30 January 1933 to 1st July 1945, although the exact scope of this provision has been strongly debated.

The Geneva Conventions of 12 August 1949 and their two additional Protocols, dated 8 June 1977, provide for the repression of war crimes without any mention of statutes of limitation. The Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda make no provision for limitations on public action and sentences.

In other words, international law imposes the prosecution and punishment of war crimes, genocide and crimes against humanity, without ever dealing with the question of limitation periods.

B – The state of Cambodian law on the subject

As discussed above, general Cambodian positive law does not incriminate genocide, crimes against humanity and war crimes.

However, the amended 2001 Law relating to the prosecution of former Khmer Rouge leaders recognises the non-applicability of statutory limitations for genocide and crimes against humanity. Similarly, Articles L.2111-1 to L.2131-6 of the draft Criminal Code define and prohibit such crimes, and Article L.121-8 of the draft Code of criminal procedure provides that:

> "Crimes against humanity, genocide and war crimes are not subject to any statute of limitations".

The FIDH considers:

- positive the fact that Article L.121-8 of the draft Code of criminal procedure declares that genocide, crimes against humanity and war crimes are not subject to any statute of limitations, and supports the adoption of this Article by the Cambodian legislative authorities.

Chapter V – Grounds for excluding criminal responsibility: Article 31 of the Rome Statute

A – Presentation of Article 31 and critical analysis

Article 31 of the Rome Statute was the subject of intense negotiations due to the clear desire of States to detail the grounds for exclusion of criminal responsibility as precisely as possible. The Article reads as follows:

> "Article 31. Grounds for excluding criminal responsibility
>
> 1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:
>
> (a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;
>
> (b) The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court;
>
> (c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;
>
> (d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:
>
> (i) Made by other persons; or
>
> (ii) Constituted by other circumstances beyond that person's control.
>
> 2. The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.
>
> 3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.".

Sub-paragraphs 1(a) and (b) relate to sickness, states of intoxication and mental deficiency as grounds for exclusion of criminal responsibility.

Sub-paragraph (c) incorporates the concepts of self-defence, distress and necessity that exist in both international and domestic law, a remarkable exercise given the diversity of definitions proposed in the general international legal order and internal legal orders.

Another specificity of this provision resides is its reference to military necessity as a constitutive element of the exclusion of criminal responsibility. This ground was introduced during drafting of the

Rome Statute at the initiative of defence ministry representatives from a number of different delegations.

If self-defence, distress and necessity are grounds for the exclusion of criminal irresponsibility for *domestic* crimes in most national legal systems, it seems contrary to reason to consider that genocide, crimes against humanity or war crimes could be committed in order to defend oneself or another person. The requirement for a proportional response to the threat can never reasonably be shown in such cases.

On this point, the International Law Commission has stated, as regards war crimes, that "*[i]t would be absurd to invoke the idea of military necessity or necessity of war in order to evade the duty to comply with obligations designed, precisely, to prevent the necessities of war from causing suffering which it was desired to prescribe once and for all.*"[82]

The Belgian declaration on this point, made upon ratification of the Rome Statute, should be praised since it states that, "*[p]ursuant to article 21, paragraph 1(b) of the Statute and having regard to the rules of international humanitarian law which may not be derogated from, the Belgian Government considers that article 31, paragraph 1(c), of the Statute can be applied and interpreted only in conformity with those rules.*".

Sub-paragraph (d)(1) of Article 31, is drafted in a confusing manner, mixing national criminal concepts of constraint, duress, self-defence and the state of necessity.

Furthermore, by taking constraint into account as a grounds of excluding criminal responsibility and not as a simple grounds for reducing the sentence, the Rome Statute seems to be more protective of defence rights than the *ad hoc* International Criminal Tribunals for Rwanda and the former Yougoslavia[83].

Given the nature of the crimes within the jurisdiction of the Rome Statute, the case-law of the *ad hoc* International Criminal Tribunals seems more appropriate.

B - The state of Cambodian legislation on the subject

The relevant provisions may be found in Articles 96 to 98 of the 1955 Criminal Code, relating to duress and the state of necessity, as well as Articles 101 to 104 relative to self-defence.

Articles 96 and 97 read as follows:

> "Art. 96. - The author of an offence shall not be held responsible where it is shown in that he was constrained to do so by *a force against which he could not resist*.
>
> Art. 97. - Such constraint may only be the result of a state of absolute necessity.
>
> Absolute necessity exists when the author of the offence, exposed to an inevitable, imminent danger, *could only avoid it by committing the offence* and, in addition, the danger did not result from an act depending on his own will, accomplished in order to create that danger." [italics added].

The Cambodian definition of constraint, or state of necessity (the 1955 Criminal Code does not seem to make a clear distinction between the two concepts), is far wider than that in the Rome Statute. This renders the Cambodian definition of constraint and the state of necessity even less appropriate as grounds for the exclusion of criminal responsibility in cases of genocide, crimes against humanity and war crimes.

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[82] International Law Commission, Annual report, 1980, II, p. 46; available at: http://untreaty.un.org/ilc/documentation/english/A_35_10.pdf.
[83] ICTY, *Erdemovic* case, Judgment, March 1998, Paragraph 17.

Indeed, at the very most, they should only constitute grounds for a reduced sentence. They cannot be acceptable defences to the commission of mass crime or war crimes.

Articles 101 to 103 read as follows:

> "Art. 101. - There shall be no crime or misdemeanour where homicide or serious bodily harm were imposed by the imminent need for self-defence or the defence of others.
>
> Art. 102. - Self-defence all the offence of others can only result from prior aggression; that is an unjust attack; it must be limited to achieving, simultaneously with the aggression, the *necessary and sufficient acts* in order to avoid the consequences.
>
> Art. 103. - If acts accomplished in self-defence produce *excessive consequences*, as compared to those that could result from the unjust attack, the criminal responsibility of the author of the homicide or serious bodily harm remains engaged: the court shall determine the degree of responsibility on a case by case basis" [italics added].

Contrary to Article 31(1)(c) of the Rome Statute, the definition of self-defence under the Cambodian criminal Code does not mention military necessity. It is therefore narrower than the definition in the Statute.

As indicated above, it would be unreasonable to interpret the letter of Articles 101 and 102 of the 1955 Criminal Code as an application of self-defence as grounds for excluding criminal responsibility in cases of genocide, crimes against humanity or war crimes.

Indeed, given the nature of the crimes committed in response, there would inevitably be "*excessive consequences*" and the response to the aggression would necessarily go beyond that which is "*necessary and sufficient*".

Finally, it should be noted that the draft Criminal Code substantially reiterates the definitions of duress, state of necessity and self-defence laid down in the 1955 Criminal Code, although it clearly distinguishes the state of necessity from duress. Article L.1121-8 of the draft covers self-defence, Article L.1121-10 defines the state of necessity and Article L.1121-11 concerns duress.

Therefore, as for the 1955 Criminal Code, the draft definition of the grounds for excluding criminal responsibility are wider than in the Rome Statute, nor do they resolve the difficulties raised concerning the provisions of the currently applicable Code .

During the far-reaching legislative reform of Cambodian criminal law currently under way, it would be appropriate to adopt more satisfactory provisions governing this matter in the draft Criminal Code.

The FIDH recommends:

- the insertion, in Chapter 2 of Book *1*, Title 2 of Part 1 of the draft Criminal Code, of three new Articles L.1121-10, L.1121-12 and L.1121-14, clearly stating that the state of necessity, self-defence and duress cannot constitute grounds for excluding criminal responsibility in cases of genocide, crimes against humanity and war crimes. Nevertheless, in case of such crimes, duress may be grounds for a reduced sentence.

Part 1, in which it is proposed to insert Articles L.1121-10, L.1121-12 and L.1121-14, relates to "*Fundamental Principles*", and Chapter 2 covers "*grounds for irresponsibility or reduction of criminal responsibility*".

New Articles L.1121-10, L.1121-12 and Article L.1121-14 would read as follows:

> ***"Article L.1121-10. – Inadmissibility of self-defence in cases of genocide, crimes against humanity and war crimes***
>
> ***Self-defence may never be raised in cases of genocide, crimes against humanity or war crimes.***
>
> ***Article L.1121-12. – Inadmissibility of the state of necessity in cases of genocide, crimes against humanity and war crimes***
>
> ***A state of necessity can never be raised in cases of genocide, crimes against humanity or war crimes.***
>
> ***Article L.1121-14. The commission of genocide, crimes against humanity or war crimes under duress***
>
> ***Duress can never be raised as a defence in cases of genocide, crimes against humanity and war crimes.***
>
> ***When genocide, crimes against humanity or war crimes are committed under duress, in the conditions set out in Article L.1121-13, the court may nevertheless grant the accused the benefit of extenuating circumstances under Articles L.1222-1 and L.1222-3".***

As a result of the proposed insertions, the original Article L.1121-10 entitled "state of necessity" would become Article L.1121-11; the original Article L.1121-11 would become Article L.1121-13; and original Article L.1121-12 entitled "criminal irresponsibility" would become L.1121-15.

Chapter VI - Superior orders and prescription of law: Article 33 of the Rome Statute

Introduction

Article 33 of the Rome Statute, entitled "*superior orders and prescription of law*" provides for the situation where an executant obeying the orders of a hierarchical superior commits one of the crimes prohibited by the Statute.

The hierarchical framework creates a relationship of subordination that the International Criminal Tribunal for the former Yugoslavia has defined as effective control exercised over the perpetrator by a superior commander[84]. Such a hierarchical corps is not necessarily a State entity. The Rome Statute covers orders of a "*Government or of a superior, whether military or civilian*". This extends to *de facto* organized hierarchies.

A – The criminal responsibility of the executant

The law of war (*jus in bello*) prohibits the execution of an illegal order. This principle was stated for the first time in Article 8 of the Charter of the International Military Tribunal in Nuremberg, which provided that:

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[84] ICTY, *The Prosecutor v. Delalic, Mucic, Delic, Landzo*, Case No. IT-96-21-T, 16 November 1998.

> "The fact that the Defendant acted pursuant to an order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires."[85].

The Nuremberg principles directly inspired drafting of the Statutes establishing the two *ad hoc* International Criminal Tribunals. Their Statutes set out the principle of individual criminal responsibility and provide for the situation of executants. Article 6(4) of the ICTR Statute provides that "*[t]he fact that an accused person acted pursuant to an order of a government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires*".

B – Presentation of Article 33 and critical analysis

Article 33 of the Rome Statute incorporates the criteria established by the Nuremberg doctrine and case-law: executants must answer for their acts when the order (the distinction between military and civil executants is nullified by the Statute) is manifestly illegal and they had knowledge of its illegality.

However, Article 33(1) defines the conditions under which the executant may be relieved of criminal responsibility. There are three cumulative criteria: executants are not criminally responsible for the crimes they have committed, where they were (a) under a legal obligation to obey orders of the Government or the superior in question; (b) they did not know that the order was unlawful; and (c) the order was not manifestly unlawful.

However, Article 33(2) specifies that "…*orders to commit genocide or crimes against humanity are manifestly unlawful*".

This provision implies that in cases of genocide and crimes against humanity, as the order is manifestly unlawful, the executant is necessarily responsible, since one of the conditions for excluding responsibility [in sub-paragraph (c)(1)] is absent.

Finally, it should be noted that Article 33 of the Rome Statute is silent on the subject of war crimes, as it only mentions genocide and crimes against humanity. This is a serious failing.

This silence results from a compromise between two opposing theories during drafting of the Statute. The American delegation tried to convince the other delegations that some superior orders to commit war crimes are not manifestly unlawful. On the other hand, the United Kingdom, Germany and New Zealand argued that such superior orders could never constitute grounds for excluding criminal responsibility and that only duress, mistake of fact and mistake of law could provide such grounds. The analysis by the second group corresponded more closely to the current state of international criminal law.

Unfortunately, the need for compromise resulted in adoption of the American approach, which may be explained by the American government's concern over the criminal responsibility of its soldiers throughout the world. This fear was weaker concerning genocide and crimes against humanity, since these crimes require active preparation implicating the authorities, and are not likely to be the consequence of a simple error of judgement.

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[85] Nuremberg Judgement, pp. 235-236, finding that the provisions of Article 8 were true to the domestic law of States and that ordering a soldier to kill or torture in violation of the international law of war has never been seen as justifying such acts of violence.

In sum, in allowing a wider exclusion of the responsibility of executants, especially in the case of war crimes, Article 33 of the Rome Statute does not provide a true reflection of prior international case-law.

C – The state of Cambodian law

Cambodian criminal law does not incriminate genocide, crimes against humanity and war crimes, except in the exceptional framework of the Extraordinary Chambers established to try crimes committed during the Democratic Kampuchea period[86]. Naturally, therefore, the issue of exclusion of criminal responsibility in cases of commission of such crimes by executants is not dealt with in positive law.

Nevertheless, it should be recalled that the draft Criminal Code provides for their repression in Articles L.2111-1 to L.2131-6 [87]. In particular, Article L.1121-7, relating to permission of law or the authorities, covers the situation of executants committing such crimes. Article L.1121-7 provides as follows:

> "A person who accomplishes an act prescribed or authorised by the law does not commit any offence.
>
> A person who accomplishes an act ordered by the lawful authorities does not commit any offence, unless the act is manifestly unlawful.
>
> The executant, instigator or accomplice of *genocide, crimes against humanity or war crimes* cannot be relieved of criminal responsibility on the grounds:
>
> 1. that he has accomplished an act prescribed, authorized or not forbidden by the law in force;
> 2. that he acted on orders from the lawful authorities" [italics added].

Under these provisions, the executant will always be criminally responsibility in cases of genocide, crimes against humanity and war crimes, without any possibility of relief.

Article L.1121-7 may thus be distinguished from the Rome Statute which, on the one hand, provides for a favourable system of relief from criminal responsibility for the executant of such crimes and, on the other hand, makes it very difficult to prosecute executants who commit war crimes.

Indeed, under the clear drafting of Article L.1121-7 of the draft Criminal Code, an executant who commits genocide, crimes against humanity or war crimes (there being no distinction between these crimes in this respect), cannot be relieved of criminal responsibility in any case at all. This could not be any clearer.

The FIDH considers:

- that it is a positive fact that Article L.1121-7 of the draft Criminal Code prohibits any exclusion of criminal responsibility of the executant of genocide, crimes against humanity and war crimes, even though the relevant provisions of the Rome Statute allow wide exclusions in this area, and thus supports adoption of this Article by the Cambodian legislative authorities, as drafted.

[86] See *supra* Part II, Chapter 3.
[87] See *supra* pp. 28.

Part V – Cooperation between the International Criminal Court and Cambodia

A proposal for the insertion of a new Title in the draft Code of criminal procedure relating to cooperation with the International Criminal Court.

According to the provisions of the Rome Statute, especially chapter IX, the Kingdom of Cambodia has the obligation to cooperate with the International Criminal Court in investigations and prosecutions by the ICC for crimes within its jurisdiction (Article 86). Consequently, the Kingdom of Cambodia must incorporate the provisions needed to respect this obligation in its national legislation.

The major ongoing reform of the Code of criminal procedure provides the perfect opportunity to incorporate such provisions. Yet the current draft Code of criminal procedure submitted to the Royal Government does not contain any provisions on the subject.

It appears necessary, therefore, to add provisions covering obligations under the Rome Statute to the existing draft Code. The way in which the draft Code has been drafted allows the insertion of Cambodia's obligations relating to cooperation with the International Criminal Court in the Book relating to special procedures, *i.e.* Book 9.

This Book contains three titles: the first relates to provisions concerning persons, including the extradition regime; the second concerns the disappearance of evidence and the interpretation and rectification of decisions; and the third relates to offences, including the prosecution and trial of military offences.

Furthermore, the execution of a certain number of reparation measures handed down by the International Criminal Court also influences the obligation of the Kingdom to cooperate with the International Criminal Court. Appropriate provisions must, thus, be inserted in that framework[88]. Our recommendations on this subject are contained in Part V of this Report.

The FIDH recommends:

- that the Cambodian authorities insert provisions relating to cooperation with the Court, in accordance with Articles 55(2), 57(3)(d), 58, 59, 75, 80, 86 to 102 (Chapter IX), 103, 105, 106, 108, 109 and 110 of the Rome Statute, in the form of a new Title called "Cooperation with the International Criminal Court" in addition to the three existing Titles in Book 9.

- After insertion of the proposed Title 1 relating to "Cooperation with the International Criminal Court", the current Title 1 of the draft Code entitled "Provisions concerning persons" would become Title 2, etc. Current Articles L.911-1 to L.931-8 would become L.921-1 to L.941-8 under the numbering system retained for the draft, the first figure indicating the Book, the second the Title and the third the Chapter.

[88] For a general study of reparation in favour of victims, see *infra* Part VI.

The proposed new Title reads as follows:

"*LIVRE* 9: SPECIAL PROCEDURES

TITLE 1: COOPERATION WITH THE INTERNATIONAL CRIMINAL COURT

Chapter 1: Judicial cooperation

Section 1: Judicial assistance

Article L.911-1

In application of the Statute of the International Criminal Court, ratified on 7 January 2002, the Kingdom of Cambodia participates in the repression of offences and cooperates with the Court upon the conditions laid down in the present Title.

The following provisions are applicable to all persons prosecuted before, or convicted by, the International Criminal Court for acts constituting genocide, crimes against humanity or war crimes within the meaning of Articles 6 to 8 and 25 of the Statute.

Article L.911-2

Requests for assistance by the International Criminal Court shall be sent to the competent authorities by virtue of Article 87 of the Statute, in original or certified copy form, accompanied by any supporting documents.

The competent authorities by virtue of Article 87 of the Statute shall transmit the request for assistance and any supporting documents to the Minister of Justice. The Minister of the Justice shall verify the regularity of the demand and forward it to the state prosecutor for the Phnom Penh Court of Appeal, which shall give it appropriate follow-up.

In case of emergency, these documents may be transmitted directly, by any means, to the state prosecutor. They are then transmitted in the form set out in the preceding paragraphs.

Article L.911-3

Requests for assistance are executed by the state prosecutor for the Court of Appeal, or by the Investigation Chamber within the Court of Appeal, which decides questions of transfer. The state prosecutor and the investigation chamber within the Court of Appeal have jurisdiction over the entire national territory, in the presence, as necessary, of the Prosecutor of the International Criminal Court or his/her representative, or any other person mentioned in the request of the International Criminal Court.

Records established in execution of such requests are sent to the International Criminal Court by the competent authorities by virtue of Article 87 of the Statute.

In case of emergency, certified copies of the record may be sent directly to the International Criminal Court by any means. The records are then transmitted in the form set out in the preceding paragraphs.

Article L.911-4

The execution of provisional measures on Cambodian territory mentioned in Article 93(1)(k) of the Statute shall be ordered, at Cambodian expense, as provided in Articles 562 to 571 of the new Code of Civil Procedure, by the state prosecutor for the Court of Appeal. The maximum duration of such measures is limited (to two years). They may be renewed under the same conditions before the expiration of this period, at the request of the International Criminal Court.

The state prosecutor for the Court of Appeal transmits any difficulty relating to execution of these measures to the competent authorities by virtue of Article 87 of the Statute, in order to organise the consultations referred to in Articles 93(3) and 97 of the Statute.

Section 2: Arrest and transfer

Article L.911-5

For the purposes of the present section, “transfer” means the delivery of a person by a State to the International Criminal Court in application of the Statute.

Article L.911-6

Requests for arrest for the purposes of transfer, issued by the International Criminal Court, shall be sent, in the original accompanied by any supporting documents, to the competent authorities by virtue of Article 87 of the Statute who shall forward the requests and accompanying documents to the Minister of Justice. The minister of Justice, after having ensured their formal validity, forwards them to the state prosecutor for the Court of Appeal.

In case of emergency, such requests may also be sent directly by any means to the Royal prosecutor with territorial jurisdiction. They are then transmitted in the form required by the preceding paragraph.

Article L.911-7

Persons arrested on the basis of a request for arrest for the purposes of transfer, must be brought before the Royal prosecutor with territorial jurisdiction within twenty-four hours. During this period, the provisions of Articles L.323-3 and L.323-4 of the present Code are applicable.

After having verified the identity of such persons, the prosecutor informs them, in a language they understand, that they are the subject of a request for arrest for the purposes of transfer and that they will appear before the state prosecutor for the Court of Appeal within a maximum period (of five days). The royal prosecutor also informs them that they may be assisted by counsel of their choice or, alternatively, by counsel designated under the conditions set out in the law on the status of lawyers, who shall be informed without delay and by any means. He also informs them that they may immediately confer with the designated counsel.

Mention of all this information shall be placed on the record, which shall be transmitted to the state prosecutor for the Court of Appeal immediately.

The royal prosecutor shall order the incarceration of such persons in prison or a detention centre.

Article L.911-8

The requested person shall be transferred, if necessary, and placed in the prison or detention centre for the Court of Appeal. The transfer must take place within a maximum period (of five days) from presentation to the royal prosecutor, failing which the requested person shall be immediately set free by decision of the president of the investigation chamber of the Court of Appeal.

The state prosecutor for the court of appeal shall notify requested persons, in a language they understand, of the request for arrest for the purposes of transfer as well as the accusations against them.

When requested persons have already sought the assistance of Counsel, who has been duly summoned, the state prosecutor shall take their declarations.

In any other case, the prosecutor shall reminded them of their right to choose counsel or request that one be designated by the court. The chosen counsel or, where there has been a request for court appointment, the President of the Bar council shall be informed by any appropriate means and without undue delay. Council may consult the file immediately and communicate freely with the requested person in full confidentiality. The state prosecutor shall take the declarations of such persons after having warned them that they are free not to make one. Mention of this warning shall be placed on record.

Article L.911-9

The investigation chamber is immediately seized of the proceedings. Requested persons shall appear before it within a period (of eight days) from their presentation to the state prosecutor. At the request of the state prosecutor or the requested person, a supplementary period (of eight days) may be granted before the hearing. The requested person is then questioned, an account of which is placed on the record.

The hearing shall be in public and at the decision shall be published, unless the Chamber orders *in camera* proceedings under Article L.513-1 (public and in camera hearings) [as modified on the basis of our recommendations presented in Part VII, Chapter 3 *infra*].

The state prosecutor and the requested person shall be heard, the latter with assistance, if necessary, of counsel and the presence of an interpreter.

Article L.911-10

If the investigation chamber observes that there is no manifest error, it shall order the transfer of the requested person and, if the latter is liberty, his or her incarceration for that purpose. Any other question submitted to the investigation chamber shall be forwarded to the International Criminal Court for action.

The investigation chamber shall hand down its decision within (fifteen days) of the appearance of the requested person before it. In case of appeal, the criminal division of the Supreme Court shall be seized within a period (of two months) following reception of the file by the Supreme Court.

Article L.911-11

The investigation chamber of the Court of Appeal maybe requested to allow conditional release at any time, in accordance with Article 59 of the ICC Statute and the procedure set out to in Articles L.413-28 and following of this Code.

The investigation chamber shall hand down its reasoned decision in a public hearing, as required by Article 59(4) of the ICC Statute.

Article L.911-12

The competent authorities by virtue of Article 87 of the Statute shall bring the decision handed down by the investigation chamber to the notice of the International criminal Court by any appropriate means and, if necessary, the place and time of transfer of the requested person, as well as the length of any detention for the purposes of such transfer.

The requested person shall be transferred within a period (of one month) from the day this decision becomes binding, or else the requested person shall be immediately freed by decision of the president of the investigation chamber.

Article L.911-13

The provisions of Articles L.911-6 to L.911-12 are also applicable where the requested person is already prosecuted or convicted in the Kingdom of Cambodia for others charges than those contained in the International Criminal Court's request. However, a person held in these conditions cannot benefit from conditional release under Articles L.911-8, L.911-11 and L 911-12 paragraph 2.

Proceedings before the International Criminal Court suspend the statute of limitations on public prosecution and sentences with regard to this person.

Article L.911-14

Where the Kingdom of Cambodia receives both a request for transfer from the International Criminal Court in accordance with Article 89 of the Statute and a request for extradition of the same person from any other State, whether a party to the Statute or not, and whether for conduct constituting the basis of the crime for which the Court has requested transfer of that person, or for different conduct, the provisions of Article 90 of the Statute shall apply.

Article L.911-15

Transit on Cambodian territory by the competent authorities by virtue of Article 87 of the Statute is authorized in accordance with Article 89 of the Statute.

Article L.911-16

Where the ICC requests the extension of the conditions of transfer granted by the Cambodian authorities, the request shall be sent to the competent authorities by virtue of Article 87 of the Statute, who shall communicate it to the investigation chamber of the Court of Appeal, with any accompanying documentation or observations of the person in question.

If, on the basis of the documents produced and, if necessary, the comments of counsel for the person in question, the investigation chamber considers that there is no manifest error, it shall authorise the requested extension.

Article L.911-17

Persons who has been placed in pre-trial detention as provided for in Article 92 of the Statute may, if they consent, be transferred to the International Criminal Court before the competent authorities by virtue of Article 87 of the Statute have received a formal request for transfer from the ICC.

The decision concerning transfer shall be made by the investigation chamber of the Court of Appeal after having informed the person in question or his or her right to formal transfer proceedings and has received consent.

During the hearing before the investigation chamber, the requested person may be assisted by counsel of their choice or, by counsel appointed as provided in the law on the status of lawyers and, if necessary, by an interpreter.

A person who has been placed in pre-trial detention as provided in Article 92 of the Statute and who has not consented to transfer to the court may be released if the competent authorities by virtue of Article 87 of the Statute do not receive a formal request for transfer within the period set out in the Rules of Procedure and Evidence of the ICC.

Such release shall be ordered by the investigation chamber upon request presented by the person in question. The investigation chamber shall hand down its decision within eight days from the appearance of that person before it.

Article L.911-18

Persons held in prison within the Kingdom may, if they consent, be transferred to the International Criminal Court for the purposes of identification or questioning or for the any other purposes of the investigation. Such transfer shall be authorized by the Minister of Justice.

Chapter 2. Execution of sentences and reparation measures handed down by the International Criminal Court

Section 1. Execution of fines and confiscation orders and reparation measures for victims

Article L.912-1

Where the International Criminal Court so requests, the execution of fines and confiscation orders, or decisions concerning reparations, handed down by the ICC shall be authorized by the court in Phnom Penh seized, for that purpose, by the royal prosecutor or any affected party. The procedure before the Phnom Penh Court shall follow the rules set out in this Code.

The court is bound by the decision of the International Criminal Court, including provisions relating to the rights of third parties. However, in the case of execution of a confiscation order, it may order any measures allowing confiscation of the value of the property, goods or holdings concerned, where it appears that the confiscation order cannot be executed. The court shall question the offender and any person having rights over the property, if necessary by rogatory commission. Such persons may be represented by counsel.

Where the court considers that execution of a confiscation or reparation order would effect the rights of a *bona fide* third party, who cannot appeal against the order, it shall inform the royal prosecutor for the purpose of returning the question to the International Criminal Court for appropriate action.

Article L.912-2

Depending on the decision of the International Criminal Court, an authorization of execution handed down by the court under the preceding Article shall result in transfer of the sum of any fines and confiscated goods, or the product of their sale, to the ICC or to the victims' trust fund referred to in Article 79 of the Statute. Such property or moneys may also be attributed directly to the victims, if the Court so decides and has identified them.

Any contention concerning the allocation of such fines, property or the product of their sale shall be sent to the International Criminal Court for appropriate action.

Section 2. Execution of prison sentences

Article L.912-3

When, in application of Article 103 of the Statute, the Royal Government has agreed to receive a person convicted by the International Criminal Court on the territory of the Kingdom, in order serve a prison sentence, the sentence is directly and immediately enforceable upon arrival of the person in the country, for any part of the sentence still to be served.

Subject to the provisions of the Statute and this section, the execution and application of sentences are governed by the provisions of this Code.

Article L.912-4

After arrival in the Kingdom, the transferred person shall be presented to the royal prosecutor at the place of arrival, who shall verify his or her identity for the record. However, if this examination cannot be undertaken immediately, the person shall be placed in a prison or detention centre for not more then twenty-four hours. Upon expiry of this period, that person shall be brought before the Royal prosecutor automatically by (the prison director).

After considering the agreement between the Royal Government of Cambodia and the International Criminal Court concerning the transfer of the offender, a certified copy of the conviction and notification by the court of the starting date for execution and the time remaining to be served, the royal prosecutor shall order the immediate incarceration of the offender.

Article L.912-5

If the offender makes a request for outside placement, semi-liberty, a reduced sentence, the division or suspension of the sentence, electronic supervision or conditional release, the request shall be sent to the state prosecutor for the Court of Appeal, who shall transfer it to the Minister of Justice.

The Minister shall forward the request to the International Criminal Court as soon as possible, with all relevant documents.

The International Criminal Court shall decide whether the offender may benefit from the measure in question or not. When the court's decision is negative, the royal Government shall inform the court whether it agrees to keep the offender in the Kingdom or whether it wishes to request transfer to another State that the ICC shall have designated.”

Part VI – Reparations for victims

Introduction

For the first time in the history of international justice, an international criminal court has been given jurisdiction to make reparation orders for victims. This means that the Court will have the power to order seizure and confiscation measures, and to determine reparation principles, including *inter alia* restoration, compensation and rehabilitation.

This power to order reparation has been granted to the International Criminal Court. The national authorities of Cambodia and other countries that are bound to cooperate with the ICC may, in some cases, also have to deal with parallel civil proceedings before their domestic courts.

Reparation for victims may, thus, concern the Cambodian authorities in the two ways:

- Parallel, or subsequent to reparation proceedings before the International Criminal Court or before foreign courts, Cambodia must give effect to decisions taken in the context of these proceedings (Chapter I);
- Directly, where reparation proceedings intervene before the Cambodian courts (Chapter II).

Chapter I – Substantive proceedings before the ICC or a foreign Court

The Rome Statute provides that the Cambodian authorities must execute decisions and reparation orders handed down by the International Criminal Court. It is specified that the Cambodian authorities must do so "*in accordance with the procedure of their national law*" [Articles 75(4) and 109(1)]. It is also reasonable to raise the issue of Cambodia's obligation to execute decisions concerning reparation proceedings before foreign courts.

A – Cooperation with the ICC and execution of reparations orders

Article 75 of the Rome Statute lays down the principle of the right of victims to reparation: "*[t]he Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation*." It may also determine the extent of any damage, loss or injury. The Court may adopt individual and collective forms of reparations.

In cases concerning individual reparations, the Court makes an order against the convicted person [article 75(2) of the Statute and Rule 98-2 of the Rules of Procedure and Evidence (RPE)]. It may also order that the reparation award be deposited with the Trust Fund if, at the time of its order, it is impossible to grant a sum to each individual victim, the amount of the individual reparations being given to the victim as soon as possible. Finally, the Court may order that the reparation award be paid to the Victims' Trust Fund when, by reason of the number of victims and the extent, form and means of reparation, collective reparations are more appropriate (Article 79 and Rule 98 RPE).

With a view to reparation, the Court may order preliminary measures, which States are bound to execute by virtue of their obligation to cooperate (for cooperation concerning preliminary measures see Articles 75(4), 57(3)(e) and 93(1)(k) of the Rome Statute and Rule 99 RPE).

The Court may hand down a sentence of forfeiture of proceeds, property and assets derived directly or indirectly from the crime (for the execution of compensation measures and reparation orders, see Articles 75(5), 77(2) & 79(2) of the Statute and RPE Rules 217 to 219 and 221-2).

1) The obligation to cooperate for the purpose of reparations

The execution of reparation measures is part of the State cooperation regime in the general framework of the execution of sentences and not that for reparations to victims[89], except for the specific case of requests for cooperation in the implementation of preliminary measures for the purposes of forfeiture (Articles 75(5), 77(2), 79(2) of the Statute and RPE Rules 217to 219 and 221-2).

Article 75(4) of the Rome Statute gives the Court power to request State Parties for the cooperation measures laid down in Article 93(1). Several provisions in this paragraph allow the adoption of adequate reparation measures: paragraph (a) provides for the location of property; paragraph (k), "*[t]he identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties*"; and paragraph (l) extends cooperation to all other forms of lawful assistance from the State. Article 96 of the Statute further specifies the content of cooperation requests.

Such cooperation for the purposes of reparation may raise two sorts of problem. First, the State in question may consider that these measures are of a nature to affect their security, public order or other superior interests. Indeed, international treaties on judicial cooperation in criminal matters often contain limits. However, they cannot obstruct implementation of State obligations to cooperate with the Court.

Secondly, the national authorities may receive competing requests, such as requests for seizure issued by both the International Criminal Court and a State Party to the Rome Statute, or even a non-party. This difficulty is covered in Article 93(9)(a) of the Statute, which identifies two distinct situations:

- The requested State is bound pursuant to an international obligation with regard to the other State that may obstruct execution of its obligations with respect to the Court. In that case, the national authorities must endeavour to "*meet both requests*" [Article 93(9)(a)(i) of the Rome Statute]. The Cambodian Parliament should thus specify which authority (Ministry of Foreign Affairs or Justice) should conduct the necessary consultations.
- Failing that, Article 93(9)(a)(ii) provides that the question should be resolved in accordance with Article 90 of the Statute. Their decision should, consequently, take account "*all the relevant factors, including but not limited to the respective dates of the requests, the interests of the requesting State including, where relevant, whether the crime was committed in its territory and the nationality of the victims and of the person sought, and the possibility of subsequent surrender between the Court and the requesting State*".

2) The obligation to execute reparation orders

The execution of reparation orders issued by the Court must comply with two major principles. On the one hand, the principle of the authority of orders, which must be fully recognized and, on the other hand, the principle of their binding force, following national procedures.

Articles 75(5) and 109 of the Statute require States to fully recognize reparation orders in their internal system.

[89] See *supra* Part V.

Rule 219 of the Rules of Procedure and Evidence prohibit the modification of such orders. Thus, it is not possible for Cambodia to submit such orders to a review procedure. Domestic law must, thus, be adapted correspondingly.

The formal conditions set out in Rule 218 of the Rules of Procedure and Evidence, which accompany forfeiture orders, allow States to authenticate and apply orders appropriately. They also allow the harmonisation of the procedure for the execution of orders.

The rules specify the procedure for cooperation measures concerning execution of such orders. In particular, Rule 217 envisages the possibility for the Presidency of the International Criminal Court to request the cooperation of States under Chapter IX of the Rome Statute as a whole, and not just under Article 93(1) alone. Rule 96-2 governs cooperation requests to States for the publication of reparation measures ordered by the International Criminal Court.

B – Cooperation between States

The rules for cooperation between States are based on ordinary, national or international rules, applying the complementary principle.

It would, however, be appropriate to improve these rules unilaterally. The Cambodian Parliament could require the executive and judicial authorities to facilitate preliminary measures concerning reparation and introduce full recognition and simplified *exequatur* proceedings for reparation orders. The Brussels Convention on jurisdiction and the enforcement of decisions in civil and commercial matters, and the Lugano Convention on jurisdiction and the execution of decisions in civil and commercial matters could serve as references on this point.

Chapter II – Substantive procedure in Cambodia

The question arises whether Cambodian civil courts may make substantive findings concerning a claim for reparation by a victim, when criminal action is under way before another Court. Three situations may arise, depending on the location of the criminal prosecution, in Cambodia, before the International Criminal Court, or before the courts of another State.

A – Criminal proceedings in Cambodia

1) Determining jurisdiction

Article 5-4 of the Brussels Convention proposes a simple solution, requiring only minor changes to Cambodian law. It stipulates that action may be taken against the defendant "*as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the court seised of those proceedings, to the extend that that court has jurisdiction under its own law to entertain civil proceedings*".

Cambodian positive law does not allow such a possibility in the case of civil action before the criminal courts. However, Article L.131-9 of the draft Code of criminal procedure introduces this procedure, providing that:

> "A civil action can be made against all persons who are liable to compensate for injury resulting from the offence: principles and co–principles in an offence; accessories and accomplices to an offence; *defendants in a civil action*." (italics added).

In the case of civil action before the Cambodian civil courts, Circular No. 04-84 from the Ministry of Justice, dated 8 September 1984, relating to civil proceedings provides ("remarks" II.2) for joinder of a defendant, noting that:

> "II. Incidents during the hearing
>
> 2 – Joinder of a third civil party or defendant during trial
>
> In the interest of the parties, the court may, during the hearing, join a third party, as plaintiff or defendant, who has a relation with the trial".

Unfortunately, the draft Code of civil procedure does not include the provisions of Circular No. 04-84. It would thus be appropriate to insert it in Article 84 of the draft, relating to the addition of, or changes to the subject of the claim.

2) The scope of jurisdiction

The definition of reparation principles should take inspiration from the evolution of positive and jurisprudential international law on the subject, as codified in the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted on 10 November 2005 by the United Nations General Assembly. This text directly inspired the drafting of Article 75(1) of the Statute, as shown by the preparatory work.

B - Procedure before the International Criminal Court

Alongside proceedings before the Court, victims must be able to claim reparations before the Cambodian courts for injury suffered as a result of the crimes in question, subject to some link between the crimes and the appropriate National courts under domestic law.

Where a reparation award has already been made by the International Criminal Court, the jurisdiction of the Cambodian courts will necessarily be limited to heads of damages not having already given rise to reparation.

C – Criminal proceedings before the courts of a third State

In such cases, the classic rules of civil judicial cooperation should be applied, especially as regards notification and service, based on the model of the 1965 Hague Convention. However, as regards *litispendance* and connecting factors, it would be more appropriate to adopt strengthened rules of cooperation along the lines of Articles 21 and 22 of the Brussels Convention.

Concrete cooperation measures between courts must then be envisaged, especially concerning the exchange of information between courts.

In any case, where a foreign judicial decision is handed down prior to that of the Cambodian court, its immediate binding authority should put an end to the Cambodian proceedings, to the extent of the heads of damage covered by the foreign decision.

The FIDH recommends:

I. Concerning proceedings before the courts of another State or before the International Criminal Court,

A. As regards cooperation with the Court:

- the insertion in Book 7 of the draft Code of civil procedure, relating to preliminary measures, a new Chapter 4 relating to cooperation with the International Criminal Court and a new Article

573 relating to preliminary measures requested by the International Criminal Court for the purposes of forfeiture for reparation (Articles 57(3)(e) and 93 of the Rome Statute and RPE Rule 99). New Chapter 4 would include, besides new Article 573, a new Article 572 (see recommendation below).

As result of the proposed insertions, Article 572 of the draft civil code, entitled "Entry in force of the Code" would become Article 574, and Book 8, entitled "Final Provisions", in which old Article 572 would be inserted, would then follow new Article 573.

The proposed Chapter 4 and Article 573 read as follows:

"Livre 7. Preliminary measures

Chapter 4. Cooperation with the International Criminal Court

[Article 572, see recommendation below]

Article 573 (preliminary measures requested by the International Criminal Court for the purposes of reparation)

The execution in the territory of the Kingdom of Cambodia of preliminary measures set out in a request for cooperation presented by the International Criminal Court, as provided for in Article L.912-1 of the draft Code of criminal procedure [Article proposed by the FIDH, see below] and in application of Article 93(1)(k) of the Rome Statute, shall be satisfied, at the expense of the Treasury and following the procedure set out in this Code, by the competent court when it is seized for that purpose by the royal prosecutor or by any party involved in the trial, as long as the proprietor of the goods could not have been ignorant of its fraudulent origin or utilization.

The total or partial withdrawal of such preliminary measures may be requested by all concerned.

The Presidency of the International Criminal Court shall be informed beforehand.

***Authorization to execute a forfeiture decision handed down by the International Criminal Court validates the confiscation measures and allows definitive inscription of the securities*".**

- the modification of Article 537 of the draft Code of civil procedure corresponding to the new drafting of Article 573 of the same draft Code, by adding a sixth paragraph relating to payment by the Treasury of expenses occasioned by execution of the preliminary measures. The sixth and last paragraph of Article 537 would then read as follows:

"When a request for the execution of preliminary measures is made by the International Criminal Court, the expenses fall to the Treasury".

B. Concerning the recognition and execution of decisions:

- the insertion in the new Chapter 4 of the draft Code of civil procedure relating to cooperation with the International Criminal Court, proposed above, of new Article 572 concerning the recognition of decisions of the International Criminal Court and other States, whether parties to the Rome Statute or not.

Proposed Article 572 reads as follows:

"Article 572 (recognition of decisions of the International Criminal Court and other States, whether parties to the Rome Statute of the International Criminal Court or not)

Decisions based on Article 75 of the Statute of the International Criminal Court relating to reparations, including those that order preliminary measures or decide to allocate the proceeds of fines and forfeiture to the Victims' Trust Fund referred to in Article 79 of the Statute, whether they are handed down by the courts of a State Party to the Statute and binding in that State, or by the International Criminal Court, shall be fully recognized in accordance with Article 109 of the Statute of the International Criminal

Court and Rules 217 and 219 of the Rules of Procedure and Evidence of the Court. They are declared enforceable by the president of the competent court upon request of any party involved in the trial.

Decisions handed down in a State Party to the Statute of the International Criminal Court shall not be enforceable in Cambodia if:

- ***they are contrary to public order;***
- ***they have been obtained by fraud;***
- ***they are irreconcilable with a decision handed down by a Cambodian Court, or with a decision handed down by the International Criminal Court or with a foreign court decision having been enforced in the Kingdom of Cambodia.***

Decisions handed down in a State that is not a party to the Statute of the International Criminal Court shall be recognized and declared enforceable in application of the applicable domestic law or convention.**"**

The FIDH considers:

II. Concerning proceedings before the Cambodian courts,

- with reference to: Articles L.2111-1, L.2121-1, L.2131-1 and L.2131-2 [as recommended by the FIDH, see above] of the draft Criminal Code, which incorporate the crime referred to in Article 5 of the Rome Statute and defined in that statute; Article L.131-9 of the draft Code of criminal procedure, which allows joinder of a defendant before the court conducting public prosecution for the reparation of injury or restoration based on an offence, as a positive development.

Finally, the FIDH also recommends:

- the insertion in Article 84 of the draft Code of civil procedure, relating to additions and changes to the subject of a claim, of a new paragraph 2 concerning the joinder of a defendant before the Cambodian civil courts in cases concerning action for reparation of injury or restoration based on one or more crimes defined in Articles L.2111-1, L.2121-1, L.2131-1 and L.2131-2 [as drafted in the FIDH recommendations, see above] of the draft Criminal Code. The initial drafting of Article 84 would thus be modified as follows:

"Article 84 (additions and changes to the subject of a claim and joinder of defendants)

1. Concerning additions and changes to the subject of a claim,

a) The plaintiff may add to or change the initial subject of a claim up until the end of the oral hearings, as long as this does not alter the legal basis on which the initial claim is founded. In cases where such addition or change would lead to excessive time wasting, the addition or change shall not be authorized.

b) An addition or change of subject of the claim shall be made in writing.

c) The written document referred to in the preceding paragraph shall be served on the adverse party.

d) If the addition or change to the subject of the claim is contrary to the interests of justice, an order shall be handed down refusing the addition or change to the subject of the claim. The court may hand down such an order of rejection at its own discretion.

2. Concerning joinder of a defendant: The defendant may be joined before the civil courts, in actions for the reparation of injury or restoration based on a criminal offence under domestic law or the Statute of the International Criminal Court ".

Part VII – Conserving the jurisdiction of the Kingdom of Cambodia in the repression of crimes through the application of pertinent international standards

Introduction

The Rome Statute is complementary to national criminal jurisdiction (Paragraph 10 of the preamble and Article 1). States retain priority for the repression of crimes coming within the Statute.

The International Criminal Court only has jurisdiction to investigate and prosecute crimes when the State does not have the will, or the capacity to conduct them fully (Article 17 of the Rome Statute). In such cases, the domestic courts of the State in question may lose jurisdiction, as provided in the Statute (Articles 17 to 19).

The ICC also designates the State responsible for the execution of prison sentences which, along with investigation and prosecution, make up the repression of crimes (Article 103 of the Statute). In cases where the State does not provide international guarantees for treatment of prisoners and convicted persons, the Court may decide not to designate that State to receive convicts (Article 103(3)(b). Such a situation would clearly tarnish the image of the State concerned, if ever one of its nationals convicted of a crime committed in that country, was forced to leave it in order to serve the sentence abroad.

Chapter I – Guarantees of a fair trial under international law

The guarantees of a fair trial recognised under international law must be respected in Cambodia in order for the State to conserve its jurisdiction for the repression of crimes under the Rome Statute. Indeed, the State's incapacity may result, in particular, from insufficient respect for the guarantees of a free trial recognized under international law [Article 17(2) and 20].

The international standard for guarantee of free trials is summarised in Article 14 of the International Covenant on Civil and Political Rights. After accession to the Covenant on 20 April 1992, Cambodia became bound to respect its obligation when the instrument came into force on 26 August 1992.

The Rome Statute also contains provisions relating to fair trials. In particular, Article 55 prohibits any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment; protection against self-incrimination or compulsion to confess guilt; the right to be assisted by counsel, especially during questioning, and the right to an interpreter.

The 1993 Constitution also contains fair trial guarantees. Article 31 provides that "*[t]he Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human rights, the covenants and conventions related to human rights, women's and children's rights*". However, as discussed previously, a large number of international

human rights conventions ratified by Cambodia (or to which Cambodia has agreed to be bound by others means, such as accession), have not yet been legislatively implemented despite their constitutional value by virtue of Article 31 of the Constitution[90].

Moreover, Article 38 of the Constitution prohibits all physical abuse, all physical or mental coercion of prisoners, and states the principles of the inadmissibility of confessions obtained by force and the presumption of innocence. Article 39 asserts the right to effective recourse of citizens against any breach of the law by State organs or their personnel. However, the application of certain laws adopted before 1979 remains uncertain, although they give effect to these principles[91], and later texts, especially the Transitional Provisions and 1993 Law on criminal procedure do not include such free trial guarantees.

Accordingly, we recommend that the Cambodian authorities include guarantees of international free trial standards in Cambodian penal legislation, in the interests of justice, thus satisfying Cambodia's obligations and also ensuring that it retains its jurisdiction over crimes under the Statute.

Current reform of criminal procedure in the draft Code already makes some steps in this direction. Gaps remain, however, concerning defence rights, the access of victims to criminal proceedings, public hearings and the right to medical examination during pre-trial detention.

A – Defence rights

1) The presence of counsel during initial questioning

The initial appearance is one of the most important phases in criminal proceedings. It is at this stage that the investigating judge may indict the suspect, proceed with questioning and take depositions.

The presence of a lawyer or counsel for the suspect is a principle at this stage of the investigation (Article 14(d) of the International Covenant on Civil and Political Rights, Article 93 of the UN Standard Minimum Rules for the Treatment of Prisoners, and Principle 17 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment), unless the suspect expressly renounces this right. Article 12(2) of the Transitional Provisions also recognises this principle.

Furthermore, Article 55(2)(c) and (d) of the Rome Statute stipulate that when a person is suspected of having committed a crime within the jurisdiction of the International Criminal Court and that person is questioned by national authorities by virtue of a request under Chapter IX of the Statute, the person shall be informed, before being questioned, of the right to "*have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her… and without payment by the person in any such case if the person does not have sufficient means to pay for it*" and "*to be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel*".

The presence of a lawyer or counsel, on the one hand, protects the accused from any possibility of coercion by the investigating judge and, on the other hand, protects the investigating judge from any complaints by the accused.

Yet, in this respect, Article L.412-3 paragraph 2 of the draft Code inherits the same failing as Article 77 of the 1993 Law on criminal procedure. Indeed, it authorizes the investigating judge to proceed

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90 See *supra* Part II, Chapter 2.

91 Due to an unfounded interpretation of Article 158 of the Constitution: see *supra* Part II, Chapter 1.

with questioning of the accused in the absence of any lawyer or counsel, if the latter does not appear after having been regularly summonsed.

The absence of counsel despite having been regularly summonsed does not justify questioning by the investigating judge without the presence of counsel to assist an accused who has not expressly waived the right to be assisted.

Even in cases of emergency resulting in danger of death of a witness or the risk of losing evidence, the presence of a lawyer remains the principle. Although, in such cases, the normal period to summon counsel (five days) has not been respected, a lawyer should still be summonsed.

The FIDH recommends:

- that the Cambodian authorities adopt a new draft of Article L.412-3 of the draft Code of criminal procedure, as follows:

"Article L.412-3 (the presence of counsel during questioning)

The accused may only be questioned in the presence of a lawyer, unless he expressly waives this right. Such waiver shall be noted in a separate report from the investigation record and signed by the accused.

When the accused is assisted by counsel, the investigating judge must summons such counsel at least five days before any questioning. During this period, counsel may consult the prosecution file.

Notwithstanding the above provisions, the investigating judge may proceed with questioning immediately in cases of emergency. Such emergency must result from a danger of death of a witness or a risk of losing evidence. The nature of the emergency shall be noted in the record.

If regularly summonsed counsel does not attend on the day and hour indicated, the accused shall be informed of the right to request court appointed counsel, as provided for in the Law on the status of lawyers, to provide assistance during the initial appearance".

- that the Cambodian authorities delete the last paragraph of Article L.412-3, as set out in the draft Code, to create a separate Article following Article L.412-3. Indeed, Article L.412-3 relates to the presence of counsel during questioning and it is not clear why it also mentions interpreters. Except for this Article, the provisions relating to interpreters in the draft Code are contained in separate Articles. Thus, it would follow the general format of the draft Code to place the right to an interpreter during questioning in a separate Article. It could be numbered "L.412-3 bis" to avoid changing the existing system of the draft Code. This new Article would read as follows:

"Article L.412-3 bis (assistance of an interpreter)

During questioning, the investigating judge may call for the assistance of an interpreter if necessary, as provided in Article L.412-2".

2) The special procedure for immediate appearance: agreement must be given in the presence of counsel

The immediate appearance procedure is a rapid, exceptional mechanism derogating from domestic law procedure: a case may be tried "summarily" on the day of arrest. It is, thus, important to ensure that defence rights are respected.

In order to preserve the balance of defence rights during such exceptional proceedings, the lawmaker must provide the accused with a certain number of solutions, especially that of requesting time for the preparation of the defence under international guarantees of fair trial standards [Article 14(3)(b) of the International Covenant on Civil and Political Rights]. The law now in force does not allow such a possibility (Article 64 of the 1993 Law on criminal procedure). The immediate appearance mechanism is hardly satisfactory under the 1993 Law as it is too wide. Beyond the fact that there is no right to request extra time to prepare one's defence, its field of application is unlimited and pre-trial detention while awaiting final judgement may last up to 4 months (Articles 63 to 66).

Articles L.214-13 and L.512-4 of the draft Code of criminal procedure constitute a considerable improvement in this respect. The system of immediate appearance is more developed and defence rights more present. Final judgement must be handed down within two weeks from presentation of the accused in court, and pre-trial detention ceases as of right upon expiry of this period. The possibility for the accused to request extra time to prepare the defence is expressly recognised.

Nevertheless, although the draft Code effectively requires that the trial can only be held the same day by immediate appearance if the accused does not request further time to prepare the defence, the draft does not clearly state the principle that the trial can only be held with the agreement of the accused. The FIDH recommends therefore to clearly state this principle in Articles L.214-13 and L.512-4 of the draft Code.

Furthermore, under international fair trial standards, such agreement should only be expressed in the presence of the accused's counsel in order to fully respect defence rights. The draft Code, as currently drafted, does not include this essential condition. The FIDH recommends, consequently, that the Cambodian authorities add this condition to the Code of criminal procedure.

Due to its derogatory, exceptional nature compared with domestic law procedure, this mechanism is limited, in principle, to minor offences of which evidence is easy to find. Although the draft Code is closely aligned on the French Code of criminal procedure, it is noteworthy that, contrary to the French procedure of immediate appearance, Article L.214-12 of the draft Code limits the field of application of immediate appearance in a more restrictive manner, to *flagrant delicto* offences for which the maximum penalty is five years' imprisonment, which is a positive point in this draft.

The FIDH recommends:

- that the Cambodian authorities, considering the above arguments, modify Articles L.214-13 and L.512-4 of the draft Code of criminal procedure as follows:

"***Articles L.214-13 and L.512-4 (immediate appearance procedure)***

When the royal prosecutor decides to use the immediate appearance procedure, he shall:

- ***note the identity of the person brought before him;***
- ***notify the acts of which he is accused and the criminal charges;***
- ***take declarations from the person, if he desires to make one;***
- ***make a record of the immediate appearance.***

The royal prosecutor shall inform the accused that he has right to the assistance of counsel of his choice, or designated in accordance with Article 30 of the law on the status of lawyers.

The designated or chosen counsel shall be informed without delay. He or she may consult the prosecution file and communicate with the accused in full confidentiality.

These formalities shall be placed on record, or else the proceedings shall be void.

The immediate appearance report shall be sent to the trial court.

The accused shall be retained under escort until appearance before the court, which must take place the same day.

During this appearance, after having verified the identity of the accused and stated the acts underlying the charges, the court shall inform the accused that he can only be tried the same day with his agreement. It shall also inform him that he may have extra timer to prepare the defence.

The agreement of the accused referred to in the preceding paragraph may only be given in the presence of counsel or, if counsel is not present, a lawyer designated in accordance with the law on the status of lawyers. If the accused consents to immediate trial, this is placed on the record.

If the accused requests time to prepare the defence or if the court considers that the case is not ready to be tried immediately, the case shall be adjourned to a later hearing. In that case, the court may place the accused in pre-trial detention by a reasoned judgement referring to the conditions set out in Article L.413-21 (motives for pre-trial detention). It shall then deliver a custody order.

The substantive judgement must be pronounced within two weeks from the initial court appearance. Pre-trial detention shall cease as of right upon expiry of the two-week period.

***If the court, when seized under the immediate appearance procedure, considers that the conditions set out in Article L.214-12 (immediate appearance) are not satisfied, or that the complexity of the case requires supplementary investigation, it shall return the file to the royal prosecutor with a view opening an investigation. The accused shall be brought before the investigating judge the same day, or the accused shall be automatically released from custody.*”.**

B - Access of the victim to criminal proceedings

In the interests of justice, the Rome Statute gives victims an important place in the criminal proceedings.

The Prosecutor of the International Criminal Court (“the Prosecutor”) may receive “submissions” from victims. If he considers that these elements are sufficiently serious and probative, he may take the initiative of opening an enquiry (Article 15 of the Rome Statute). If, on the other hand, he concludes that the information submitted by victims does not constitute a sufficient basis to open an inquiry, he informs them of the decision [(Article 15(6)]. Victims may then make representations to the Pre-trial Chamber of the Court contesting the decision of the Prosecutor not to enquire [(Article 15(3)].

In all cases, including where an enquiry is opened into a situation notified by a State or the Security Council, victims have the right to participate in proceedings before the Court when their “*personal interest are affected*” under Article 68(3) of the Statute, right from the enquiry phase, as recently ordered by Pre-trial Chamber I.[92]

The victim's participation and reparations section of the Registry is required to help victims exercise their rights. Victims will participate through legal representatives whom the Registry may also place at

[92] http://www.icc-cpi.int/library/cases/ICC-01-04-73_English.pdf

their disposal. The Office of Public Council for Victims, an independent body within the Court, will support such representatives, including in exceptional cases, directly representing victims.

Within the Court Registry, there is also a Victims and Witnesses Unit to provide appropriate help to victims who appear before the Court and their families, and take measures to ensure their protection and security [Article 43(6)]. The protection and participation of victims at trial are expressly developed in Article 68 of the Statute and, more particularly in Rules 89 to 93 of the Rules of Procedure and Evidence.

The Pre-trial Chamber may request the cooperation of States, "*in the superior interests of victims*", in order to take preliminary measures for the purposes of confiscation, even before the substantive judgement [Article 57(3)(e)]. This shows the important place of victims under the Rome Statute.

Indeed, historically, victims have always played a preponderant role in the repression of genocide, crimes against humanity and war crimes. Incontestably, their participation is an essential element in the reconstitution of facts and the trial of criminals.

Concerning international free trial standards, the right of victims to participate in criminal proceedings has now taken on considerable importance in the context of the repression of crimes within the jurisdiction of the Court, because these crimes touch the whole of the international community. The access of victims of such crimes to the criminal trial is therefore essential and constitutes a fundamental guarantee of fair trials.

1) Initiating public prosecution

Generally speaking, the right of access to a court is one of the free trial guarantees recognized by international law (Article 14(1) of the International Covenant on Civil and Political Rights). The victim of a criminal offence must, thus, be able to raise his cause in court.

The 1993 Law on criminal procedure, currently in force, only allows civil parties to participate by way of "*intervention*". In other words, the victim may be joined as a civil party once the public prosecution has been launched by the Prosecutor and before the final judgement (Article 131). The 1993 Law on the organization of the courts provides that the injured party to a military offence has the same right [Article 9(4)].

The draft Code of criminal procedure goes further. It allows civil parties to participate by way of "*action*" (Article L.121-3). The victim may thus initiate public prosecution simply by introducing a civil party action, even before the Prosecutor has launched an investigation. This is a significant contribution by the draft Code on the question of victim access to criminal proceedings. Nevertheless, this draft does not clearly express the principle of such initiation of public prosecution.

The FIDH recommends:

- the inclusion of new Article L.111-2 in the draft Code of criminal procedure, stating the principle of initiation of public prosecution by the injured party, in Title 1 of Book 1 relating to general principles. The proposed Article would read as follows:

"Article L.111-2 (initiation of public prosecution)

Public prosecution shall be initiated and exercised by the prosecution

Such action may also be initiated by the injured party, as provided in this Code".

2) Direct citation

The draft Code does not clearly state the persons or authorities with power to initiate direct citation (Articles L.711-1 and following). A study of the provisions governing this mechanism shows that only the Prosecutor may do so.

We recommend therefore that the Cambodian authorities clearly state in the future Code of criminal procedure that direct citation is exercised at the initiative of the royal prosecutor.

It also appears from a study of the draft Code that, contrary to the initiation of public prosecution, direct citation is not open to the victim. This constitutes a restriction on the right of access to justice, and thus, as discussed above, on a guarantee of fair trials. It would thus be appropriate to allow victims to initiate such proceedings.

However, as the necessary system of "*huissiers*" does not yet exist, it appears difficult in practice to allow this right to victims.

The FIDH recommends consequently that the Cambodian authorities expressly provide for victim initiation of the direct citation mechanism as soon as the *huissier* system has been established.

3) The right of associations to take action as civil parties to combat genocide, crimes against humanity and war crimes

The draft Code of criminal procedure takes an important step with respect to current positive law by authorising associations whose statutory aims include the fight against sexual violence and violence against the family; kidnapping, exploitation and human trafficking; and against racism and ethnic, racial or religious discrimination, to exercise civil party rights (Articles L.131-5, L.131-6 and L.131-7).

In order to bring the draft Code into conformity with obligations under the Rome Statute, it would also be appropriate to open this possibility to associations whose statutory aims include combating genocide, crimes against humanity and war crimes.

The FIDH recommends:

- that the Cambodian authorities adopt a new Article L.131-8 of the draft Code of criminal procedure as follows:

> ***"Article L.131-8 (associations combating genocide, crimes against humanity and war crimes)***
>
> ***Any association that is regularly declared for at least 3 years before the date of the offence, and whose statutory aims include combating genocide, crimes against humanity or war crimes, may exercise civil party rights concerning the offences set out in Articles L.2111-1, L.2121-1 and L.2131-1 of the criminal Code".***

As a result of the proposed addition of new Article L.131-8, the initially numbered Articles L.131-8 to L.131-14 of the draft Code would be renumbered from L.131-9 to L.131-15.

C - Public hearings

Public hearings are one of the free trial guarantees recognized by international law. Nevertheless, in the interests of good morals, public order or national security, the private life of the parties to the action or in the interests of justice, *in camera* proceedings may be ordered (Article 14(1) of the International Covenant on Civil and Political Rights). The parties to the trial may, thus, request *in camera* hearings. This is a guarantee of fair trials for victims. Indeed, it gives them access to the criminal proceedings while respecting their private life and human dignity.

Article 129 of the 1993 law on criminal procedure provides that "*the hearing can be conducted in camera, if the proceedings in open court might deem dangerous to the public order and good tradition*". Article 23 of Transitional Provisions also allows civil parties to request *in camera* hearings. This positive law mechanism is absent, however, from the draft Code of criminal procedure.

Under Article L.513-1 of the draft Code, the court may only order *in camera* hearings in the interests of public order and good morals. Protection of the interests of the parties and their private life is omitted. There is no provision for the civil parties to request an *in camera* hearing. The draft Code is therefore less satisfactory on this subject than the law in force.

The FIDH recommends:

- consequently, that the Cambodian authorities modify Article L.513-1 of the draft Code of criminal procedure by adopting the following text:

> "***Article L.513-1 (public and in camera hearings)***
>
> ***Hearings are public, unless such publicity is harmful to public order or good morals. In this case, the court shall so declare by a judgement handed down in a public hearing.***
>
> ***Nevertheless, the court may prohibit the access to the courtroom for minors or some of them.***
>
> ***Concerning prosecution for rape or torture and acts of barbarity accompanied by sexual aggression, in camera proceedings are available as of right if the victim civil party or one of such victims requests it; in other cases, in camera hearings may only be ordered if the victim civil party or one such victim does not oppose it. The court shall decide by a separate reasoned decision from the substantive judgement.***
>
> ***The substantive judgement must always be handed down at a public hearing.*"**.

D - The right to medical examination during pre-trial detention

The search for the constitutive elements and evidence of an offence during pre-trial detention can in no circumstances justify torture and other cruel, inhuman or degrading treatment (Article 38(5) of the 1993 Constitution; Article 12(1) of the Transitional Provisions; Article 5 of the Universal Declaration of Human Rights; Article 7 of the International Covenant on Civil and Political Rights; Article 15 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Principle 21 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment).

Article 55 of the Rome Statute further provides that when a person is suspected of having committed a crime within the jurisdiction of the International Criminal Court and is questioned by national authorities pursuant to a request under Chapter IX of the Statute, that person "*shall not be subjected to*

any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment".

The detainee must be treated with humanity and respect for inherent human dignity (Article 38(2) of the 1993 Constitution; Article 12(2) of the Transitional Provisions, Principle 1 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; and Article 10(1) of the International Covenant on Civil and Political Rights).

Doctors have an important role in verifying respect for these fundamental obligations by observing the state of health of the detainee after detention (Article 12(2) of the Transitional Provisions; Principle 24 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment). In particular, they check whether the person should be placed in detention. They participate in the struggle against torture and mistreatment by recording the results of the medical examination (Article 12(2) of the Transitional Provisions; Principle 26 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment), and observing the torture or mistreatment, if any, inflicted on the person during detention.

The guarantee of the detainee's right of access to medical examination is one of the fair trial guarantees recognized by international law. Indeed, it helps prevent declarations obtained by torture or other mistreatment from being used against the detainee as evidence at trial (Article 14(3)(g) of the International Covenant on Civil and Political Rights; Article 15 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Principle 21(1) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment).

Article L.323-4 of the draft Code of criminal procedure, as currently drafted, does not include this guarantee. Indeed, the detainee's *right* of access to a doctor is not protected. Only the Prosecutor "*may order that the detainee be examined by a doctor*" without the detainee or the family being able to request a medical examination.

The FIDH recommends:

- consequently, that the Cambodian authorities introduce the detainee's right of access to a medical examination in a new draft of Article L.323-4, as follows:

"Article L.323-4 (assistance of a doctor during pre-trial detention)

Any person placed in pre-trial detention may, at his request, be examined by a doctor designated by the royal prosecutor. He may invoke this right during the first 24 hours after arrest and may renew the request after this period.

At any time, the royal prosecutor may order that the detainee be examined by a doctor. The doctor shall verify in particular whether the state of health of the detainee is compatible with pre-trial detention.

In the absence of any request by the detainee or the royal prosecutor, a medical examination is of right if a member of the family requests it. The doctor is designated by the royal prosecutor.

If the doctor considers that the state of health of the detainee is incompatible with detention, the judicial police officer immediately informs the royal prosecutor. The doctor delivers a medical certificate which is placed on the prosecution file. The judicial police officer records the name of the doctor as well as the day and hour of the medical examination.

The royal prosecutor may visit the location to verify conditions the of pre-trial detention".

Chapter II - International guarantees for the treatment of convicts and prisoners

The international law guarantees for the treatment of prisoners are set out in UN General Assembly Resolutions 43/173 dated 9 December 1988 and 45/111 dated 14 December 1990, as well as the Standard Minimum Rules for the Treatment of Prisoners (the "Minimum Rules"), adopted by the first UN Congress for the prevention of crime and the treatment of prisoners, held in Geneva in 1955 and approved by the Economic and Social Council in Resolutions 663 C (XXIV) dated 31 July 1957 and 2076 (LXII) dated 13 May 1977.

Resolution 43/173 is entitled Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (the "Body of Principles") and Resolution 45/111 concerns Fundamental Principles for the treatment of Prisoners (the "Fundamental Principles").

By virtue of Article 74 of the Transitional Provisions, the Minimum Rules and the Body of Principles are "*applicable law in Cambodia*".

The rules and principles stated in these Resolutions do not aim to provide a detailed description of a model penitentiary system. Resolutions 43/173 and 45/111 establish the principles and rules of a good penitentiary organization and treatment of prisoners complying with generally accepted guarantees under international law.

In addition, all human rights in general apply to prisoners and accused. In this respect, they enjoy, for example, the guarantees set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

Prison is a place designed for the execution of sentences handed down by the competent court and for pre-trial detention of the accused. Only those persons who are the subject of a judgement handed down by a competent court or a legal warrant may be placed in prison, in accordance with Article 9(1) of the International Covenant on Civil and Political Rights, which provides that "*(e)veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.*"

The aim is to rehabilitate the prisoner. Acts of torture or inhuman and degrading treatment are therefore to be excluded, in accordance with Article 10(1) of the same Covenant, which states that "*[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person*".

Ministerial decree No. 217, dated the 31 March 1998, concerning prison management, also rightfully refers to the Minimum Rules as well as the International Covenant on Civil and Political Rights. Article 4(7)(a) of the ministerial decree notes that "*the rights of prisoners are recognised in this Article, the International Covenant on Civil and Political Rights and the Standard Minimum Rules for the Treatment of Prisoners*".

We remind the Cambodian authorities of the need to ensure that the treatment of prisoners respects the relevant international guarantees, whether under Cambodian legislation and regulations or in the practical implementation of these provisions. If Cambodia were not to respect such guarantees, the ICC would not be able to designate it to receive prisoners [Article 103(3)(b) of the Rome Statute] and such a situation would assuredly tarnish its image, if one of its nationals, convicted of a crime committed on its territory, were required to serve the sentence in a foreign country.

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The FIDH takes sole responsibility for the opinions expressed in this Report, which can in no way be attributed to the European Union

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141 organisations

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