

# **Report**

## **International Criminal Court programme**

### **Articulation between the International Criminal Court and the Khmer Rouge Tribunal: The Place of Victims**

**(Phnom Penh, March 2-3, 2005)**

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**The opinions expressed in this document are those of the FIDH only and can not be attributed to the European Union.**

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*"Left to right: Mrs Kek Galabru, President of LICADHO, Mr. Thun Saray, President of ADHOC and Mrs Evelyn Balais Serrano, Asia Coordinator of the CICC"*



*"Group discussions on the second day of the conference"*

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## **Introduction**

The Conference was jointly organized by three organizations: ADHOC, LICADHO and FIDH with the cooperation of the Coalition for the International Criminal Court (CICC). ADHOC and LICADHO are member organisations of the FIDH.

The Conference was preceded by a number of meetings organized by ADHOC and LICADHO on behalf of the FIDH, with representatives of the authorities as well as a number of civil society representatives. The FIDH delegation was composed of three representatives: Mrs Isabelle Brachet (Belgium), Desk Officer for Asia in the FIDH International Secretariat, Mrs Karine Bonneau (France), FIDH Permanent delegate to the International Criminal Court in The Hague, and Mr David Boyle (Australia), FIDH Chargé de mission and researcher. Mrs Evelyn Serrano, Asia Coordinator of the Coalition for the International Criminal Court (CICC) participated in the various meetings with the Cambodian authorities and civil society.

The aim of those meetings was to present the objectives of the conference as well as to assess the degree of implementation of the Statute of the ICC in Cambodia. The objective of those meetings was also to discuss with various personalities the issue of the place of victims in the KRT.

Meetings had been fixed with His Excellency Mr. Sok An, Minister and Minister of State, as well as with H.E. Mr. Om Yentieng, President of the Governmental Human Rights Committee of Cambodia. However, both meetings were cancelled at the last minute by the authorities concerned because of a heavy agenda. The FIDH delegation was nevertheless able to meet with Mr. Tony Kranh, Under Secretary of State; Dr. Helen Jarvis, Advisor in the Office of the Council of Ministers and member of the task Force on the KRT; and the Vice-President of the Governmental Human Rights Committee.

The Delegation also met with H.E. Men Marly, President of the Senate Human Rights Committee, as well as with the two Vice-Presidents of that Committee; H.E. Hang Roraken

General Prosecutor of the Appeal Court as well as H.E. Mr. Uk Vithun, Attorney general of the Supreme Court.

The FIDH delegation met with H.E. Mrs. Kim Sathavy, Director of the Judge School, as well as Mr. Ang Eng Thong, Director of the Lawyer School. The Delegation met with Ms. Margo Picken, Director of the Cambodia Office of the High Commissioner for Human Rights, Mr Yvon Roe d'Albert, Ambassador of France in Cambodia, Mr Alain Rausch, First Advisor and Mrs Claude Abily, First Secretary in the French Embassy. A meeting also took place with Mr Winston Mc Colgan, Chargé d'affaires in the Delegation of the European Commission in Cambodia.

The FIDH met a number of civil society representatives, including Mr. Chhang Yok, Director of Cambodia Documentation Center (DC-CAM); Mr. Ouk Vandeth, Director of Legal Aid; Mr Sok Sam Oeun, Executive Director of the Cambodian Defenders Project; various members of the Human Rights Action Committee<sup>1</sup>; as well as Mrs Sara Colm, Senior Researcher of Human Rights Watch in Cambodia.

The FIDH would like to thank the persons who accepted to meet with its Delegation.

The present report includes a summary of the presentations made during the two days conference, as well as of the debates which took place during the conference. It also includes recommendations based on the discussions during the conference as well as on the information received on the occasion of the various meetings with both the Cambodian authorities and representatives from civil society.

The FIDH, ADHOC and LICADHO hope that the present report will be a useful tool for all those who will be involved with the KRT or with the implementation of the ICC Statute in Cambodia.

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1. HRAC is a national coalition of Cambodian human rights NGOs.

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### **Opening Remarks**

The Conference was officially opened by Mr. Thun Saray, President of ADHOC, who welcomed all the participants and thanked them for their presence.

Cambodia has participated in the establishment of two very important courts: the International Criminal Court [ICC], since Cambodia was among the first sixty countries to ratify the Rome Statute, thereby allowing its entry into force; and the Khmer Rouge Tribunal to prosecute Khmer Rouge leaders. The objective of the conference is to discuss the articulation between the ICC and the Khmer Rouge Tribunal, and to discuss ways in which the Khmer Rouge Tribunal could build upon ICC mechanisms with regards to victims rights including protection and participation. The focus of the Conference is participation and protection of victims and witnesses, including after the Tribunal finishes its mandate.

Ms. Isabelle Brachet, FIDH Desk Officer for Asia introduced the organization to the participants, explaining its composition and mandate. The mandate of FIDH is generalist; it works on all the human rights enshrined in the Universal Declaration of Human Rights. It also works on the protection of human rights defenders, who are often at risk in their own country because of their activities in favour of human rights. One of FIDH's main priority is globalisation and its impact on human rights, in particular on economic and social rights. Another is the struggle against impunity, notably through the international justice system. FIDH is also focusing on the impact of the struggle against terrorism on human rights, in particular since 9-11.

The Conference took place in the context of a broader program carried out by the FIDH concerning the ratification of the ICC statute and its implementation. It aimed at being in complementarity with past and existing initiatives being carried out in Cambodia on both the ICC and the Khmer Rouge Tribunal. The Conference focused on participation of victims before the Khmer Rouge Tribunal and the ICC and the issue of their protection. The objective of the Conference is to come out with clearer ideas of what could and should be the place of victims before the Khmer Rouge Tribunal and what could be the strategy of NGOs in that regard.

Dr. Kek Galabru, President of LICADHO rounded off the Welcoming Remarks. She noted a lack of experience and knowledge about the ICC, including among members of the Royal Government of Cambodia, parliamentarians, and

senators. As an example she pointed out that Cambodia is still lacking an ICC implementing legislation. She introduced the international participants who would be acting as technical experts during the Conference, and thanked, in particular, government officials who were present at the Conference, adding that she hoped future discussions would be held with government to assist it in making sure that the Khmer Rouge Tribunal is fair, reliable and can be used as case-law for crimes committed later. She expressed the hope that Cambodian victims will trust the judicial system and that justice will be done.

Mr. David Boyle, Charge De Mission FIDH explained the organization of the Conference. On the first day, there would be debates that will build on previous initiatives on the Khmer Rouge Tribunal conducted by different NGOs like Open Society Justice Initiative (OSJI). The first two sessions would endeavour to situate the Khmer Rouge Tribunal in the broader perspective of international criminal justice, notably the ICC, since Cambodia ratified the ICC Statute in 2002.

He stated that the current importance for ending impunity for past crimes through focus on the Khmer Rouge Tribunal, should not take away attention from full implementation of Cambodia's obligations under the Statute of the ICC. While the Khmer Rouge trials are an important step in the effective punishment of such crimes, these crimes have been introduced into domestic criminal law only for the strict purposes of these trials. Once the trials are completed, the Extraordinary Chambers will be automatically dissolved. Thus, the Khmer Rouge Tribunal Law only partially satisfies Cambodia's obligations to punish and prohibit international crimes, and to provide effective remedies for those crimes. This had been made all the more pressing by the ratification of the ICC statute, because ratification without implementation leaves Cambodia open to ICC intervention if there are claims by victims of crimes that come within the jurisdiction of the Court.

The third session would focus on the Khmer Rouge Tribunal and the role of victims in international justice. A major innovation in international law introduced by the ICC Statute is the first ever recognition of the place of victims in the proceedings themselves, other than just as witnesses. In addition, the insistence on respect for Cambodian criminal procedure in the Khmer Rouge Tribunal raises questions about whether and to what extent victims may participate as civil parties in the proceedings.

## **Session 1- The ICC and the International Justice System**

### **A. GENERAL INTRODUCTION TO THE ICC**

**Ms. Evelyn Serrano, Asia Coordinator of the Coalition for the International Criminal Court (CICC), gave a brief historical background of the establishment of the ICC.**

The ICC is the first permanent, independent international court capable of investigating and bringing to justice individuals who commit the most serious violations of international law. It is a treaty based organisation with its seat in The Hague, Netherlands. It has jurisdiction over the following crimes committed after 1st July 2002: Genocide; Crimes against humanity; War crimes; and Crime of aggression, once a definition will have been adopted.

The first call for the adoption of an international criminal code and establishment of an international criminal court arose in October 1946, when, shortly after the Nuremberg Tribunal, an international congress met in Paris. Two years later, in 1948, the UN General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide. Separately, members asked the International Law Commission (ILC) to study the establishment of an international criminal court. From 1949-1954 the ILC drafted statutes for the ICC but opposition from powerful states on both sides of the Cold War hindered the effort.

The end of the Cold War in 1989 brought a dramatic increase in the number of UN peace-keeping operations and the idea of establishing an ICC became more viable. Trinidad and Tobago proposed to the UN that it again take up the issue of the ICC. The General Assembly asked the ILC to draft the ICC Statute. The conflicts in Bosnia-Herzegovina and Croatia in the early 90s led the UN Security Council to establish an ad hoc tribunal for the Former Yugoslavia in 1993 and strengthened discussions for the creation of a permanent court. In 1994, the ILC submitted the draft Statute for the ICC to the General Assembly.

The genocide in Rwanda led the Security Council to establish the second ad hoc tribunal for Rwanda. Shortly after, the ILC presented the final draft Statute of the ICC to the General Assembly and recommended that a conference of plenipotentiaries be convened to negotiate the Statute. In 1995 the NGO Coalition for the ICC was formed to coordinate efforts of human rights organizations like Amnesty

International, Human Rights Watch, Parliamentarians for Global Action, FIDH and others in advocating for an independent and effective ICC.

160 countries participated in the UN Diplomatic Conference on the establishment of the ICC held on 15 June-17 July 1998 in Rome, Italy. On the 17th of July, 120 States overwhelmingly voted in favor of the Rome Statute. 7 voted against including the US, China and Israel. Under the Clinton Administration, the US signed the Rome Statute of the ICC, but on 6 May 2002, the US under Bush administration withdrew its signature and sought bilateral immunity agreements (BIAs) with all countries, especially those parties to the ICC Statute.

On 11 April 2002 the 60th ratification instrument was deposited. Cambodia was one of the 60th ratifying countries. The Rome Statute of the ICC then entered into force on 1 July 2002.

From 3-7 February 2002, the first Assembly of States Parties, composed of all countries which ratified the Rome Statute was held in New York, at the UN. At this session, the first batch of 18 judges of the ICC was elected. A few months later, on 16 June, the first ICC Prosecutor, Luis Ocampo from Argentina, was sworn in. The ICC began formal investigations in the Democratic Republic of Congo and in Uganda in June/July 2004. The 3rd session of the Assembly of States Parties [ASP] was held short after from 6-10 September 2004 in The Hague.

The ICC is notable because it is an attempt to respond to the over 250 conflicts in the past 50 years which resulted in the deaths of more than 86 million civilians and the stripping of rights of more than 170 million victims. Until the Rome Statute, no system was proposed to enforce the norms concerning war crimes, by holding individuals criminally responsible for the most serious violations of international law. Moreover, the Rome Statute is the first treaty that codified gender related crimes including crimes of sexual violence. It is also the first international court that provides special attention to victims and witnesses in terms of their participation and their right to be granted reparation.

The ASP oversees the whole operation of the court which is divided into the following organs:

- The Presidency, in charge of the operation of the three Chambers (Pre-Trial Chamber, Trial Chamber and the Appeal Chamber).

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- The Office of the Prosecutor, which acts independently, and is responsible for receiving referrals, examining and conducting investigations and prosecutions before the Court.
- The Registry, responsible for the non-judicial aspects of administration.

The ICC is independent from the UN and has to enter into agreements with all States parties to allow court personnel and staff to operate in the territories of the countries and provide them certain privileges and immunities (APIC, Agreement on Privileges and Immunities of the Court). At the time of this conference, 22 countries have ratified APIC and it came into force in 2003.

The ICC is different from other international courts. The International Court of Justice deals with disputes between states, and has no jurisdiction over individuals. The Ad Hoc tribunals, such as those for the former Yugoslavia and for Rwanda have been established by the Security Council, are country specific and have a mandate limited to a specific time period.

The Rome Statute (RS) is based on the principle of complementarity: The ICC will only intervene if the State is unwilling or unable to investigate, prosecute and try an individual who allegedly committed the crimes foreseen in the Rome Statute. "*It is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes*" ( Preamble). To do so a state's national penal code must include the crimes enshrined in the Rome Statute. Also, it is the general obligation of States Parties to cooperate fully with the Court in its investigations and prosecutions, and national law must provide necessary procedures for cooperation.

There are three ways that the ICC's jurisdiction over a case may be triggered. First, States parties can request the Prosecutor of the ICC to investigate a situation (Art. 14 RS). Second, the Prosecutor may initiate investigations himself/herself, with the authorisation from the pre-trial chamber of the Court (Art.15 RS) or third, the Security Council can, acting under Chapter VII of the Charter of the UN, refer a situation in which one or more international crimes appear to have been committed. (Art. 13(c) RS).

However, before the ICC Prosecutor's decision to investigate, an admissibility analysis must be conducted showing that either the alleged crimes took place on the territory of a state party or were committed by a national of a state party. These preconditions do not apply to referrals from the Security Council.

The ICC faces several challenges. There is a need to obtain worldwide ratification of the Rome Statute and the Agreement on Privileges and Immunities; to ensure the development of strong implementing legislation in all States Parties; to continue to defend the integrity of the Rome Statute against threats posed by the American offensive against the ICC including through BIAs and to raise awareness about international justice mechanisms and the responsibility of states to fight impunity.

### **B. THE ICC IN ITS OPERATIONAL PHASE: THE POLICIES OF THE ICC PROSECUTOR**

**Ms. Karine Bonneau, FIDH Permanent Delegate before the ICC, explained the policies of the current ICC Prosecutor, Mr. Luis Moreno Ocampo, as well as the first measures taken in relation to ongoing investigations in Uganda and the Democratic Republic of the Congo.**

The Prosecutor may start an investigation upon referral of situations of crimes. Three State Parties so far have made referrals for crimes committed on their territories since 1st of July 2002, date of the entry into force of the RS. These are: Uganda in December 2003 for crimes committed in Northern Uganda; the Democratic Republic of Congo (DRC) in April 2004, and the Central African Republic in December 2004.

The Security Council can also act to address a threat to international peace and security and can refer a situation to the Court. There is a pending debate on the situation in Darfur, regarding a possible referral to the ICC by the Security Council<sup>2</sup>.

In all cases, the Prosecutor must evaluate material submitted to him and decide whether to proceed with the prosecution. He may also receive information from other sources, including NGOs or victims, then conduct a preliminary examination of such information and request the Pre-Trial Chamber to authorize an investigation. Around 1,100 communications have been sent to the Office of the Prosecutor.

A non-state party may also make a declaration recognizing the jurisdiction of the court over crimes committed on its territory or by its nationals. In April 2003, the Ivory Coast made such a declaration.

All referrals of communications are dealt with by three divisions of the Office of the Prosecutor (OTP). The Jurisdiction Complementarity and Cooperation Division initially receives and analyses all communications. 80% of the 1,100 communications received so far were found to be outside the ICC's jurisdiction. The ICC will only open an investigation if a

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State party is unable or unwilling to investigate. This capacity is examined by the division. This division will also advise the Prosecutor against opening an investigation if it thinks that doing so will not serve the interests of justice.

There are 6 situations currently being scrutinized: Central African Republic; Ivory Coast; Afghanistan; Colombia; Burundi; and Darfur.

The second division is the Investigation Division, responsible for preliminary examinations and the conduct of investigations (such as collecting and examining evidence, questioning persons being investigated as well as victims and witnesses). It is headed by the Deputy Prosecutor Serge Brammertz, from Belgium.

Finally the Prosecution Division is headed by the Second Deputy Prosecutor, Mrs. Fatou Bensouda from Gambia.

The role of victims is unique before the ICC, not only because they can trigger situations and provide the basis for a proprio motu investigation by the prosecutor, but also with regards to their own rights.

Based on information collected, the Prosecutor opened two investigations: the first in DRC on the 23rd of June 2004 (which focuses on Ituri, Eastern Congo) and the second in Northern Uganda, opened on 29 July 2004. According to the court's 2005 budget adopted by the Assembly of States Parties, the Court has the possibility to open a third investigation in 2005.

Because of the time it has taken to recruit the investigation teams, both investigations effectively started in October 2004. Because of budgetary restrictions, the teams are only comprised of 6 investigators each, although in DRC, only three of them are currently operational even though DRC is at least 15 times the size of Cambodia.

The three main issues defining the policy of the prosecutor are:

### **1. Principles that define his criminal strategy.**

a. Mr. Ocampo has, as of today, privileged situations referred to him by State parties rather using his proprio motu power to act on his own initiative. For example, in the Congo case, after receiving several communications from individuals and non-governmental organizations, the Prosecutor announced in July 2003 that the situation in the DRC would be a priority for his Office, especially in Ituri. In December 2003, he informed the Assembly of States Parties that he was prepared to seek authorization from the Pre-Trial Chamber to

start an investigation of the DRC situation while at the same time sought to get a referral and active support from the DRC government. On one hand, a State Party referral might guarantee better cooperation from the States as the ICC largely relies on States cooperation to fulfil its mandate. On the other hand this approach could hold the risk of political instrumentalization of the ICC. The State's cooperation might not be genuine enough and in fact, as of today, neither Uganda nor Congo adequately cooperate with the court.

b. The gravity of crimes. As the ICC is permanent and universal, the Prosecutor works on establishing unified criteria for initiating an investigation. He said he will investigate only the most serious crimes. The Office of the Prosecutor is drafting criteria to define what are the "most serious crimes".

c. To make sure ICC investigators will investigate as many situations as possible in all regions, the Prosecutor insists of having very focused investigations. They should be completed in a brief timescale to enable the ICC to investigate other situations, focused on the most significant crimes and individuals with the greatest responsibility (between 4-6 persons per situation).

d. To avoid very long trials, the Prosecutor will not call many witnesses and will therefore have to rely on other sources of evidence.

e. The Office of the prosecutor [OTP] wishes to keep a very low profile on ongoing investigations. This low profile means there will be a limited and short presence in the field. This is for both security and political reasons.

2. Articulation between peace and justice - The OTP must investigate and prosecute in the context of ongoing conflicts or situations of political transition. For example, in Uganda a campaign was started last year calling members of the Lord Resistance Army to surrender and benefit from an amnesty. Large parts of civil society opposed the ICC involvement because they feared it would hinder that "reconciliation" process. If the OTP very often stressed its obligation to prosecute the grave crimes within the jurisdiction of the Court, the Prosecutor also stated that it must take into account the peace process, in order to adapt to it. In practice this means that the ICC investigations might be slower, more complex or even delayed taking into account political factors. It should not be forgotten that the Security Council already has the capacity to postpone an investigation or prosecution on the base of chapter VII of the UN Charter (threat to peace and security) according to art.16. In addition, the Prosecutor can decide not to open an investigation if he believes that an investigation would not serve the "interest of justice". What this means has yet to be determined, and ongoing



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consultations with NGOs are being held. It is one of the main issues to be dealt with by the ICC, and is especially relevant as the Court will only deal with States that do not have the capacity or willingness to investigate or prosecute the most serious crimes, meaning that instability and conflicts will very often take place.

3. Status and interest of victims - For the first time in history victims have the independent right to participate and ask and receive reparation. As before the International Tribunal for the Former Yugoslavia [ICTY], victims and witnesses have a right to protection. Before going into the field, the OTP assesses the risk of interviewing witnesses and victims it will contact once in the field. It may also organize joint missions with the Victims and Witnesses Unit (in charge of protection) and may refer the names of victims interviewed to the Victims Participation and Reparation Section. However, it should also be noted that the OTP defends its own interests, which might be quite different than the ones of the victims who want to participate.

The OTP and the Registry agreed that the outreach and communication of the ICC shall not interfere with the Prosecutor's strategy. In practice this means that until now, there is no broad information and outreach in these countries, neither about the scope of the investigation nor on the rights of victims. Often, victims in DRC and Uganda have no possibility to know what their rights are under the Statute unless an NGO tells them. Consequently, it is harder for them to have access to the court and participate in the proceedings.

*Ms. Chea VANNAK from CSD raised three questions*

1. *Is there any section or division of the ICC responsible for training on the mandate of the ICC?* Evelyn Serrano responded that according to an orientation session by the Registrar's office, there is a special division for training. CICC, has also conducted trainings on the ICC for any interested groups. Karine Bonneau added that the Victims and Witnesses Unit has to organize trainings for investigators and others working in the ICC, on trauma and how to interview the victims for instance. There is also a Children's and Gender unit within the OTP which organizes training for investigation teams on issues related to women and children. Apart from that, there is a unit in charge of informing the public about the ICC, which organizes conferences on the court mandate.

2. *How will the ICC relate to the US?*

Ms. Serrano said there have been efforts on the part of the US to undermine the court. CICC has been asking everyone,

including advocates, to encourage and convince the US that it has nothing to fear, as long as it does not violate human rights or go against the principles and provisions of the ICC. Being a State party will serve its best interests, especially with regards to its peace-keeping operations around the world. Ms. Bonneau said that the ICC can investigate crimes committed within the territory of a state party or by a national of a state party. So if a US soldier commits a war crime in the Congo, that country can send the US citizen to the ICC. That is why the US is waging this campaign against the ICC. The ICC will not investigate if the state itself investigates and punishes the criminal. If the US punishes its own citizens, then the court will never have to take jurisdiction.

3. *Have the cases of Indonesia and Timor Leste been brought before the ICC?*

Ms. Serrano said that Timor Leste could not be brought before the ICC because the crimes in question took place before the Rome Statute entered into force. She noted that judgments rendered by Indonesian special courts do not seem fair, based on the actual situation in Indonesia and Timor Leste. Now Timor Leste is lobbying with the UN to set up a special tribunal.

*Ung Bun Ang, Senator from SRP asked what the ICC can do if a state party fails to adopt a law in compliance with the Rome Statute. Is there a time limit for compliance? Is expulsion a possible sanction?*

Ms. Serrano said that only a state party's inability and unwillingness to prosecute is included in the RS. It is only under these circumstances that the ICC will inquire into a case. A state party's failure or refusal to enact legislation will make it difficult for the court to operate in any case involving the state party. It would be in the best interest of the people of Cambodia to have these enacting laws adopted to protect its own citizens. Because such a refusal and reluctance would somehow mean that there is inability on the part of the State Party to cooperate with the Court and honor its obligations under the RS. It will be the responsibility of the ICC to determine if this is unwillingness or inability to cooperate, so that it can practice the complementarity principle, by which any party which enters into the ICC must seriously undertake its obligations.

Ms. Bonneau added that the lack of implementing legislation might be one of the criteria to consider that there is a lack of capacity or ability. There is no possibility of expulsion, however, as under the Rome Statute, the only grounds for

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expulsion is the failure to pay the contributions to the Court. The Legal Division in the Registry can work with the state and assist it in drafting implementing legislation. Also, there is a current broad campaign of NGOs, including FIDH and CICC, which are working on models of implementing legislation and information has been posted on the website of the CICC on what such a legislation should include. Consultancy, advocacy and working together is much more useful than expulsion.

When a country signs the Rome Statute, it's a signal that it wants to cooperate, and be part of the international movement for justice. When it ratifies the Statute, it confirms its desire to cooperate. However, if a State Party doesn't cooperate, the ICC Statute does not include specific provisions in terms of expelling or punishing the uncooperative state party. However, this could be a sign that the state party is unwilling or unable to cooperate and in that case, the ICC may decide to take over the case. The first priority is for the state party to prosecute, and if it doesn't cooperate and is unwilling/unable to do so, the ICC may take over the case.

Ms Serrano noted that Cambodia has the reputation among ASEAN countries and the whole of Asia, of having signed most if not all the core international human rights treaties. It has signed 11 of 12 core human rights treaties. However, whether these treaties have been implemented in the domestic legislation is another question. Cambodia has to do its tasks. If it hasn't done so in the past, it should start now, because what we are after now in terms of convincing Cambodia to adopt implementing legislation for the ICC that it ratified almost 3 years ago, is really for Cambodia to be able to fulfill its obligation to its own citizens, to give them protection when cases of international concern affect the country.

Ung Bun Ang, Sam Rainsy Party stated that while Cambodia has ratified a number of UN treaties, it may have done so for the wrong reasons. Ratification does not necessarily reflect any willingness of the government to comply. However as even the ICC took nearly a half century to be established, it is not strange for Cambodia to take 20-30 more years to prosecute the Khmer Rouge.

*Yun Kim Eng, KYA. Can the ICC prosecute individual cases and what kind of cases, and with what scope? Can it take cases where only one person was killed? Also, what measures can the ICC take if a state party refuses to cooperate in the ICC's investigation on its territory?*

Ms. Serrano clarified the jurisdiction of court, and said it was important to understand that the ICC will only deal with the

most heinous, gravest crimes of international concern. Such crimes that are planned, deliberate, systematic, form a pattern and are widespread. The crime does not only involve one or two persons, but a big number of people. The list of crimes are genocide<sup>3</sup>, crimes against humanity<sup>4</sup> and war crimes<sup>5</sup>. For example, in Uganda and DRC where investigations have been opened by the prosecutor, the whole region is affected, and hundreds of thousands of victims are involved.

Ms. Bonneau added that the court will only prosecute individuals, and only those found to be the highest responsible, whether in government or in a rebel group. Genocide could be one crime, one murder if there is proof that the intention is to destroy a group. Crimes against humanity usually involve a massive or systematic attack against a civil population, it may be launched against an entire village while "only" one person might be victim. As for cooperation, there is one Division of the ICC in charge of having discussions and convincing states to cooperate effectively. The ICC is currently facing this problem in Uganda, for instance, where the authorities refused the investigating team to have its own car. All other states which ratified the Rome Statute have the obligation to cooperate at the request of the ICC, as to send helicopters or participate in exhumations, etc. The ICC can also receive cooperation from UN peace keeping operations. But in the DRC, there have been problems because peacekeepers have also committed violations and therefore part of the population have lost confidence in them. Recently, 7 members of the UN mission were killed in Ituri. It is a grave problem of credibility and security for the ICC.

*Yun Kim Eng, KYA asked for a definition of the word "widespread". What is the scope that will let ICC look into a situation?*

Ms. Bonneau said that it was up to the judges to decide what this means. Based on decisions of other tribunals and case law, the context of the attack must be taken into account. It is not possible to answer with numbers. It means a course of conduct involving the commission of multiple acts, also pursuant to or in furtherance of a State or organization policy.

Ms. Serrano added that rape, even when committed individually, if it is part of a plan to undermine the population of a specific group can be looked into by the ICC. If the single rape was part of a plan, and other individual rapes took place in other regions, involving other women, then it's considered systematic, there is a plan, it is widespread, it took place not only once, and not only in one place. It is the same with

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torture, even if committed individually, if it is part of a broader plan and took place in several different instances and venues, then it is systematic and widespread.

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2. On 31 March 2005, the Security Council made its first ever referral to the ICC under Article X of the Court's Statute, concerning the situation in Darfur, Sudan. In the first US concession in its war against the Court, the United States abstained in return for assurances that no Americans would be tried.

3. See article 6 of the RS.

4. See article 7 of the RS.

5. See article 8 of the RS.

## **Session 2- The ICC and Cambodia**

### **A. THE STATUS OF SIGNATURES, RATIFICATIONS AND IMPLEMENTATION OF THE ICC STATUTE IN ASIA**

**Ms. Evelyn Serrano, CICC Coordinator for Asia made a presentation on the status of signatures, ratifications and implementation of the ICC Statute in Asia.**

More than half of the world's countries have ratified the Rome Statute, since there are 97 ratifications in total.

Asia remains the continent with the least number of ratification and implementation.

In Southeast Asia there are two signatories, Thailand and the Philippines, and two ratifications, Cambodia and Timor Leste. Laos has recently signaled its intention to ratify the Rome Statute. In Cambodia, the implementation process stalled because of the 2004 delay in establishing a government. Asia has remained a challenge for the international community. It has the least number of ratifications and accessions. It is unthinkable that Asia is not part of the ICC process. The ICC and the Land Mine Convention are the two treaties to come into force fastest. In both, Asia is lagging behind. Despite tragedies in the region, there is good news about Laos, Japan announced its openness to work on the ratification process, and there have been initiatives from governments and civil societies in countries like China, Vietnam, Sri Lanka, India as well as Pakistan.

There are signs that internal conflicts in various Asian countries have taken priority with the governments concerned, which have redirected their attention from the ICC. Moreover, the US continues to exercise its power to pressure and threatens smaller countries in the region to sign BIAs. Of the 30 countries that have ratified, 20 have signed bilateral immunity agreements with the US, giving immunity to all American nationals not to be prosecuted by the ICC.

There are only 2 Asian countries which signed APIC (Mongolia and South Korea).

For Cambodia, it appears that the main problem is the total lack of knowledge and understanding about the ICC, even among lawyers. They are not very familiar with international law particularly on the newest international mechanisms for justice. CICC has started work on translation of ICC

documents (Rome Statute, etc.) into local languages. Adhoc and CDP have translated some of the ICC documents into Khmer. This has been done in almost all countries in Asia. CICC has held national workshops in all major countries, and is trying to favour the establishment of working groups and coalitions to further campaign for better understanding of the ICC in their respective regions. Before any government can ratify or implement the ICC there should be a broad understanding among civil society and government, particularly the officials and persons involved in preparation of laws, as well as judges and prosecutors. It is a challenge to convince other countries in the region that the Court will work for the protection of their own citizens.

### **B. THE US POLICY ON THE ICC**

**Ms. Sara Colm, Human Rights Watch Asia Senior Researcher, then discussed the US Policy on the ICC.**

Over the last years, the US has negotiated Bilateral Immunity Agreements (BIAs) with many countries. It has threatened to cut off military aid and other benefits to countries who ratified the RS. The US demands that any US national accused of crimes under ICC jurisdiction should be returned to US without any commitment that they be prosecuted by US courts and without any recourse if US courts fail to fulfill their responsibilities.

These BIAs lead to a two-tiered system of justice where one tier applies to US nationals, and the other applies to the citizens of the rest of the world. More than 80 countries would have signed "impunity agreements"; 1/3 of ICC States Parties have signed agreements, while 2/3 have refused to sign. In Asia the track record is not very good, 5 of 10 members of Asean have signed.

The US Secretary of State visited Cambodia in June 2003 and obtained an agreement from the Prime Minister that Cambodia would not object to exempting US nationals on its territory from prosecution by the ICC. This agreement has not yet been ratified by the National Assembly, and just last month, it was reported in the newspapers that some lawmakers would vote to reject such an agreement.

No one, regardless of nationality, should have impunity for the worst international crimes. Signing such an agreement goes

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against Cambodia's obligations to the Rome Statute. It has the obligation not to undermine the treaty, and has the obligation to ensure that the people responsible for most serious crimes under international law are brought to justice.

The widespread campaign to undermine and marginalize the ICC prevents it from becoming an effective instrument of justice. By allowing a non-state party to affect the ICC, they are opening the door to impunity, which is the reverse of what is intended under the Rome Statute.

Cambodia should take pride in being the first Southeast Asian country to have ratified the Rome Statute, should reject the BIA, and ally itself with the vast majority of states who are in favour of upholding international justice.

### **C. PROCESS OF RATIFICATION IN CAMBODIA**

**Mr. Thun Saray, President of ADHOC explained the history of the ratification process in Cambodia.**

In 2000 Cambodia signed the Rome Statute. ADHOC cooperated with the CICC to convince senior government officials, including the Secretary of State of the Ministry of Foreign Affairs to accelerate the submission of the document for ratification. At that time, a national conference was organized with the participation of the Undersecretary of State, lawmakers, Ministry of Justice and the government human rights commission. The Government gave its support to that initiative, and the CICC met with Prime Minister Hun Sen and clarified with him the wishes of the delegates. There was a delay of several months, but on 26 November 2001 the National Assembly examined the ICC Statute and on the 27th, the National Assembly ratified the text. On 7 January 2002 Chea Sim, who was acting head of state, ratified the statute. However, it took the Ministry of Foreign Affairs several months to deposit the document with the UN Secretary General. Finally on 11 April, Cambodia became one of the first sixty countries to ratify the ICC Statute, thereby allowing its entry into force.

After the entry into force of the Rome Statute, a conference in which about 20 countries participated was organised in Cambodia. A second conference was held where legal experts participated but civil society and NGOs were not invited. The most important element is that Cambodia should push other countries that have yet to ratify the Rome Statute to do so. Implementation should also be carried out. On the 27th of June 2003, after ratification, Cambodia signed an "impunity agreement" exempting American nationals involved in crimes.

Cambodia has not yet complied with its obligation to adopt a law incorporating the principles and crimes covered by the ICC as well as the modalities of cooperation with the Court. Among the 97 countries, probably 20 have adopted special laws in compliance with ICC. Cambodian government officials apparently want to integrate the ICC principles into the criminal codes, but while the draft penal code has inserted these principles, they have not been inserted into the draft criminal procedure code.

Cambodia has also not ratified the APIC nor adopted a domestic law on immunity for personnel or judges of the ICC who may come to work in Cambodia. In Cambodia, ratification can be very fast, but implementation is generally lacking.

### **D. ICC JURISDICTION**

**Mr. Stan Strygin, Professor of Law, Pannasastra University then spoke about the jurisdiction of the ICC and how it relates to Cambodia.**

Mr. Stan Strygin noted that he has received a number of questions on why the Khmer Rouge or Democratic Kampuchea cannot be prosecuted by the ICC. He explained that the Rome Statute is non-retroactive, and no individuals will be prosecuted for crimes occurring before its entry into force.

By ratifying the Rome Statute, the state fully and cognizantly commits to the statute, which in reality means that if certain admissibility requirements are met, the ICC can exercise jurisdiction of a given case.

Admissibility through ICC has a number of tests, one test has already been spoken about, that a government is unwilling/unable to genuinely carry out investigations or prosecutions. One word usually omitted is the word "genuinely" that has never been explained. The next test is that the state investigated but decided not to prosecute. If Cambodia begins investigating and then for a reason, whether political or economic, the case is officially abandoned or stalled at the national level, then the ICC can establish jurisdiction over the case. Test 3 is that the person concerned has already been tried for the same conduct. Double jeopardy is not allowed (non bis in idem principle).

With regards to unwillingness, the ICC shall consider:

1. Shielding - suspects are shielded by national legislation or judiciary, or new legislation made after commission of crimes.

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In a case where the ICC can prove that shielding is happening, the ICC can immediately establish jurisdiction and take over the case, and declare primacy over the national court.

2. Unjustified delay - If the ICC can show in a given case that at the national level there has been a delay which cannot be justified by valid reasons, then the ICC will assume jurisdiction.

3. Proceedings not independent or impartial - Inconsistent with intent to bring person concerned to justice. Of the 97 states parties who have signed/ratified, independence/impartiality might be an issue in 70-80% of those states..

4. To determine inability, the court considers whether, because of collapse or unavailability of a national judicial system a State is unable to obtain the accused or necessary evidence and testimony, or cannot carry out its proceedings. This potentially can apply to a number of other situations, e.g. states with completely demolished judicial systems. A number of states in a number of high profile cases, have been unable to obtain the accused, or unable to secure evidence or testimony. The ICC will take the liberty and will exercise its admissibility test.

Article 27 of the Rome Statute discusses irrelevance of official capacity. It indicates that regardless of the official capacity of a suspect, no immunity, pardon or clemency, national or international, will be recognized by the ICC. Once the court establishes jurisdiction over a case, and for example, a high-ranking official has been indicted, this suspect will be stripped of immunity, pardon, and/or clemency. This is very important: there will be no immunity guarantees before the ICC. The political will of a number of governments is diminished when they see how the ICC by taking over a case, and exercising jurisdiction, can strip them of their immunity and they can be prosecuted before an independent court.

A number of states have done what Cambodia has done, remained a state party but signed a BIA with the US. However, prevalence is given to Rome Statute if there is a conflict. The expulsion of states is not conducive for growth and authority of the ICC, which is why states which maintain their BIAs are still state parties .

*So Mosseny of Courtwatch from CSD opened the question and answer session by asking whether the existence of the ICC precluded the creation of ad hoc tribunals in the future?*

*He also asked whether ICC can decide on reparation for victims.*

*Mr. Starygin said there will be ad hoc tribunals, because the UN Charter says that the Security Council retains its powers under Chapter 7, which allows them to create more ad hoc tribunals*

*Sovannaly of CDP -If a state party has already signed a BIA with the US, what measures can be taken to ensure that a suspect is brought before the ICC? When can the leader of a country be arrested and prosecuted for committing international crimes? Must the ICC wait until the leader leaves power or the regime collapses? Also, if the Security Council retains its powers to create ad hoc tribunals, why do we need the ICC?*

Ms. Serrano gave the Human Rights Court created in Indonesia as an example, stating that it tried individuals responsible for invading Timor Leste and only sentenced the "small fish" to 6 years imprisonment, and shielded the perpetrators. This is one sign of inability or unwillingness on the part of a government to give justice to the victims. But in this specific example, it happened in the past, and it is not within the jurisdiction of the newly established ICC. That is why there is a need for ad hoc tribunals, despite the existence of the ICC. When the case is not within the ICC jurisdiction because of the time period the UN may decide to create an ad hoc tribunal.

The BIA is a very controversial issue. Signing a BIA exempting specific nationals from the jurisdiction of the court is a direct violation of the provisions of the Rome Statute because according to the RS, regardless of nationality or rank or position, no immunity is granted to any individual as far as the ICC is concerned. The BIAs the US are undertaking, are considered a violation of the Rome Statute by the NGO community and we urge countries that have ratified and those that have not ratified to resist signing the BIAs.

Mr. Starygin further stated that if a victim is not satisfied with the decision of the national court, the victim cannot appeal the decision to the ICC. There is no appeal from the national level to ICC level The ICC was created for high profile cases of egregious human rights violations. The crimes it covers cannot be committed just against one person, or committed just by one person, a number of people will be held responsible..

Mr. Thun Saray reiterated that crimes committed prior to 1 July 2002 cannot be brought before the ICC. In between this

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time, and even after, for example, war crimes were committed outside jurisdiction of ICC or in countries which were not members of ICC. In these cases, the UN Security Council might create ad hoc tribunals to prosecute such crimes. If the serious cases are within the jurisdiction of the ICC, and are brought to the attention of the Security Council, it may just refer the case to the ICC, rather than create a new ad hoc tribunal.

*Ouk Van Deth, LAC asked if the ICC has any mechanism to punish suspects and criminals and force them to pay compensation to victims?*

Ms. Bonneau explained that victims have the right to reparation within the Rome Statute, this is the first time in history that it is recognized. It is up to the court and not to national institutions to determine the procedures for reparation, including the Trust Fund established through Rome Statute.

## **Session 3- The Khmer Rouge Tribunal**

### **A. THE COMPOSITION AND FUNCTIONING OF THE EXTRAORDINARY CHAMBERS**

#### **Mr. Stan Starygin spoke about the composition and functioning of the Extraordinary Chambers**

The law on the tribunal was passed in 2001, and was amended in October 2004.

The Court currently has 2 chambers: the trial chamber and the Supreme Court chamber. The court was previously supposed to include an extra chamber, which was the chamber of appeals, but it was suppressed by the 2004 revision. The trial chamber will be composed of 5 judges, 3 Cambodian, including the President of the chamber and 2 international judges. The Supreme Court chamber will have 7 judges, 4 Cambodian including the President of the chamber and 3 international judges. Cambodian judges will be nominated and appointed in a different process from international judges. The Supreme Council of Magistracy (SCM) will appoint international and Cambodian judges. The SCM will appoint at least 7 Cambodian judges and will appoint international judges, from a list of at least 7 judges provided by the UN Secretary General. The SCM will appoint 5 of these international judges as sitting and 2 as reserve judges.

Decision making by the trial chamber shall require the affirmative vote of at least 4 of the 5 judges, or a super-majority. This will require the affirmative vote of at least one international judge, alongside the votes of Cambodian judges. A decision of the Supreme Court will require the affirmative vote of at least 5 judges. At least one international judge will have to cast an affirmative vote for any decision made by the Supreme Court chamber.

What constitutes a decision?

The law says that when there is no unanimity, the decision shall contain the opinions of the majority and minority. The language of the law at this point is inconclusive. If the super majority criterion isn't met, there will be no conclusive judgment, but there will be an opinion.

The Extraordinary Chambers will have two co-prosecutors and all indictments in the chambers will be the responsibility of these two co-prosecutors. One co-prosecutor will be

Cambodian, the other international. The SCM appoints the Cambodian prosecutor, while for the international prosecutor, the UN Secretary General submits a list of 2, and the SCM appoints one.

What happens if a dispute arises between co-prosecutors? The 2004 law says that in case of dispute between co-prosecutors, each of them will have 30 days to file a request for dispute resolution. If the prosecutor fails to file a request within 30 days, the prosecution goes on. If he files a request with the director of the Office of Administration, he will forward it to the trial chamber, which votes on the request. Again a super-majority is required, if that can't be achieved, then the prosecution will continue as it is. If there is an affirmative vote of 4 out of the 5 judges, then the decision is confirmed and sent over to the Office of Administration, which informs the prosecutors about the judgment of the trial chamber.

Co-investigating judges are in charge of all investigations, and will cooperate with the co-prosecutors. The dispute resolution for co-investigating judges follows the same pattern as for the prosecutors.

The trials will have to be fair and expeditious, with full respect for the rights of the accused, and will give protection to the victims.

The 2004 law on the Khmer Rouge Tribunal indicates that Cambodian law will hold primacy over international law. Cambodian law will primarily apply in the Extraordinary Chambers. If there are inconsistencies and gaps in Cambodian law, guidance will be sought in international law. However, judges will have to show the inconsistencies and gaps which prevent them from administering justice and only then can they seek guidance from international law.

### **B. THE LEGAL FRAMEWORK OF THE KHMER ROUGE TRIBUNAL**

#### **Mr. David Boyle, Charge De Mission of the FIDH then spoke about the legal framework of the Khmer Rouge Tribunal.**

The Khmer Rouge Tribunals are both legally and formally domestic Cambodian courts. They were created by the 2001 law as amended by the 2004 law, there is an international agreement regarding these trials, but that agreement does



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not create or establish the court, it simply organizes the international participation in that court. The recent report of the UN Secretary General referred to it as technical assistance.

The Khmer Rouge Tribunal is very different from other hybrid courts, such as the Sierra Leone court, created by an international agreement, and which is not part of the Sierra Leone legal system. The Cambodian solution was not the preferred solution by the UN. There has been a lot of criticism, some of it very justified, of the potential for problems with this tribunal.

There are however, some positive aspects. First, the trials will be held in Cambodia. This is positive for participation in the trials by Cambodians and is a priority solution for punishing international crimes. Another positive aspect is that Cambodian criminal procedure will be applied in these courts and all the experience gained by prosecutors, investigating judges, the victims, and the judges themselves will be of use to them in the future because they are actually applying their own procedure. Another point is that the official language of the trials is Khmer, which makes the trials more comprehensible for the local population, although this could raise some translation problems, e.g. as mentioned earlier, what is the precise meaning of the Khmer word for "decision" requiring a super majority: any finding of the Extraordinary Chambers, or just final decisions concerning guilt or innocence?

Although the Extraordinary Chambers are purely internal courts from a formal, legal point of view, in substance, it is a hybrid court. In the first place it will apply both Cambodian and international substantive criminal law. It is also hybrid because of its personnel, who will be both Cambodian and international. The decision making process before the court itself is also hybrid, as it incorporates French/European style and some common law procedures. True to the French/European style, the Tribunal is supposed to make a unanimous decision, and the decisions are not motivated. If unanimity is not possible, then the common law solution is second, with not only a super majority but also written opinions.

The dichotomy between the legal status of the court and its hybrid nature in practice has important consequences for the trials themselves. It will raise a number of practical issues. One aspect very rarely raised is the aims of justice itself. Before the hybrid tribunal there may be some conflict between what is the most important aspect of these trials. Is it supposed to establish the truth? Before a domestic court,

truth is not so much of an aim, it is a means by which a person is found guilty or not. But before an international court, saying what happened is seen as more important for the future. It is so important, that quite often it is seen that a judicial solution is not sufficient. Judicial truth is not necessarily the truth that people have suffered in their villages and lives. This is the reason why some prefer truth and reconciliation commissions. The best example is South Africa; another example is East Timor, where the government has now established a joint truth commission with Indonesia to resolve the failings of the courts in East Timor trying to deal with international crimes.

Punishment is one other obvious aim of justice. At least in theory, all people who commit crimes should be brought to justice and punished. But before international courts, this is always a selective process. It is impossible for international courts to try everyone responsible for mass crimes. Choices have been made for the hybrid court in Cambodia; according to KRT law, only senior leaders and those most responsible will be tried. This is in keeping with what's happening before other international courts, e.g. ICTY and ICTR. The major difference is that someone who is not prosecuted before the ICTR can still be prosecuted either before the ordinary courts or the traditional justice system. Because the Cambodian system is an internal court, any person not tried by the Extraordinary Chambers will have de facto immunity from prosecution because there's no other way to try people who are not tried by the Extraordinary Chambers. The court is looking at crimes committed a long time ago, and the statute of limitations for normal crimes has run. That has been changed for the common crimes, such as murder, included in the statute of this court, but as soon as the Extraordinary Chambers have finished their work, they will disappear, and the statute of limitations extension will also disappear.

To respect the rights of the accused, the accused must be tried for crimes that existed at the time they committed the acts. They resolved this for the common crimes by applying the 1956 Penal Code and extending the statute of limitations. Cambodia ratified the Genocide Convention but never adopted implementing legislation to make genocide a crime under national law. They resolved this issue by application of Art. 15 of the ICCPR, which says that you can try someone for what was a crime under national or international law at the time the crimes were committed. Genocide was quite clearly a crime under international law in 1975, and is generally seen as a customary law crime. Even in a country that has not signed the Genocide Convention, someone can be tried for it, simply by adopting a procedural law deciding where a person

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can be tried. The Khmer Rouge Tribunal law is just such a procedural law specifying that the Extraordinary Chambers have the jurisdiction to try these crimes. Crimes against humanity were never defined until the ICC statute was adopted. It is however included in the statute of the Cambodian tribunal because it was considered a customary crime under international law at the time the crimes were committed. However, this will undoubtedly be attacked by the defense in these cases.

There are also constitutional problems raised by these tribunals. Take for example pre-trial detention. Two people have been in detention for some years now, Ta Mok and Duch, and the defense will undoubtedly attack the detention as illegal. It is one reason to give for unconstitutionality of the law. It is unclear what exactly will happen at this stage. Although, in theory, the Cambodia Constitutional Council may have the power to hear constitutional issues raised before lower courts, it has never done so in practice. In addition, the relation between the Extraordinary Chambers and the Council is not dealt with in the 2004 Law. If it turns out that the Council is not able to make a ruling on constitutional questions raised before the Extraordinary Chamber, the question will have to be decided by the appeal judges of the Extraordinary Chambers, as is the case before other international criminal courts.

The case of Ieng Sary is an example of the problems that will arise before the Cambodian court. Ieng Sary has been granted a constitutionally valid pardon and immunity for certain crimes and for prosecution under the 1994 law. To what extent is this constitutionally valid amnesty and pardon applicable before the Khmer Rouge trial? This has been left to the court to decide.

All these questions will be raised by the defense, and should be dealt with beforehand in order to avoid that talented lawyers will slow trials down so much that three years will not be enough to finish. There are two possible avenues for partially resolving these issues. One would be for judges immediately after having been nominated by the SCM to get together with prosecutors and investigating judges and work out exactly what is the applicable procedure for the courts. They cannot change the law, but they can work out what the law means. The second option is for the law-makers to adopt the draft code of criminal procedure which is before the Council of Ministers at present. That would also solve the problem of judges having to look at a number of laws instead of just one, since it is the current Cambodian criminal procedure in force that will be applicable before the KRT.

**C. CIVIL SOCIETY INITIATIVES RELATED TO THE KHMER ROUGE TRIBUNAL**

**Ms. Laura McGrew, Project Consultant, Open Society Justice Initiative (OSJI), made a presentation on Civil Society initiatives related to the Khmer Rouge Tribunal.**

Ms. McGrew explained the work of OSJI, which has offices in Abuja, Budapest and New York, as well as Consultants in Phnom Penh. OSJI has five priority areas: national criminal justice; international justice (ICC, Rome Statute, Hybrid tribunals and Cambodia); freedom of information and expression; equality and citizenship; and anti-corruption.

There are many sorts of responses Civil Society can undertake in relation to the KRT, and which some NGOs have already begun. These are: coordination; monitoring (of the trials, preparations and media); knowledge-sharing (reporting, training and technical assistance); outreach; information and awareness; advocacy and lobbying; witness and victim support; evidence collection; investigations; counselling; training; legal advice; drafting and reviewing legislation and procedures; and general judicial reform.

Civil Society can have three roles. Civil society can be supportive, they can seek funds, lobby for support or help in evidence collection. It can be critical, and conduct its own investigations and lobby against the trial; or civil society can do both, or do a balance, and monitor trial proceedings, etc.

There are different types of organizations and their roles will vary. International NGOs may act more independently of the host government, but they may be influenced by head office/funders. Local NGOs may be closer to the communities. Community-based organization may be closer to grass roots. It will be most effective if international and local organizations work closely together in partnerships. Media organizations can provide news. Mental health and religious organizations can all play important roles in the tribunal.

Each organization has to plan what its priorities are and what purposes it wishes to serve. Depending on their priorities, each NGO will have a different focus or undertake different activities. If an NGO wishes to monitor, it can record the proceedings in detail with monitors present in the court. This will be for advocacy of detailed issues and for the general historical record. Civil society can also monitor more generally, by following official press releases and decisions. They can monitor court proceedings, government responses, the international community/UN and the media.

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The purpose of outreach is to disseminate information about the tribunal, before, during, after the proceedings. This is to encourage participation by public, to encourage witnesses to come forward, to promote national reconciliation, to increase long-term positive effects of tribunal on justice system and society and to point out problems if they arise. The audience will be both domestic, and international (UN, donor governments, etc.).

The purpose of advocacy is to influence Court behaviour and decisions, enter Amicus curiae briefs into the official record, and influence external parties. NGOs can also lobby on particular issues such as: national legislation; for funding; witness support; judicial appointments.

An important issue that civil society may be very helpful in is victim and witness protection. This should take place from the pre-trial stage and during investigations. Civil society can be present at first contact, during interviews (NGOs can provide the location, safe houses, outside the village or in an NGO office), and can act as intermediaries between the witness and the court. During and after trial, protection is necessary. NGOs can assist in counselling witnesses, helping in their resettlement and in monitoring any threats against witnesses.

The Khmer Rouge Trial Law and the Agreement between the Royal Government of Cambodia and the UN contain articles related to civil society. The Khmer Rouge Trial Law provides in Article 23 that non-governmental organizations may provide information to the co-investigating judges. Article 34 says that trials shall be public. Article 44 says that NGOs may contribute funds to the Extraordinary Chambers. The Agreement between the Government and UN specifies that non-governmental organizations have access at all times to the proceedings before the Extraordinary Chambers.

Some NGO activities are already underway; others are awaiting funding; others are still in the planning stage, and some are only being discussed.

Organizations which have primary focus on the Khmer Rouge Tribunal include the Documentation Center of Cambodia (DC Cam), which does evidence collection, documentation, affinity group, forensics, genocide education, legal training, living documents, information - magazine/radio, mapping, promoting accountability, public information room. The OSJI does coordination, technical assistance, outreach, advocacy, monitoring and organizes meetings on planning, legal issues, outreach. It provides technical assistance by organising training visits on prosecution, information management,

judicial standards, security, victim and witness protection. It also does outreach and advocacy/monitoring

Human Rights Watch, Amnesty International, ADHOC, LICADHO, CDP, LAC, the Cambodian Human Rights Action Committee (CHRAC) and the International Working Group on the Extraordinary Chambers are some human rights organizations which plan to do long-term monitoring of the Khmer Rouge Tribunal process.

ADHOC will do monitoring, outreach, advocacy, training, legal review, victim/witness support. The Khmer Youth Association (KYA) is planning on monitoring. LICADHO will do Advocacy, monitoring, outreach, training, documentation, information, victim/witness protection, while the Cambodian Human Rights Action Committee (CHRAC) will work on coordination, monitoring, training, outreach, and information sharing.

Legal assistance groups such as the Cambodian Defenders Project (CDP) will do monitoring, advocacy, training, legal advice, drafting and reviewing legislation and procedures, documentation. Legal Aid of Cambodia (LAC) will conduct activities related to monitoring, advocacy, training, legal service and drafting.

The Khmer Institute of Democracy (KID) is doing outreach/information/awareness, research, monitoring, and training. Open Forum is working on outreach, specifically a Web Portal. The Center for Social Development (CSD) has a Courtwatch project which does court monitoring, and does outreach, by holding public forum on Khmer Rouge issues.

Mental Health Organizations like the Social Services of Cambodia (SSC) and the Transcultural Psychosocial Organization (TPO) are planning projects on outreach/information sharing, counselling treatment and emotional support. Silaka will do advocacy, and may do counselling, training, outreach projects. The Jesuit Refugee Services (JRS) may do outreach, advocacy, counselling activities. NGO Forum is planning on working on advocacy.

Media organizations also have ongoing or planned activities. The Women's Media Centre (WMC) does radio shows, in relation to Outreach/Information/Awareness. Internews may do journalist training, outreach, and open a public information room. The Indochina Media Memorial Foundation (IMMF) may do journalist training. The Media Consulting and Development (MCD) has a Khmer Rouge clipping service and may do journalist training, and outreach. There are many other organizations that will become involved if/when the KRT begins.

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Civil Society has the following goals for the Khmer Rouge Tribunals. They would like to find out the truth; ensure access to justice, draw attention to the broader picture of Legal/Judicial Reform; hope it acts as a deterrent to future leaders; relieve Khmer Rouge-related Trauma and decrease impunity in the future.

Civil society also has many concerns. It is worried about the independence and competence of judges, including the appointment of support staff.

### **D. CIVIL SOCIETY ASPIRATIONS FOR THE TRIBUNAL**

#### **Mr. Sok Sam Oeun, Executive Director, Cambodia Defenders Project (CDP) elaborated on civil society aspirations for the Tribunal.**

The goal is not just to bring elderly Khmer Rouge leaders to trial. He identified 5 goals.

1. To seek justice for the victims and those who died. They must have access to justice
2. To learn why those in power killed so many people.
3. If the tribunal is good and fair, it should serve as a signal to future leaders not to follow the path of Pol Pot. If leaders commit any wrong, they must be held accountable for crimes they have committed.
4. The judges, prosecutors and leaders should learn from the Tribunal and it can be used as a model for judicial reform in Cambodia at a later stage.
5. To relieve trauma from the Khmer Rouge regime.

If these five goals are reached, then the possible future outcome is that Cambodia will properly apply the laws and there will be more justice.

Civil society hopes that there will be independent, proper, thorough investigations, and that all the major perpetrators will be brought to justice, and not merely a few political scapegoats. The court should apply international standards. Information should reach the ordinary people, so their trauma can be relieved, and the proceedings must be publicized and televised throughout the country.

Civil society is worried about the selection of judges. There have been recommendations made to government, and it is hoped that the selection process will be more broad and open, to select competent Cambodian who may not be currently sitting on the bench. Another worry is that the Khmer Rouge Tribunal is required to apply the laws in force, which are

not always good laws. Last, current ambiguities in the procedure to be used by the Tribunal could cause innumerable delays, and the Khmer Rouge leaders may die before the trials are completed.

The following suggestions were proposed: recruitment of judges should be agreed upon by both the UN and the Government; the process of recruiting Cambodian judges should be more open; and all judges should agree on special rules of the tribunal prior to its becoming operational and finally, the UN must assist the Cambodian police who are tasked with protecting witnesses.

*The question and answer session opened with three queries from Ping Muntheng, program officer from KID.*

1. *Please clarify the difference between crime against humanity and genocide.*
2. *We know there will be loopholes in the law, and as we have the ICC statute, can we apply the ICC statute as a whole or only take parts of it to fill gaps?*
3. *We will have to apply international law to fill the many gaps in Cambodian law. What happens if these international standards go against good Khmer traditions?*

Mr. Starygin noted that genocide is very specific as defined in the 1948 convention and has the following elements: the act of targeting a specific group; and/or the proven intent to exterminate certain groups. To prove that someone committed or conspired to commit genocide you have to prove that this individual participated in an act targeting a specific group (national, ethnic or religious) and there was specific intent to exterminate this group.

Mr. Boyle added that genocide is a specific and particularly serious form of crime against humanity. While the basic acts constituting both crimes are similar, what distinguishes the two is the special intent in genocide to destroy a particular group. For example, the ICTY had to decide whether ethnic cleansing was a crime of genocide or a crime against humanity. In Yugoslavia people were raped, tortured, killed and chased from their homes, and thus it could be either crime. But what was the intent of the people who committed or ordered the commission of such crimes? Was the intention to chase them out of the country so that Serbia would be ethnically pure, or was the intent to destroy Bosnians and Croats? If the intent was the first, then the acts were crimes against humanity. If the intent was the second, then the acts were genocide. In the safe-haven of Srebrenica, it was found that there was no way for the persons to escape, so the intention was not to chase them out, but to destroy them, so the ICTY decided it was genocide.

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Dr. Lao Mong Hay noted that when the Khmer Rouge chased people out of towns, it would be considered a crime against humanity. It would be up to the Court to decide if it was genocide, but it would be difficult to prove.

Mr. Sok Sam Ouen answered the second question by saying that the Memorandum of Understanding recognized that Cambodian Law must be applied, but the Cambodian law must meet international standards. Any gaps in national law or provisions contrary to international standards would be filled by international law. In the Memorandum of Understanding there was confusion between international law and a law adopted which met international standards. The ICC is not international law, it is one which meets international standards. Defense lawyers are likely to argue that Cambodian law does not meet international standards. Then the trial will be delayed, as the chambers will have to find the appropriate international law. Special rules must be discussed and created prior to the operations of the tribunal.

Mr. Starygin said that the ICC has little or nothing to do with Khmer Rouge Tribunal. Becoming a signatory to the Rome Statute is not a prerequisite to having the Khmer Rouge Tribunal. However, some of the tenets of international law incorporated into the Rome Statute can potentially influence and benefit the functioning of the Khmer Rouge Tribunal.

Mr. Boyle further added that the ICC Statute cannot be incorporated completely, but some parts of it can be used. For example, in disciplinary actions involving a question whether a judge is independent. This is an issue likely to be raised by the defense lawyers. As Cambodian law is applicable, this would mean that the issue would be raised before the SCM, which would again be likely to be attacked by the defense. However, the ICC statute simply decides this issue through an absolute majority vote of judges. All the judges get together to discuss the issue, without the participation of the judge whose impartiality is being questioned, and the other judges decide whether he is independent or has a conflict of interest.

Dr. Lao Mong Hay asked about the non-retroactivity of criminal law. Can the ICC rule be applied to the Khmer Rouge Tribunal?

Mr. Boyle responded by saying that subsequent procedural laws are not forbidden by the principle of non-retroactivity, but only substantive legislation defining crimes.

## **Session 4- Victims Rights: Building on the ICC Statute**

### **A. VICTIMS' EXPECTATIONS FROM THE KHMER ROUGE TRIBUNAL**

#### **Mr. Vanthan Dara, DC CAM Outreach Deputy Director spoke about victims' expectations from the Khmer Rouge Tribunal.**

During the Khmer Rouge regime, more than 2 million people died from 1975-1979. The figures of the dead or those who were killed are still in dispute; some Khmer Rouge scholars estimate 1.7 million of the population died, but DC Cam has been mapping grave sites and according to statistics of the Royal Government of Cambodia, more than 3 million people died.

Since 1979 until today, the victims of the Khmer Rouge regime have not been rendered justice. In 1977 the Royal Government of Cambodia appealed to the UN to support the establishment of the Khmer Rouge Tribunal and at present they have reached an agreement on the establishment of the Extraordinary Chambers to prosecute the Khmer Rouge leaders. The Government adopted the Khmer Rouge law, and amendments have been made. So the question is then what are the real expectations of the victims?

Under the Rome Statute of the ICC, the victims are protected and enjoy many rights, including the right to participate directly or indirectly through their representatives and the right to reparation/restitution. The agreement between the UN and the Royal Government of Cambodia as well as the law for the prosecution of Crimes Committed during the Period of Democratic Kampuchea, contain no article on the rights of witnesses or victims, except Art. 43 of the agreement, which mentions protection. It is a concern that when witnesses come to provide testimony before the court, there can be problem of reprisals, there can be harassment afterward. But the Khmer Rouge Tribunal law doesn't mention the rights of victims, more the rights of the accused.

KID, CSD and DC Cam conducted a survey of the general public regarding the Khmer Rouge Tribunal. According to the survey, majority of citizens were victims of the Khmer Rouge regime. Most responded that they want to have a tribunal prosecuting Khmer Rouge leaders. However, the issue of compensation and reparation has not been addressed.

There is also a lack of information about the tribunal in remote villages. They think that maybe all those responsible

for crimes will be prosecuted. Information related to the Khmer Rouge Tribunal and the ICC should be broadly disseminated so that people will be aware of these courts. It would benefit Cambodian people who will be able to participate in the tribunal the more they are aware of or understand it. Then the court will be effective and come up with acceptable decisions.

### **B. VICTIMS RIGHTS BEFORE THE ICC**

#### **Ms. Karine Bonneau then spoke about victims' rights before the ICC.**

She explained that the role of victims before the ICC is a historic progress. It is much stronger than anything before. This came about due to the experience and practice of the ICTY and ICTR, the development of international law and the crucial role of NGOs in lobbying for victims' rights.

Before ICTY and ICTR, victims really didn't have any rights as victims. They were limited to the role of witnesses, there was no right to participate in the proceedings and they couldn't claim reparation. There were many instances of victims who were re-traumatized by the process. It was essential to involve them to contribute to the process of reconciliation. The lack of provisions on the right to reparation caused a lot of frustration, because it was clear there was no way to get reparation from the national courts.

There is now recognition that international justice is not just punishing criminals, but assisting the victims. The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, in 1985 set out a good framework for victims rights in international proceedings.

- Victims should be treated with compassion and dignity.
- Their views should be considered at appropriate stages of proceedings.
- Victims should be provided with proper assistance throughout the legal process.
- Measures should be taken to ensure their safety from intimidation.
- Procedures should be put in place to ensure that victims have access to restitution, compensation and medical, psychological and social assistance.

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The right to reparation for victims has been subsequently dealt with in more detail by the draft *Principles and Guidelines on the right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights and Serious Violations of Humanitarian Law*. It includes 5 components: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. The right to restitution involves goods, properties and also rights, including the right to live with one's family. The right to compensation means monetary compensation for material and physical damage, and lost opportunities and earnings. For example, someone imprisoned many years who couldn't finish studies will receive compensation. The right to rehabilitation is the cost of medical, psychological, social and legal services that victims might and should receive. The right to satisfaction means more a symbolic reparation, and could mean commemoration, memorials, revelation of the truth and ensuring that perpetrators will be punished. The guarantees of non-repetition means changing law so that this violation does not happen again.

These definitions were the basis for the provisions in the Rome Statute. These created a new system of law, a mixture of civil and common law. The Rome Statute recognized the right of victims to participate in all stages of the proceedings. Victims can ask the prosecutor to open an investigation by sending information and a communication. Victims may participate and be represented at all stages of the proceedings, in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. The Statute has equally made it possible for the Court to order reparation to victims, including restitution, compensation and rehabilitation. The Trust Fund for Victims has been established to operate side by side with the Court. Finally, victims and witnesses have the right to be protected by the Court.

According to Rule 85 of the Rules of Procedure and Evidence, victims are individuals who have suffered harm as a result of crime falling under the jurisdiction of the Court. Where property dedicated to religion, education, art, health, science, and charitable purpose is harmed, an institution may also be considered a victim. It will be up to the Judges to decide in each case who is a victim in accordance with the definition.

The Victims and Witnesses Unit, under the responsibility of the Registrar, is in charge of the protection and support for victims and witnesses. This Section advises all organs of the Court on protective measures, security measures, counseling, and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk of testimony given by such witnesses. This Section facilitates their participation in the

proceedings in the Hague; it has also engaged in training for the other organs of the Court in issues of trauma, sexual violence, security and confidentiality; and that section is represented in the field offices of the ICC. As protection is confidential, it is difficult to know exactly what measures are taken in each case.

Article 68 defines the rights of a victim to participate in the proceedings. A victim may submit observations to the Court where the admissibility of the case is challenged; provide observations where the Prosecutor decides not to investigate or prosecute following a State referral; provide observations when the Pre-Trial Chamber confirms the charges being brought against the accused; and participate in trial and question witnesses, the accused and experts.

Proceedings will only be successful if victims are provided quality legal representation. Victims are free to choose their legal representative. In cases where there are a large number of victims, the relevant Chamber may ask victims to choose a shared legal representative. The Registrar may provide a list of legal representatives and help the victims choose one with due respect to their interests. Victims may also receive financial assistance from the registry. The Chamber will decide on the modalities of such legal representation.

Participation of victims will be effective under two conditions: that they are well-informed of their right to participate, and that they are adequately represented. The Victims Participation and Reparation Section within the Registry, is in charge of designing and implementing public information and outreach campaigns to victims; processing applications for participation and reparation; and organizing legal representation for victims. This Section produced a standard form to make it easier for victims to file their petition and is drafting an informative booklet for victims.

The Court set up the Public Counsel Office for Victims. It is filled with "in house lawyers" available at the earliest stage, mostly to assist the legal representatives, but also to represent victims on some specific issues.

However, expectations are very high and many constraints exist. Few victims from Northern Uganda and Ituri know about the ICC and their right to participate. Few will have access to the standard form for participation if not distributed by NGOs. Few will be able to fill up such a form, as it is very technical and it only exists in French and English. Meetings between NGOs and the ICC are taking place on that specific issue at the Court. But the approach of the ICC seems to be dangerously unrealistic: if a collaboration has to be found, it

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is unreasonable to rely only on NGOs to have access to the victims, help them to understand the form, fill up the form and send it back to the Hague.

Article 75 of the Rome Statute and Rules 94-98 of the Rules of Procedure and Evidence enable victims to ask for reparation. Either upon request or on its own motion, the Court may determine the scope and extent of any damage, loss and injury to, or in respect of victims. The definition of reparation includes the right to live with family, reparation of goods, for legal and social and medical services, compensation for physical harm.

The Court may make an award for reparation directly against the convicted person on an individualized basis or when appropriate, on a collective basis. In most of the cases brought before the Court, collective reparation might be more adequate, as it will have a stronger impact on the injured community.

The Court may order that the award for reparations be made through the Trust Fund, in particular where the number of the victims and the scope of reparations make a collective award more appropriate.

The Assembly of States Parties established a Trust Fund for Victims in September 2002. The Trust Fund is an independent organ which receives funds through fines, forfeitures, freezing of assets, awards of reparation ordered by the Court against a convicted persons, and through voluntary contributions. It implements the Court's reparation awards and its capacity to receive voluntary contributions will provide the Fund with the means to further assist victims in need. Its draft regulations still need to be approved at the next session of the Assembly of States Parties, and then it might be entirely operational.

It is very important that States provide in their implementing legislation, adequate provisions on victims issues, and on reparation, as requested by the Rome Statute, to strengthen victims' rights at the national and international levels.

### **C. VICTIMS RIGHTS UNDER CAMBODIAN LAW AND BEFORE THE KHMER ROUGE TRIBUNAL**

#### **Mr. David Boyle, Charge De Mission FIDH spoke on victims' rights under Cambodian law and before the Khmer Rouge Tribunal.**

Unfortunately, the Khmer Rouge Tribunal law, adopted in 2001 and amended in 2004 does not specifically recognize

victims' rights either to participate or to receive protection except to the extent that they are also witnesses.

Because there is no general reference to victims rights in the law, some argue that the Extraordinary Chambers have purely criminal jurisdiction and cannot include victims' participation, as this is a civil matter. There are a number of reasons to consider that this may not necessarily be the case.

Art. 36 of the law states that appeals from the lower chamber to the appeal court may be made by the accused, the victims or the co-prosecutor. It is difficult to understand how victims could appeal a decision if they aren't parties. It would be a serious violation of the rights of the accused if people who weren't parties to the proceedings were allowed to appeal. This provision was confirmed in 2004, and tends to suggest that victims' rights are recognized.

Another argument which complements this is based on the exact terms used in Arts. 20 and 23, that the procedure applied will be the existing procedures in force in Cambodia. Most if not all of the existing criminal procedure and criminal laws recognize the rights of victims to participate in criminal proceedings as civil parties. This civil party system that comes from the French system is part and parcel of all criminal proceedings.

Under Cambodian law, criminal courts also have civil jurisdiction. The ICC is in itself a purely criminal court, but the ICC recognizes a certain amount of participation and also allows for reparation, which doesn't change it into non-criminal court. At least in theory victims have the right to participate in the Khmer Rouge Tribunal in the same way as they have the possibility to be joined in as civil parties in any criminal case in Cambodia.

Under the French-inspired system adopted in Cambodia there are two separate aspects of civil party proceedings which need to be distinguished: the rights of victims before criminal investigation begins; and their rights during proceedings.

Victims can always make complaints to police or judicial authorities but in most systems, it is at the discretion of the prosecutor to decide whether to investigate a complaint. In some countries, like France, the simple fact of making a complaint and asking to be joined as civil party forces the investigating judge to investigate. It is not the case in Cambodia. Before procedures begin, the victims have the right to file a claim, but cannot force the prosecutor or the investigating judge to investigate.



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This is of extreme importance given the jurisdiction of the Khmer Rouge Tribunal. One aspect is the culpability of those who are the most responsible. It is fairly clear who are the former leaders of the Democratic Kampuchea, but victims may be able to identify a person in one particular region or a specific set of acts that went beyond everything else and were therefore more responsible than the others. Unfortunately under this system, that evidence could be presented by victims, but they cannot force the prosecutor to prosecute.

The most important aspect is that by being joined, people are asking for reparation of damages suffered. A victim of a simple crime in Cambodia has the individual right to reparation for damages suffered. However, given the scale of the loss suffered under the Khmer Rouge regime, and the small number of people who will be tried, however rich they may be, they would never be able to satisfy the demands of everybody for reparation for such an enormous loss.

Another advantage of being a civil party is access to the file. In criminal cases, it is only at trial that information becomes public. During investigations, little or no information is available to the victims about what is happening, unless they are joined as civil parties, which means that they'll have access to file and will have information about what is happening.

There are, however, disadvantages. As has been shown by DC CAM surveys, 90% or more of the current population of Cambodia may be defined as victims under ICC rules. Even if only 1% ask to be joined individually as civil parties, this could totally block the proceedings. This happened in Ethiopia; but as the court in that case was not subject to a 3-year time limit, it was able to look into all civil party claims before starting its investigations. One possible solution is the formation of associations representing victims which can make claims on their behalf. All victims of Phnom Penh or S-21 etc could group together in an association and make a single claim. This is not clearly provided for as such in Cambodian law that associations can be civil parties, but it is one avenue of compromise possible.

While one penalty provided for in the Khmer Rouge law is confiscation of all illegal gains from those persons found guilty, the law specifies that any such property will be returned to the state. Therefore, any money they have theoretically will go to the state. The Cambodian government thus has an important role to play in satisfying the victims' right to appropriate forms of reparation, which would probably be more symbolic than monetary and could take a number of forms.

*Two questions were accepted from the participants. Ping Bunheng from KID asked Ms. Bonneau whether there would be any protection during the trial and how and who would be responsible for the budget for protection of witnesses and victims.*

Ms. Bonneau informed the participants that the ICC Budget is adopted every year by the ASP. The court presents what it wants included in the budget and the states decide on the request. Victims and Witnesses may benefit for protective measures at the seat of the Court like the modification of voice, identity, the use of pseudonyms for victims who participate as such, etc. When witnesses and victims return to their countries, the ICC has to make sure that there are no reprisals against them. The ICC has a program of re-installation of witnesses, and the court must keep in touch with them. If they are still in danger, the court has the jurisdiction to ensure they escape to another country. Witnesses are approached by investigators who ask them if they have faced any problems since their return. If there are problems, then there is the possibility to take victims away from the region. The ICC also has special agreements with other states.

*Van Chearatha asked about the impact of the Extraordinary Chambers on those who were former Khmer Rouge senior leaders and who are currently in the government?*

Mr. Vanthann Dara answered that last year, there was a conference, and Star Kampuchea also published a book which identified 7 persons who will be prosecuted, and no current senior government leaders were implicated.

Mr. Boyle added that as has been pointed out, there may be a problem of immunity. While the ICC does not recognize any immunities regardless of position of person involved, the Cambodian Constitution provides immunity for current or actual leaders of government. This problem of whether international principles or the Cambodian Constitution will apply will have to be decided by the judges in the case.

Tara Gutman noted that she believes the only persons with immunity under the law from prosecution in the Khmer Rouge trials, are the current and previous King and his wife. In her view there is no evidence to suggest that any current government officials were senior leaders of the Khmer Rouge. However, if they were, they would not be immune from prosecution. Their only immunity is for acts committed as part of their membership in the current government. As for Steve Hedder's book, 7 Candidates for Prosecution, that is by no

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means a definitive list of who will be tried; it is a researcher's view of available evidence and prosecutions it may lead to. If indeed there is evidence, then there is no reason why they couldn't be prosecuted. To conclude, a lot of research, mostly at DC Cam has shown that there is no hard evidence against Hun Sen, who was a junior member of the Khmer Rouge, or Hor Nam Hong.

Dr. Lao Mong Hay closed the conference. He first appealed to all participants to return the following day and participate in the round table discussions, especially as there was not enough time to receive questions in the afternoon. He then presented a summary of the afternoon's discussions noting that the tribunal prosecuting Khmer Rouge leaders is very important for Cambodian history. Cambodian people have struggled for almost 7-8 years to get the tribunal in place. 17 April 2005 will mark the 30th anniversary of the Khmer Rouge genocide. He thanked all the panelists, organizers, interpreters and participants.

### **Group Discussions and Initial Recommendations**

The second day of the Conference was devoted to discussion in smaller groups. About 30 persons participated in the round table discussions. The participants were divided into two groups. Mr. David Boyle and Ms. Evelyn Serrano facilitated the first group, while Ms. Karine Bonneau and Ms. Laura McGrew facilitated the second group. The discussions became question and answer sessions, as participant's knowledge was not equal, and some needed more basic information on both the ICC and the Khmer Rouge Tribunal. At the end of the discussions, the groups presented their recommendations.

The objective of the roundtables was to discuss more in-depth the notions presented during the first day of the conference, and to suggest possible recommendations to various actors concerned.

### **Group I**

The first issue raised by the group was reparation. One person asked if victims could claim for reparation through ordinary Cambodian courts if Khmer Rouge leaders are found guilty by the Khmer Rouge Tribunal. It was responded that for crimes under Cambodian law, there would be difficulties because of the statute of limitations, as the Khmer Rouge crimes were committed between 1975-1979, and the period to prosecute was extended to 35 years to allow prosecution only before the Khmer Rouge Tribunal. However, it might be possible for the international crimes which have no statute of limitations. She

pointed out though, that the reason for having the special Khmer Rouge Tribunal was because the Cambodian courts were not strong enough to handle the prosecutions on their own.

David Boyle said the statute of limitations is different for criminal and civil actions. In addition, it would be difficult to go from the Khmer Rouge Tribunal to another court, since victims must choose whether to be joined as civil parties to the criminal proceedings or to take separate action before the civil courts. But if some victims do not believe in the Extraordinary Chambers, they can always try a civil action straightaway and see what happens? Even if it were possible to start a case before the civil courts for the Khmer Rouge Tribunal, the question of the running of the statute of limitations would be raised, as civil courts do not have jurisdiction over international crimes. However, in many other countries formerly under authoritarian rule, or where armed conflicts occurred, even when statutes of limitations have already run, the courts have sometimes accepted civil party claims because they believed there is no statute of limitations if the crime is said to be "continuous". An example would be disappearance cases in Latin America. The court said that for those who wanted to make a claim against the state for the death of their relative, the statute of limitations would not run until they found the body of their relatives.

A representative from ADHOC said he understood that compensation was only theoretical. If 3 million survivors file for reparation, who would be able to pay the compensation? The Khmer Rouge law doesn't stipulate reparation, but if it did and the court orders the accused to pay compensation, and the accused cannot pay, this would affect the credibility of the court. A civil society representative said she researched about truth commission in South Africa and the victims had access to compensation both from the convicted perpetrators and partly from government.

It was reported that there's only a small possibility for reparation. Ieng Sary reportedly received 1 billion dollars through Singapore, according to the biography of Lee Kwan Yu, over a 10-year period after the downfall of the Khmer Rouge. If we find this money, it can be used for reparation. It's likely the money was spent on arms, or is so far away that it won't be found. Under the law, any illegally gained profits will be confiscated, property or money, but returned to government, then government decides what to do. If the court then decided to make an award to a particular victim or group, how would you access or find that money? Unless there is a very elaborate international tracing operation, not likely that there will be large sums of money uncovered.

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David Boyle added that the law in South Africa provided for state help with reparations. That is not the case in this law. Apparently, confiscation of property from accused persons is a very old tradition in Cambodia. Once a state confiscates an accused property, who gets the first share? In the new draft code which hasn't been adopted yet, it says that confiscation cannot be done if it affects the rights of third parties. It would seem to indicate that victims get reparation first, then the state gets the rest. The question is what do you want the state to do with it.

Evelyn Serrano talked about the experience in the Philippines, which would apply to Cambodia and other countries where victims seek compensation/reparation. This always involves good will and political will of the government to give justice to the victims and on the other side, the strength of civil society or victims themselves, their determination to really get justice for the wrong that has been done to them. For example, Philippine human rights victims successfully sued the Marcoses, found out where the money was, and got it returned to the Philippines, but still did not receive compensation.

The second issue raised by the group was witness protection. A civil society representative asked what is the best strategy to encourage witnesses and victims to participate in the Khmer Rouge tribunal, because they're living in fear and don't want to speak out? A civil society representative said that the Khmer Rouge Tribunal should be able to reassure witnesses that they would be protected, and there should be protection mechanisms.

Tara Gutman explained that there is a witness protection unit, but it is very general at this point and is in the planning stage. She said that not every witness is going to be useful to the court. The prosecution needs evidence linking senior leaders to crimes they are accused of committing. The unit will be jointly staffed by UN and Cambodian staff, but it is up to the Cambodian police to provide security. Tara said she was surprised to hear the comment that people are living in fear, as all other surveys and research seem to suggest that the Khmer Rouge do not pose any threat.

A civil society representative said that he did 2 surveys, one in Koh Sla, a former Khmer Rouge area, with former Khmer Rouge still living there. The other survey was in Kampong Cham. Both groups said that if they appear in court, it might affect someone in government and that they are living in fear, because it will affect those in the Royal Government of Cambodia, so they don't want to speak out.

A civil society representative said that the victims of Khmer Rouge regime had no power during the regime, and until now are still victims and still don't have power. Those who really committed the crimes were in power during the Khmer Rouge regime and are still in power now, and therefore people are living in fear, and don't want to talk about the Khmer Rouge.

A civil society representative said his neighbor was a former Khmer Rouge cadre and is now a high-ranking military commander. That is why there is fear. The issue of reparation is very important, because in criminal cases, we cannot apply the principle of an eye for an eye; if someone was killed, we cannot kill the accused. Compensation is something to help the victim live in peace, because his/her loved one was killed. It is only compensation that can lure him/her to live in peace. Can justice be revealed because a majority of the judges are Cambodian?

David Boyle distinguished the problem of victims from that of witnesses. Victims who participate in the court as civil parties would be involved in a fairly minor way, and wouldn't necessarily be standing before the court, they would be represented by a lawyer. But if victims worried about becoming civil parties lose any chance of reparation because of fear, a possibility is the creation of an association of victims. A victim becomes a member and the association looks after the victim's rights and asks for compensation in his/her name. In Cambodia that system doesn't exist though the draft procedural code says any association that has been in existence for a while can make claims in the name of victims. For witnesses, this is a weakness in the Khmer Rouge Tribunal law, compared to all the other international hybrid courts. People who are likely to be witnesses and give evidence about senior leaders or regional cadre military commanders are probably also Khmer Rouge themselves. So, it may be less of a problem than thought.

A civil society representative noted that one goal is to seek the truth. If Khmer Rouge senior leaders appear before the tribunal and know they will be convicted, and know they have committed the crimes, then they will remain silent. The truth that civil society wants to dig out will not be revealed. The former Khmer Rouge say they are also victims of the regime. Who is a victim? Some people say they don't care about senior leaders. They say they don't know Pol Pot, they only know the ones who killed their family. Why not convict the one who killed their family, if Pol Pot or senior leaders get convicted, it won't affect them. It's better to have a truth commission.

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A civil society representative said that if we want to close the door on the culture of impunity in Cambodia and we only prosecute the most senior Khmer Rouge leaders, what about those in lower ranks who did not receive any orders for the crime they committed? Then the culture of impunity cannot be stopped.

### **Group II**

The first issue raised was the prosecution of current government officials who were former Khmer Rouge. Laura McGrew answered that nothing in the law prohibits a current leader being tried, even a senior leader in the government today, if there is evidence. However various researchers have not found current officials to either be the most senior or the most responsible. The final answer is that the prosecutor and the evidence will decide if anyone in present government will be tried.

A participant reminded the group of the official stance of King Sihanouk, who doesn't believe justice will be given to victims in KRT. One reason is that only a few will be prosecuted. The second is that he does not believe the Khmer Rouge Tribunal will be in a position to answer questions about who removed his parents from the Bang Trabeich camp where they were kept between 1975 - 1978 and who ordered their killing. He said that at the time, it was believed that the chief of camp, Hor Nam Hong, is the one who gave the orders. However, Hor Nam Hong won two trials, first against Sihanouk in 1999 when a French court turned down Sihanouk's accusation because no witnesses appeared at the trial in Paris and second against the Cambodia Daily, as no witness came to the trial when called. How will the Khmer Rouge Tribunal provide protection for witnesses?

Laura McGrew said that victim and witness protection is a big problem. Karine Bonneau added that even before the ICC the main issue is protection of victims. In the ICC, there is a unit working on protection of victims and witnesses. This unit provides counselling, training, medical assistance for those who go before the judges. Someone from the court will meet with the witness and provide a cover story to explain their being away. Witnesses will always be with someone from the court to make sure they are ok and able to give testimonies. The name of the victim will not be made known to the public. They can also take steps to change the voice and face, during the trial.

Someone said that while the ICC can change the voice, face, hide the name of victim or witness, in Cambodia we don't

have the technology or ability to do this. There is a need to draft a law and procedure for the Tribunal to cover these issues.

A participant raised problems with the lack of a criminal law and procedure, and detailed the current status of the law.

Karine Bonneau clarified that a witness identify is always verified, but that s/he can use pseudonyms. The accused can know the real identity and name and is prohibited from disclosing the identity of the witness. Nobody else can know. The lawyer of the accused, prosecutor and some judges will know as well. There is a provision to reveal the identity to protect the right of the accused to a fair trial and know his accuser. If the accused does not respect the prohibition and reveals the identity of the witness, the judge can take action against the accused for doing so.

Laura McGrew stated that these issues have been discussed for a while, and these protection measures (name, face, voice disguised) are being planned. A document has already been produced listing all these protections, and lobbying on these points. Dr. Kek Galabru said that while this is good, there is a need to disseminate more information. Everyone in Cambodia should know they can be protected and encouraged to testify. If they are not encouraged, they will not come.

Civil society representatives were more worried with the fundamental fairness of the trial.

A civil society representative raised concerns about witness protection because all the people in this country are victims and witnesses. But because only a few senior people are being prosecuted, witnesses should be the people who are aware and worked closely with those people. Without witnesses, the Tribunal is nonsense. He especially emphasised post-trial security.

A civil society representative specified that KID interviewed 536 persons in 10 provinces and Phnom Penh. 56.6% want to be witnesses in the Tribunal but 71.2% worry about their personal security. A countrywide survey should be conducted on this issue.

## **Recommendations**

### **RECOMMENDATIONS of FIDH, ADHOC and LICADHO CONCERNING THE KHMER ROUGE TRIBUNAL AND ITS ARTICULATION WITH THE INTERNATIONAL CRIMINAL COURT**

Those recommendations are based on the discussions during the two days conference as well as various meetings with the authorities and representatives of civil society.

The first set of recommendations concerns the Khmer Rouge Tribunal (KRT) while the second set regards the International Criminal Court.

#### **1. The Extraordinary Chambers for Democratic Kampuchea (KRT)**

Considering the importance of judging international crimes committed by the Khmer Rouges between 1975 and 1979

Considering that recent polls carried out by Cambodian NGOs showing that the overwhelming majority of the Cambodian population wish to see the authors of those crimes prosecuted

Considering that the UN and the government of Cambodia signed an Agreement in regulating the international involvement in the KRT

Considering that the National Assembly adopted domestic legislation establishing the KRT in 2001, revised in 2004

Considering that the UN SG made clear that the process of setting up the KRT can only be initiated once the full budget for all three years has been pledged and the first year is in the bank account

Considering that a donors conference took place on 28 March 2005

Considering that a number of international donors already pledged to support the KRT with close to the full amount of fund pledged

Considering that the majority of the Khmer Rouges senior leaders are aging and that there is consequently urgency to try them

Considering that civil society organisations raise serious concerns regarding the independence and impartiality of judges and other personnel of the future KRT

Considering that many Cambodian and international NGOs working in different fields have adopted varying but largely complementary strategies in view of the establishment of the KRT

Considering that other NGOs are still considering what their approach should be with regard to the KRT

Hoping that free and fair trials by the KRT will lead to better administration of criminal justice in Cambodia

**Articulation between the International Criminal Court and the Khmer Rouge Tribunal:  
The Place of Victims**

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**Recommendations to the Royal Cambodian Government**

On the appointment of judges and other staff

- To ensure that the judges will be individuals of integrity and ability with appropriate training or qualifications in law and that candidates be selected through an open and fair appointment process (and other criteria as per CHRAC petition of 7 April 2004)
- To make public the current list of judges and prosecutors that might be appointed at the KRT and allow review by civil society
- To select prosecutors and other court staff in the same fair, independent and transparent way as the appointment of judges, and with appropriate criteria for each position
- To reform the Supreme Council of the Magistracy to ensure that the appointment process for judges, prosecutors and staff follow the above criteria

On witnesses and victims

- To consider the victim's role before the KRT
  - a. Which victims (of all the many) will be allowed to participate, and who will represent them?
  - b. Who will provide legal advice to the victims before the trial begins?, A group of lawyers should be identified as soon as possible in order to communicate this information to the victims
- To ensure full participation of victims in the trials if they wish, in accordance with applicable procedure under Cambodian law.
- To guarantee witness and victim security, crucial to the success of the KRT, at all stages including before, during and especially also after the trials. These recommendations apply to witnesses for both the prosecution and the defense. Specific recommendations include:
  - a. Create a separate witness and victim unit;
  - b. Consult NGOs in the planning for the unit and throughout the process;
  - c. Include provisions to protect witnesses, such as protection of identity when necessary; those provisions need to be written into the procedure or a practice note and clarified at early stages. They need to be:
    - i. Communicated to potential witnesses;
    - ii. Monitored and rules need to be enforced;
    - iii. Adequately funded, especially to pay for protection after the trial

On the legislation applicable, KRT orders and reparation

- To speed up the process of adoption of the draft Criminal Procedure Code and to consider greater civil society input in the drafting process
- To foresee specific provisions, with the participation of the KRT judges and civil society, in order to avoid delays based on unclear procedures
- To ensure full compliance with the orders of the KRT judges regarding arrest, detention, extradition (in case the accused is abroad), witness protection, freezing of funds and assets accused, etc
- To consult civil society about transparent and appropriate forms of reparation, in particular, collective or symbolic reparation, out of the property confiscated from those Khmer Rouges found guilty. Collective and symbolic reparation might include the building of memorials and museums on the genocide, the elaboration of school manuals on the genocide, etc.

**Recommendations to the future judges of the KRT**

- To adopt rules of procedure, including rules of evidence, in order to clarify issues that currently lack clarity. The procedures need to be clear and comprehensive. NGOs should be consulted about these procedures.
- To ensure that appropriate mechanisms be established for victims and witnesses participation, including through legal representation by NGOs or by counsel appointed by the court, possibly inspired from the ICC Statute ratified by Cambodia - the registrar should make sure that a group of lawyers within the KRT will provide legal advice to the victims to facilitate their participation and should set up a victims and witnesses unit in charge of their protection
- Provisions to protect the identity of victims and witnesses should be adopted
- The protection available should be communicated to potential witnesses
- To comply with international standards on the right to a fair trial

**Articulation between the International Criminal Court and the Khmer Rouge Tribunal:  
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**Recommendations to the United Nations**

- To ensure that the judges will be individuals of integrity and ability with appropriate training or qualifications in law and that candidates be selected through an open and fair appointment process (and other criteria as per CHRAC petition of 7 April 2004)
- To select prosecutors and other court staff in the same fair, independent and transparent way as the appointment of judges, and with appropriate criteria for each position
- Secretary General: to solicit input from civil society on the list of international candidates to the KRT and to submit this list to the Royal Cambodian Government immediately after satisfaction of all conditions for establishment of the KRT
- General Assembly: to follow up the implementation of its resolution 57/228 on the establishment of the KRT
- UNDP: to continue with the urgent training on international standards on the right to a fair trial for all personnel of the KRT

**Recommendations to the international community**

- Provide additional funds to make up the shortfall from the March 28 donors conference and to provide the necessary support in order to allow the KRT to work as quickly as possible
- Send a strong, clear message to the Cambodian authorities regarding the need to ensure the respect of international standards regarding:
  1. the right to a fair trial
  2. the independence, integrity and impartiality of the judges, prosecutors and court staff as well as their security
- to support legal assistance to victims participating in the proceedings before the KRT
- to consider supporting local NGO projects which provide for assistance to witnesses and outreach to the community.

**2. The ICC**

Recording that the International Criminal Court (ICC) is the first permanent and universal international criminal jurisdiction with the mandate to investigate and prosecute authors of the most serious international crimes, such as genocide, crimes against humanity, war crimes, and crime of aggression (once the definition of the latter has been adopted)

Recording that the ICC is complementary to national jurisdiction and that it gains jurisdiction only if national courts are unwilling or unable to prosecute the alleged crimes.

Recording the important innovations of the Rome Statute, such as the absence of any immunities, the right of victims to participation and be granted reparation and the protection of witnesses and victims

Welcoming the ratification of the Rome Statute by Cambodia, who was the sixtieth State Party to the Rome Statute (along with several other states) and the first in the ASEAN region

Deploring the small number of ratifications by Asian States

Deploring the policy of the United States Government to enter into immunity bilateral agreements that prohibit such States to transfer to the Court the US citizens suspected of having committed crimes under the jurisdiction of the ICC

Stressing the importance of universal ratification of the Statute and of strong commitment by States parties to defend its integrity

Stressing that ratification is a first step which should be followed by full implementation of the ICC Statute in domestic legislation

**Articulation between the International Criminal Court and the Khmer Rouge Tribunal:  
The Place of Victims**

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**Recommendations to the Royal Cambodian Government**

- To carry out legislative screening of the Cambodian Constitution as well as draft national substantive criminal and procedural criminal law in order to proceed with due implementation of the Rome Statute, in particular with regards to the definitions of crimes, the principles of criminal law and the implementation of the obligations contained in the statute pertaining to the cooperation between the Court and the Cambodian authorities
- To share those drafts with NGOs and more generally establish mechanisms to consult civil society on draft legislation
- To adopt without delay the new Penal Code which should fully incorporate international crimes under the Rome Statute as well as other international human rights instruments ratified by Cambodia
- To reform without delay the Constitution if necessary
- To adopt the law on the status of judges and prosecutors
- To adopt the law on Anti-corruption in order to struggle against corruption in the judiciary
- To include training programs on the ICC in law school curricula (notably Ecole Royale de la Magistrature and Lawyers Training School)
- To ratify the Agreement on Privileges and Immunities
- To ask the Constitutional Council to examine any conflict between the BIA between the US and the Royal Cambodian Government, and Cambodia's obligations as a State Party to the Rome Statute
- To strengthen its dialogue with ASEAN States to facilitate their ratification of the Rome Statute

**Recommendations to the Parliament**

- Not to ratify the bilateral impunity agreements signed in 2003 with the United States

**Recommendations to ASEAN**

- To adopt a joint position on the ICC and promote the ICC among ASEAN member states

**Recommendations to the international community**

- Include full implementation of the ICC as a benchmark for Cambodia in the next Consultative Group Meeting of donors
- To provide any technical advice that the Cambodian authorities might request in order to implement the ICC Statute in domestic legislation



**Articulation between the International Criminal Court and the Khmer Rouge Tribunal:  
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## APPENDICES

### Annex 1: Programme of the Conference



Fédération internationale des ligues des droits de l'Homme  
International federation of human rights  
Federacion internacional de los derechos humanos  
الغدرالية الدولية لحقوق الانسان



LICADHO

**Articulation between the International Criminal Court and the Khmer Rouge Tribunal:  
the Place of the Victims**

*Tonle Bassac Conference Room, Hotel Cambodiana  
March 2-3, 2005*

March 2, 2005

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- |              |  |
|--------------|--|
| 8.00-9.00 AM | Arrival of participants, registration and distribution of documents  |
| 9:00-9:15 AM | <b>Welcoming Address</b><br><i>Mr. Thun Saray, President of ADHOC</i><br><i>Dr. Kek Galabru, President of LICADHO</i><br><i>Ms. Isabelle Brachet, FIDH</i>                                   |
| 9:15-9:30 AM | <b>Introduction on the objectives of the roundtable</b><br><i>The ICC and the Khmer Rouge Tribunal: mandates and articulation</i><br><i>Mr. David Boyle, lawyer / chargé de mission FIDH</i> |

**Session 1 – The ICC and the International Justice System**

- |                |  |
|----------------|--|
| 9.30-10:30 AM  | <b>A general introduction to the ICC</b><br><i>Ms. Evelyn Serrano, Coalition for the International Criminal Court (CICC) Coordinator for Asia</i>      |
|                | <b>The ICC in its operational phase: the politics of the ICC Prosecutor</b><br><i>Ms. Karine Bonneau, FIDH Permanent Representative before the ICC</i> |
| 10:30-10:45 AM | Questions and debate   |
| 10.45-11.00 AM | Coffee break   |
| 11:00-11:30 AM | Status of signatures, ratifications and implementation of the ICC Statute in Asia  |

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*Evelyn Serrano, Coalition for the International Criminal Court (CICC) Coordinator for Asia*

**US policy against the ICC**

*Ms. Sara Colm, Human Rights Watch Asia*

**Session 2- The ICC and Cambodia**

**11:30-12:15 PM The ICC and Cambodia: history of ratification**

*Mr. Thun Saray, ADHOC*

**The jurisdiction of the ICC and how it relates to Cambodia.**

*Mr. Stan Starygin, Professor of Law, Pannasastra University*

**12:15- 12:30 PM** Questions and debate

**12.30-2:00 PM** Lunch Break

**Session 3- The Khmer Rouge Tribunal**

**2:00-3:30 PM Introduction on the Khmer Rouge Tribunal: functioning, composition and legal framework**

*Mr. Stan Starygin, Professor of Law, Pannasastra University*

**The legal framework of the Khmer Rouge Tribunals**

*Mr. David Boyle, Chargé de Mission of FIDH*

**Civil society initiatives related to the KRT**

*Laura McGrew, Project Consultant, Open Society Justice Initiative (OSJI)*

**Civil society aspirations regarding the KRT**

*Mr Sok Sam Oeun, Executive Director, Cambodia Defenders Project (CDP)*

**3:30-3:45 PM** Questions and debates

**3:45-4:00 PM** Coffee break

**Session 4 – Victims Rights: Building on the ICC Statute**

**4:00-4:45 PM Victims' expectations from the KRT**

*Mr. Vanthan Dara, DC CAM Outreach Deputy*

**From Witnesses to Victims Status: Victims Rights before the ICC**

*Ms. Karine Bonneau, FIDH Permanent Delegate to the ICC*

**Articulation between the International Criminal Court and the Khmer Rouge Tribunal:  
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**Victims Rights in Cambodian law and before the Khmer Rouge Tribunal**  
*Mr. David Boyle, Chargé de mission of FIDH*

4:45- 5:00 PM                      Questions and debate

5:00-5:15 PM                      Closing remarks

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**March 3, 2005**

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**9:00-12:30 PM                      Group Discussions**

**Facilitators** : Ms. Karine Bonneau and Mrs. Laura McGrew  
**Rapporteur** : Youk Chang DC Cam

**Facilitators** : *Ms. Evelyn Serrano CICC and Mr. David Boyle*  
**Rapporteur** :

12.30-2:00 PM                      Lunch Break

2:00-2:45 PM                      Presentation of group reports by the rapporteurs

2:45-3:00 PM                      Closing remarks

## **Annex 2: List of Participants**

- |     |   |     |                     |
|-----|---|-----|---------------------|
| 1.  | Top Phanara                                       | 45. | Ros Udam, NICFEC    |
| 2.  | Kao Makara  | 46. | Chou Chantra, KID   |
| 3.  | Hing Chansokunthea                                | 47. | Men Chansokol, KID  |
| 4.  | Prince Sisowath Thomico                           | 48. | Joanna, ADHOC       |
| 5.  | H.E. Donica Pottie, Ambassador of Canada          | 49. | Chhum Phally, ADHOC |
| 6.  | Suon Visal, Pannasastra University                | 50. | Chakriya, ADHOC     |
| 7.  | Dominique Frentz, Intern, Embassy of France       |     |                     |
| 8.  | Yi So San, ADHOC                                  |     |                     |
| 9.  | Pen Socheat Ratanak, NICFEC                       |     |                     |
| 10. | Sot Meas  |     |                     |
| 11. | Ra Vy, NICFEC                                     |     |                     |
| 12. | Chrek Sandab, NICFEC                              |     |                     |
| 13. | Heang Sok Heng, NICFEC                            |     |                     |
| 14. | Chhieh Thul, NICFEC                               |     |                     |
| 15. | Phou Chantha, NICFEC                              |     |                     |
| 16. | Sot Mao, NICFEC                                   |     |                     |
| 17. | Mit Chan Thol, NICFEC                             |     |                     |
| 18. | Prince Thomico Sisowath                           |     |                     |
| 19. | Laura McGrew, OSJI                                |     |                     |
| 20. | Te Chamnan, CDP                                   |     |                     |
| 21. | Hout Sotheary, KID                                |     |                     |
| 22. | Chet Ngar   |     |                     |
| 23. | Penh Buntheng, KID                                |     |                     |
| 24. | Chea Vannak, CSD                                  |     |                     |
| 25. | Ung Bun Ang, SRP                                  |     |                     |
| 26. | Yun Kim Eng, KYA                                  |     |                     |
| 27. | So Mosseny, CSD                                   |     |                     |
| 28. | Ouk Van Deth, LAC                                 |     |                     |
| 29. | Kek Galabru, LICADHO                              |     |                     |
| 30. | Thun Saray, ADHOC                                 |     |                     |
| 31. | Lao Mong Hay, Head of the legal Department, CSD   |     |                     |
| 32. | Jehanne Henry, USAID                              |     |                     |
| 33. | Tara Gutman, Secretariat                          |     |                     |
| 34. | Hengroth Raken, General Prosecutor, Appeals Court |     |                     |
| 35. | Sok Sam Oeun, CDP                                 |     |                     |
| 36. | Stan Starygin, Pannasastra University             |     |                     |
| 37. | David Boyle, FIDH                                 |     |                     |
| 38. | Karine Bonneau, FIDH                              |     |                     |
| 39. | Isabelle Brachet, FIDH                            |     |                     |
| 40. | Naly Pilorge, LICADHO                             |     |                     |
| 41. | Thara, LICADHO                                    |     |                     |
| 42. | Kazumi , CDP                                      |     |                     |
| 43. | Ms. Evelyn Serrano, CICC                          |     |                     |
| 44. | Chhouk Kimmao, KID                                |     |                     |

### **Annex 3: List of acronyms**

ADHOC - Cambodian human Rights and Development Association  
APIC - Agreement on Privileges and Immunities  
ASP - Assembly of States parties  
BIA - Bilateral "immunity" agreements  
CDP - Cambodian Defenders Project  
CICC - Coalition for the International Criminal Court  
CSD - Center for Social Development  
DRC - Democratic Republic of Congo  
ICC - International Criminal Court  
ICTY - International Tribunal for the Former Yugoslavia  
ILC - International Law Commission  
FIDH - International Federation for Human Rights  
LICADHO - Cambodian League for  
NGO - Non Governmental Organization  
NICFEC - Neutral and Impartial Committee for Free Elections  
OSJI - Open Society Justice Initiative  
OTP - Office of the prosecutor  
RS - Rome Statute  
SCM - Supreme Council of the Magistracy  
SRP - Sam Rainsy Party  
UN - United Nations

## Annex 4: Joint statement on victims and witnesses



### FIDH, ADHOC and LICADHO Statement on witnesses and victims

Paris – Phnom Penh, 29 March 2005

#### Victims and Witnesses protection

The FIDH, ADHOC and LICADHO welcome the 14 March 2005 statement of the government's Task Force on the Khmer Rouge Tribunal concerning the commitment of the government of Cambodia to full protection of the security of both witnesses and victims during the Khmer Rouge trials.

Any reference by the speakers at the conference to the fears of witnesses and victims simply reflected such fears expressed by the Cambodians present at the conference in questions from the floor. Some participants expressed fears from the accused - especially if they lived in Pailin, while others specified that they were afraid of reprisals from others who may be implicated, but not tried. Other participants said that they would like to testify and had no fear. Indeed, the provisions of the Extraordinary Chambers (EC) Law and the agreement with the UN concerning the security of victims and witnesses implicitly recognize that these groups have legitimate concerns for their safety before, during and after the trial.

However, this general framework needs to be completed and widely disseminated in order to allay these legitimate fears. The FIDH welcomes the creation of a high-level security commission on this issue and hopes that NGO's will be included in the process and kept informed of the "separate security arrangements" agreed with the UN.

#### Victim's participation

It is also encouraging to see official confirmation that the right of victims, under Cambodian law, to join criminal proceedings as civil parties will also be implemented before the Extraordinary Chambers. However the FIDH, ADHOC and LICADHO note that in its statement the Task Force expresses concerns about the implementation of this right.

Indeed, one of the main aims of the Conference organised by FIDH, ADHOC and LICADHO in Phnom Penh on 2 and 3 March 2005 was to raise awareness amongst NGOs and victims about the need to envisage mechanisms for effective participation of victims and to build upon the existing mechanisms for victims of massive crimes before the International Criminal Court.

Guaranteeing the right of victims to participate will give them a greater sense of "ownership" of the trials and will guarantee their right to an effective remedy through participation and legal representation.

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In particular, given the absence of any specific reference to civil parties in the relevant legal documents, the FIDH, ADHOC and LICADHO would welcome clarification that the provisions concerning the protection of victims and witnesses [EC Law Art. 33], the independence of counsel [EC Law Art. 42(3)] and of witnesses and experts [UN Agreement, Art. 22], will apply equally to victims in their capacity as civil parties and to counsel, witnesses and experts appearing for them.

**Reparation**

With regards to reparation, the FIDH, ADHOC and LICADHO welcome the Task Force statement that it is taking reparation into account. Reparation includes indeed restitution, compensation and rehabilitation. It does not necessarily, nor exclusively, mean monetary compensation, but may also take collective or symbolic forms as well as access to psychological assistance. Some suggestions included construction of memorials, organisation of religious ceremonies or burials, and revelation of the truth, including the preparation of school textbooks covering this period.

Whereas the judges of the Khmer Rouge Tribunal will decide on the extent and appropriate forms of reparation, the government of Cambodia will play an essential role through its obligation to cooperate and facilitate the implementation of reparation orders, since the EC Law stipulates that all unlawfully acquired property by the persons found guilty shall be returned to the State (art. 39).

# FIDH represents 141 Human Rights organisations

## 141 organisations

- Afrique du Sud**-Human Rights Committee of South Africa  
**Albanie**-Albanian Human Rights Group  
**Algérie**-Ligue Algérienne de Défense des Droits de L'Homme  
**Algérie**-Ligue Algérienne des Droits de L'Homme  
**Allemagne**-Internationale Liga für Menschenrechte  
**Argentine**-Centro de Estudios Legales y Sociales  
**Argentine**-Comite de Accion Juridica  
**Argentine**-Liga Argentina por los Derechos del Hombre  
**Autriche**-Osterreichische Liga für Menschenrechte  
**Azerbaïjan**-Human Rights Center of Azerbaijan  
**Bahrein**-Bahrain Human Rights Society  
**Bangladesh**-Odhikar  
**Bélarus**-Human Rights Center Viasna  
**Belgique**-Liga Voor Menschenrechten  
**Belgique**-Ligue des Droits de L'Homme  
**Bénin**-Ligue pour la Défense des Droits de L'Homme Au Bénin  
**Bhoutan**-People's Forum for Human Rights in Bhutan (Nepal)  
**Bolivie**-Asamblea Permanente de los Derechos Humanos de Bolivia  
**Brésil**-Centro de Justicia Global  
**Brésil**-Movimento Nacional de Direitos Humanos  
**Burkina Faso**-Mouvement Burkinabe des Droits de L'Homme & des Peuples  
**Burundi**-Ligue Burundaise des Droits de L'Homme  
**Cambodge**-Cambodian Human Rights and Development Association  
**Cambodge**-Ligue Cambodgienne de Défense des Droits de L'Homme  
**Laos (France)**-Mouvement Lao pour Les Droits de L'Homme  
**Cameroun**-Maison des Droits de L'Homme  
**Cameroun (France)**-Ligue Camerounaise des Droits de L'Homme  
**Canada**-Ligue des Droits et des Libertés du Québec  
**Centrafrique**-Ligue Centrafricaine des Droits de L'Homme  
**Chili**-Comite de Defensa de los Derechos del Pueblo  
**Chine**-Human Rights in China  
**Colombie**-Comite Permanente por la Defensa de los Derechos Humanos  
**Colombie**-Corporacion Colectiva de Abogados Jose Alvear Restrepo  
**Colombie**-Instituto Latinoamericano de Servicios Legales Alternativos  
**Congo Brazzaville**-Observatoire Congolais des Droits de L'Homme  
**Côte d'Ivoire**-Ligue Ivoirienne des Droits de L'Homme  
**Côte d'Ivoire**-Mouvement Ivoirien des Droits de L'Homme  
**Croatie**-Civic Committee for Human Rights  
**Cuba**-Comision Cubana de Derechos Humanos y Reconciliacion National  
**Ecosse**-Scottish Human Rights Centre  
**Egypte**-Egyptian Organization for Human Rights  
**Egypte**-Human Rights Association for the Assistance of Prisoners  
**El Salvador**-Comision de Derechos Humanos de El Salvador  
**Equateur**-Centro de Derechos Economicos y Sociales  
**Equateur**-Comision Ecumenica de Derechos Humanos  
**Equateur**-Fundacion Regional de Asesoría en Derechos Humanos  
**Espagne**-Asociacion Pro Derechos Humanos  
**Espagne**-Federacion de Asociaciones de Defensa y Promocion de los Derechos Humanos  
**Etats Unis**-Center for Constitutional Rights  
**Ethiopie**-Ethiopian Human Rights Council  
**Finlande**-Finnish League for Human Rights  
**France**-Ligue des Droits de L'Homme et du Citoyen  
**Georgie**-Human Rights Information and Documentation Center  
**Grèce**-Ligue Hellenique des Droits de L'Homme  
**Guatemala**-Centro Para la Accion Legal en Derechos Humanos  
**Guatemala**-Comision de Derechos Humanos de Guatemala  
**Guinée**-Organisation Guineenne pour la Défense des Droits de L'Homme  
**Guinée Bissau**-Liga Guineense dos Direitos do Homen  
**Irak (Royaume Uni)**-Iraqi Network for Human Rights Culture and Development  
**Iran**-Centre des Défenseurs des Droits de L'Homme en Iran  
**Iran (France)**-Ligue de Defense des Droits de L'Homme en Iran  
**Irlande**-Irish Council for Civil Liberties  
**Irlande du Nord**-Committee On the Administration of Justice  
**Israël**-Adalah  
**Israël**-Association for Civil Rights in Israel  
**Israël**-B'tselem  
**Israël**-Public Committee Against Torture in Israel  
**Italie**-Liga Italiana Dei Diritti Dell'uomo  
**Italie**-Unione Forense Per la Tutela Dei Diritti Dell'uomo  
**Jordanie**-Amman Center for Human Rights Studies  
**Jordanie**-Jordan Society for Human Rights  
**Kenya**-Kenya Human Rights Commission  
**Kosovo**-Conseil pour la Défense des Droits de L'Homme et des Libertés  
**Kyrgistan**-Kyrgyz Committee for Human Rights  
**Lettonie**-Latvian Human Rights Committee  
**Liban**-Association Libanaise des Droits de L'Homme  
**Liban**-Foundation for Human and Humanitarian Rights in Lebanon  
**Liban**-Palestinian Human Rights Organization  
**Liberia**-Liberia Watch for Human Rights  
**Libye (Suisse)**-Libyan League for Human Rights  
**Lithuanie**-Lithuanian Human Rights Association  
**Malaisie**-Suaram  
**Mali**-Association Malienne des Droits de L'Homme  
**Malte**-Malta Association of Human Rights  
**Maroc**-Association Marocaine des Droits Humains  
**Maroc**-Organisation Marocaine des Droits Humains  
**Mauritanie**-Association Mauritanienne des Droits de L'Homme  
**Mexique**-Comision Mexicana de Defensa y Promocion de los Derechos Humanos  
**Mexique**-Liga Mexicana por la Defensa de los Derechos Humanos  
**Moldavie**-League for the Defence of Human Rights  
**Mozambique**-Liga Mocancicana Dos Direitos Humanos  
**Nicaragua**-Centro Nicaraguense de Derechos Humanos  
**Niger**-Association Nigérienne des Droits de L'Homme  
**Nigeria**-Civil Liberties Organisation  
**Nouvelle Calédonie**-Ligue des Droits de L'Homme de Nouvelle Calédonie  
**Ouganda**-Foundation for Human Rights Initiative  
**Pakistan**-Human Rights Commission of Pakistan  
**Palestine**-Al Haq  
**Palestine**-Palestinian Centre for Human Rights  
**Panama**-Centro de Capacitacion Social  
**Pays Bas**-Liga Voor de Rechten Van de Mens  
**Pérou**-Asociacion Pro Derechos Humanos  
**Pérou**-Centro de Asesoría Laboral  
**Philippines**-Philippine Alliance of Human Rights Advocates  
**Polynésie Française**-Ligue Polynésienne des Droits Humains  
**Portugal**-Civitas  
**RDC**-Ligue des Electeurs  
**RDC**-Association Africaine des Droits de L'Homme  
**RDC**-Groupe Lotus  
**République de Djibouti**-Ligue Djiboutienne des Droits Humains  
**République Tchèque**-Human Rights League  
**Roumanie**-Ligue pour la Défense des Droits de L'Homme  
**Royaume-Uni**-Liberty  
**Russie**-Citizen's Watch  
**Russie**-Moscow Research Center for Human Rights  
**Rwanda**-Association pour la Défense des Droits des Personnes et Libertés Publiques  
**Rwanda**-Collectif des Ligues pour la Défense des Droits de L'Homme Au Rwanda  
**Rwanda**-Ligue Rwandaise pour la Promotion et la Défense des Droits de L'Homme  
**Sénégal**-Organisation Nationale des Droits de L'Homme  
**Sénégal**-Rencontre Africaine pour la Défense des Droits de L'Homme  
**Serbie et Montenegro**-Center for Antwar Action - Council for Human Rights  
**Soudan (Royaume Uni)**-Sudan Organisation Against Torture  
**Soudan (Royaume-Uni)**-Sudan Human Rights Organization  
**Suisse**-Ligue Suisse des Droits de L'Homme  
**Syrie**-Comite pour la Défense des Droits de L'Homme en Syrie  
**Tanzanie**-The Legal & Human Rights Centre  
**Tchad**-Association Tchadienne pour la Promotion et la Défense des Droits de L'Homme  
**Tchad**-Ligue Tchadienne des Droits de L'Homme  
**Thaïlande**-Union for Civil Liberty  
**Togo**-Ligue Togolaise des Droits de L'Homme  
**Tunisie**-Conseil National pour Les Libertés en Tunisie  
**Tunisie**-Ligue Tunisienne des Droits de L'Homme  
**Turquie**-Human Rights Foundation of Turkey  
**Turquie**-Insan Haklari Dernegi / Ankara  
**Turquie**-Insan Haklari Dernegi / Diyarbakir  
**Union européenne**-FIDH AE  
**Uzbekistan**-Legal Aid Society  
**Vietnam (France)**-Comite Vietnam pour la Défense des Droits de L'Homme  
**Yemen**-Human Rights Information and Training Center  
**Yemen**-Sisters' Arabic Forum for Human Rights  
**Zimbabwe**-Zimbabwe Human Rights Association Zimrights

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### Cambodian League for the Promotion and Defense of Human Rights (LICADHO)

#16, St. 99, Boeung Trabek, Phnom Penh, Cambodia  
 Mailing Address: P.O. Box 499, Phnom Penh, Cambodia  
 Tel: (855) 023 330 965, (855) 023 211 391, (855) 023 982 669  
 Fax: (855) 023 330 965, (855) 023 217 626  
 E-mail: [contact@licadho.org](mailto:contact@licadho.org) <<mailto:contact@licadho.org>>

### ADHOC - The Cambodian Human Rights & Development Association

BP 1024 - N° 1 Oknha Truong Cang (St. 158)  
 Phnom Penh 12211, Cambodia  
 tel: 00 855 23 218 653 / 982 407 - fax: 00 855 23 217 229  
<http://www.bigpond.com.kh/users/adhoc/>

FIDH - 17, passage de la Main d'Or - 75011 - Paris - France  
 CCP Paris : 76 76 Z  
 Tel : (33-1) 43 55 25 18 / Fax : (33-1) 43 55 18 80  
 E-mail: [fidh@fidh.org](mailto:fidh@fidh.org) / Internet site: <http://www.fidh.org>

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