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### STUDY ON CAMBODIA'S CRIMINAL JUSTICE SYSTEM WITH FOCUS ON PROSECUTING FOREIGN CHILD SEX OFFENDERS



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# I. Introduction and methodology

## Why use the term 'child sex offences'?

Different terms can be used to describe the act of sexually abusing children, namely: child sex abuse, commercial sexual exploitation of children (CSEC), and child sex offences.

CSEC is defined as *“the use of a child for sexual purposes in exchange for cash or in-kind favours between the customer, intermediary or agent and others who profit from the trade in children for these purposes (parents, family members, procurer, teacher)”*<sup>1</sup>

This definition implies that the CSEC refers to acts perpetrated on children where an exchange occurs, which means either giving money directly to the child or providing him/her with any other kind of favour directly or indirectly, such as housing, feeding, buying clothes, paying for school, giving money to the family, etc.

According to a common definition, CSEC includes child prostitution, child pornography, child sex trafficking, child sex tourism. Under Cambodian legislation, CSEC could be one of the following offences: trafficking, prostitution, pimping, or debauchery. This omits those offences which do not involve any exchange, such as rape or assault. However, such offences could be used to prosecute an offender in a case where there has not been an exchange of money or favours.

The term child sex abuse refers to the act of sexually abusing children without taking into account its legal aspects or legal consequences. As this survey is focused on the criminalization of such acts, the use of the term child sex abuse would not be appropriate.

Consequently, the term used throughout this survey will be child sex offences rather than commercial sexual exploitation of children or child sex abuse. The people committing child sex offences will thus be named child sex offenders.

## Introduction and objective of the survey

Child sex offences occur frequently in Cambodia, and contrary to common thinking, most offenders are Cambodian nationals rather than foreign tourists or foreign residents. However the fact that foreigners are coming to Cambodia for short-term or long-term sex tourism is a reality and Action Pour Les Enfants (APLE) is one of the Non Governmental Organizations (NGO) fighting against child sex offences with a focus on foreign offenders. APLE is addressing the issue of child sex offences in Cambodia by monitoring foreigners suspected to be child sex offenders and cooperating with the Cambodian Police and Judiciary to prosecute them. As this stage, the organization has two offices: one in Phnom Penh and the other in Sihanoukville (or Kompong Som).

In cooperating with the Cambodian Police and Judiciary, APLE noticed that the Cambodian criminal justice system was facing difficulties. The objective of this survey is therefore to detail the instruments used for the foreign child sex offenders' prosecution and highlight the factors that limit the effective functioning of the criminal justice system.

## The survey methodology

This survey deals with the Cambodian justice system, with focus on prosecuting child sex offenders. This focus has been chosen in order to keep the survey closely linked to APLE

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<sup>1</sup> Ministry of Interior General Direction of National Police and Law Enforcement Against Sexual Exploitation of Children Project, *Understanding and Investigating Child Sexual Exploitation*, 2000, p.14.

activities. For the same reason, the part of the survey dealing with criminal procedure will focus on pre-trial procedure, as the majority of APLE activities are limited to the investigation phase.

The analysis of the Cambodian criminal justice system includes:

- the Cambodian laws that are used in the prosecution of child sex offenders (criminalizing laws and laws on criminal procedure)
- the implementation of those laws in practice
- the limits of, and burdens on, the criminal justice system
- the connections between Cambodia and other countries regarding the prosecution of child sex offenders.

Four methods have been used to gather the information needed for this survey:

1. Collecting and analysing the relevant pieces of legislation.
2. Analysing previous APLE cases in order to illustrate the points explained throughout the report.
3. Conducting interviews with relevant legal and humanitarian workers on the interpretation of criminal laws and their implementation in practice.
4. Collecting and reading reports from other NGOs that provide information on the prosecution of child sex offenders and the interpretation and implementation of Cambodian laws.

#### The pieces of legislation

The Cambodian pieces of legislation used in the report are:

- The *Provisions Relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia During the Transitional Period*, written by the United Nations Transitional Authority in Cambodia, adopted in 1992, and known as the UNTAC Code.
- The *Law on Suppression of the Kidnapping, Trafficking, and Exploitation of Human Beings*, adopted in 1996.
- The *Law on Aggravating Circumstances of the Felonies*, adopted in 2001.
- The *Law on criminal procedure*, adopted in 1993.
- The *Constitution of Cambodia*, adopted in 1993.

As the survey deals with the Cambodian criminal justice system, international conventions and foreign criminal legislation<sup>2</sup> are not analysed in-depth. However, some of them are mentioned in the two last sections of the report, and the ways in which they can be utilised is explained.

#### APLE cases

Each time a new case is discovered by APLE investigators either in Phnom Penh or in Sihanoukville, a file is opened and updated regularly. These files have been analysed regarding the Cambodian criminal legislation and its implementation, and a selection of relevant examples have been chosen from amongst them in order to illustrate the legal explanations or the procedural errors and the system limits that exist in practice.

Note: the examples in the survey report are either fictitious situations or situations extracted from cases opened in either city (Sihanoukville and Phnom Penh). Where the example is extracted from APLE cases, this is mentioned at the beginning.

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<sup>2</sup> The section dealing with foreign legislation (or extraterritorial laws) is mainly based on a APLE and LICADHO report of June 2005 that deals with extraterritorial laws: *Extraterritorial Legislation and the Sexual Exploitation of Children*, Briefing paper.

## 🚦 Interviews

Interviews have been held in order to gather information on the interpretation of the laws and the limits of their implementation in practice with:

- APLE's Lawyer
- An Investigating Judge of the Sihanoukville Court
- A policeman from one of the Anti – Human Trafficking and Juvenile Protection Units
- A UNICEF Child Protection Officer
- 2 representatives of the NGO Protection of Juvenile Justice (PJJ)
- 3 personnel from other NGOs

These persons have requested anonymity and their names will not appear in the report.

## 🚦 The reports

The reports used for the survey have been published for the main part by NGOs. Some of them have only been used for a general comprehension of the situation and are not quoted in the report, while others that have been specifically used are referenced in footnotes.

### Structure of the survey report

The first section is devoted to the explanation of the articles criminalizing child sex offences, the possible charges against a child sex offender, and the legal gaps that limit their effective implementation.

The second section is devoted to the criminal procedure. This part contains:

- the explanation of the criminal procedure before trial, its limits both in law and in practice, and the role of NGOs in the investigation phase.
- an analysis of problems in the procedures during and after trial.

The third section is devoted first to an overview of the International Convention on the Right of the Child and its Protocol related to the sexual exploitation of children, and second to a presentation of extraterritorial laws, i.e. criminal laws of foreign countries that can be used where a citizen of a country commits a child sex offence abroad.

### General conclusions

The general conclusion of this survey from a legal perspective is that the Cambodian criminal laws are extremely unclear and incomplete, and that this leads to serious problems and errors in their implementation. From a practical point of view, it is concluded that there exists a lack of concern and will regarding the fight against child sex offenders at many levels among the general population, government, law enforcement and judicial officers, and foreign diplomatic representatives.

## II. Cambodian tools to prosecute the Child sex offenders

### 1. Incriminating criminal laws

#### a. Cambodian Laws that address the situation

Several Cambodian laws can be enforced when a child sex offence is committed.

The pieces of legislation that contain provisions criminalising child sex offences are the criminal laws:

- The 1996 *Law on the Suppression of the Kidnapping, Trafficking and Exploitation of Human Beings*<sup>3</sup>
- The 1992 *Provisions relating to the Judiciary and Criminal Law and Procedure applicable in Cambodia during the transitional period*<sup>4</sup>
- The 2001 *Law on Aggravating Circumstances of the Felonies*<sup>5</sup>

Some other laws are not criminal laws but can be informally used:

- The 1993 *Constitution of Cambodia*
- The *Tourism Law of Cambodia* (Draft written in 2004)

Regardless of the content of these laws, an initial problem is evident. In many countries, the criminal laws are gathered in one document named the Penal Code. In Cambodia, such a Penal Code does not exist. A draft is pending but has not been adopted yet.

Furthermore, when several laws can be applied which law will prevail? Which provisions have authority over the others?

An internationally accepted principle states that the latest law will prevail. In other words, when two articles in two different laws criminalise the same offence, the judicial officers should apply the relevant article of the latest law. Nevertheless, the laws' plurality leads to confusion either where the criminalised offences are not exactly the same but identical elements are used to define the crime, or when the offence is the same but the elements used to define it are different. This is the case in some articles criminalising child sex offences in Cambodia and therefore, it confuses the judicial officers when charging the offender.

**Ex:** The most obvious problem concerns the offence of pimping/prostitution (this will be examined in more depth below).

It would simplify and reinforce the enforcement of the laws to bring the criminal laws into line and gather them in one single document divided in chapters. General definitions such as the definition of a child or the age of consent could then be set out initially in a chapter devoted to children. The provisions criminalising child sex offences would therefore be clearer.

#### b. The relevant articles

A child sex offence is perpetrated:

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<sup>3</sup> Throughout the report, this law will be named the 1996 law

<sup>4</sup> Throughout this report, this law will be named: the UNTAC Code

<sup>5</sup> Throughout this report, this law will be named: the law on aggravating circumstances

- When the person commits sexual acts with a child: the most obvious sexual act is penetration, however, acts such as caressing, touching, or kissing are undoubtedly included.

- When the person participates in the child abuse without directly committing sexual acts, for example, trafficking children for the purpose of sexual exploitation, pimping children etc ...

The Cambodian laws criminalise these acts with different charges depending on the circumstances of the offence.

A child sex offender could be charged with: trafficking, rape or attempted rape, indecent assault, pimping or prostitution, or debauchery.

Some of these charges target actual sexual acts (debauchery, rape/ attempted rape, indecent assault), whilst others target the fact that persons earn money from the sex trade (debauchery, trafficking, pimping/prostitution)

Child sex offenders are usually charged with debauchery or rape.

### i. The charges targeting the physical sexual acts

#### Rape/ Attempted rape<sup>6</sup>

The offence of rape is a felony (the higher range of offences), covered by the UNTAC Code and the law of Aggravating circumstances<sup>7</sup>. Rape is limited to the sexual act of penetration carried out with violence, coercion or surprise. There is no direct reference to the victim's consent and therefore, the provisions imply the non-consent of the victim. The punishment ranges from 10 to 15 years imprisonment. The punishment increases to 15 to 20 years imprisonment<sup>8</sup> when the offence is perpetrated with aggravating circumstances:

- when the victim is a pregnant woman or an infirm or sick person
- when the rape is accompanied by threats with a weapon
- when the offender is in a position of authority over the victim (ex: an older relative, a teacher, a policeman, etc...)
- when the victim is a child under 14 years of age

#### **Ex.1: Violence**

A woman walks in the street at night. A man suddenly appears behind her, grabs her hair and pulls her down. As she begins to shout and cry, the man slaps her. He tears off her clothes and rapes her.

#### **Ex.2 Surprise**

A man invites his female neighbour to have a drink at his house. The woman, wanting to maintain good relations with neighbours, accepts and goes to the man's house. The man knows the woman will never accept to have sex with him, so he drugs her drink. Five minutes later, the woman falls asleep. The man carries her to the sofa and rapes her whilst she is sleeping. When she wakes up, the woman is naked on the sofa and the man is still lying on top of her.

#### **Ex.3.1: Coercion**

A boy comes home after school. A man follows him until he is alone on the road. He then stops his motorbike and approaches the child. He tells the child to undress and lie down. He adds that if the child is not obedient, he will take back all the money

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<sup>6</sup> According to the law, raping and attempting to rape someone is considered as the same act. We will then employ the term of rape for both.

<sup>7</sup> Cf Annex 1, Rape, UNTAC Code, Art. 33 and Law on aggravating circumstances, Art.5

<sup>8</sup> Under the UNTAC Code, an offender is liable to be imprisoned from 5 to 10 years for a rape, and from 10 to 15 years for a rape committed with aggravating circumstances.

he previously gave to the child's family. The boy, frightened that his family might have to return to living on the street obeys the man. The man rapes him.

One question arises: how is the offence classified when the victim is a child?

Firstly, we can state that the aggravating circumstance of the "position of authority over the victim" exists de facto when a child is raped, as all adults could be said to have a position of authority over a child. This is particularly true in Cambodia where "[a] child is (...) subordinate to his elder"<sup>9</sup> and is not in a position to oppose an adult's authority. Two aggravating circumstances are therefore relevant: the victim is a child and the offender is in position of authority over him/her. What is the penalty in such a case?

Secondly, following the same argument, the adult/child relationship in terms of sexual intercourse could be defined as coercion (intimidation). The consent of a child is extremely difficult to identify, and almost always absent even where the child does not say "no".

### **Ex.3.2: Coercion**

A is a small girl living with her family. One day a foreigner friend of her father, B, is at home. While her parents are out, the man begins to touch her. A is confused. She does not know what it means. She has seen her parents doing the same and her mother was happy. Moreover she has known the foreigner for 2 years and he has always been kind to her. A is afraid of hurting B and disobeying her father who told her before leaving that morning to obey B. Even if she does not like what B is doing to her, the small girl does not dare saying anything and B rapes her.

This shows that using a criterion which is more applicable to adults such as the consent, leads to difficulties in qualifying the act of having sexual intercourse with a child. It may be better therefore, to add a specific provision which gives a different criteria to define a rape where the victim is under 14 years old (age stipulated for this offence).

### Debauchery

The offence of debauchery is criminalised in the 1996 Law<sup>10</sup>. Two offences are covered by the term "debauchery": opening a place for committing debauchery or obscene acts<sup>11</sup>, and committing acts of debauchery involving a minor below 15 years old<sup>12</sup>.

- 🗨 According to the law, opening a place for committing debauchery or obscene acts is punishable by between one and five years imprisonment and a fine of five million to thirty million riel (the punishment is doubled if it is a recurrent offender).

Unfortunately, there is no definition of "opening a place". It could mean opening a bar or any other place opened to the public, or opening a private place where only a selected group can go. It would be difficult to interpret one man taking one child home within the term "opening a place" for debauchery. However, the lack of this definition is problematic in cases involving paedophilic acts with several children at a house or a guesthouse.

**Ex:** APLE case: the suspect used to take several children to his rented house where he had sex or played "sexual games" with them. After a while, the children even slept there and spent a lot of time at the offender's house. Two of the suspect's friends also suspected of child sex abuse, were seen spending time a great deal of

<sup>9</sup> Caroline GRILLOT, Street Paedophilia in Cambodia, APLE, Sept. 2005, p.7

<sup>10</sup> Cf Annex 1, Debauchery, 1996 Law, Art. 7 and 8

<sup>11</sup> 1996 Law, Art.7. This offence is a misdemeanour

<sup>12</sup> 1996 Law, Art.8. This offence is a felony



time at the suspect's house. In such a case, one can wonder whether it could be considered that the man opened a place for committing debauchery.

- ✚ Committing acts of debauchery is punishable where the victim is a child under fifteen years of age. The offender is liable to between ten and twenty years imprisonment, regardless of the circumstances; in other words, whether the child consents or not, and whether the offender came in contact with the child through a third party or not. When the offence is repeated, the maximum punishment is applied. The law adds that the Court may apply a sub-punishment restricting the offender's civil rights and a non-authorization of residence<sup>13</sup>.

The following examples describe some situations that are considered as debauchery.

**Ex.1:**

A is the child of a very poor family. An NGO running a project where donors can individually sponsor children puts a foreign man, B, in contact with A and A's family. After having exchanged letters and supported A for one year, B flies to Cambodia to meet A personally, despite this being against the NGO's policy. He lives with the family for some time, gives them money, builds a new house, offers clothing to A and pays for her schooling. The man is very kind to A. One day her parents are not at home, he begins to touch her in a sexual way. A thinks B will not help them anymore if she refuses to have sex with him. The man has sex with the girl repeatedly for 8 months.

**Ex.2:**

A is a little boy who shines shoes to earn money to eat at the entrance of a petrol station. One day a foreigner, B, asks A to accompany him to his house. A thinks B will give him money if he does so, and therefore, he accepts. Once in B's house, B shows A pictures of naked children having sex with men. Then B proposes A to have a shower. While A is cleaning himself, B enters the bathroom and begins touching A's genitals. B takes the boy to his bed and asks him to do the same as the children in the pictures. After having had sex with the boy, B gives him 5 dollars. The following day, the man returns to the petrol station. A has told his friends that they can earn money if they go with him to B's house. B takes the 4 children to his house and this cycle of abuse happens for a number of months.

This article incriminating debauchery shows several gaps.

Firstly, debauchery is not defined and therefore, it remains a rather elusive sexual offence. It is commonly defined as having sex with a child, or touching, caressing or kissing him/her in a sexual manner.

Secondly, the consent or non-consent of the child is irrelevant in the qualification of the offence. This means that the child could be non-consenting, like in a rape case.

In the example 1, we can see the confusion that result between debauchery and the offence of rape with coercion<sup>14</sup>. In both cases, the children accept because they are afraid the man will stop giving them and their family money. In the first case, the man threatens to do so, whereas in the second case it is not explicit; but the girl knows it could happen and therefore, the reason she accepts is exactly the same.

As a result, these two offences are likely to confuse the criminal law enforcement officers and the court officials. It is interesting to note, that Cambodians are often charged with rape and foreigners with debauchery in light of sexual offences. Thus, a Cambodian perpetrator and a foreign perpetrator are likely to receive different penalties for the same act.

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<sup>13</sup> This clearly targets foreign offenders

<sup>14</sup> Example 3.2 in the previous section related to rape

In order to clarify the two offences, the 2005 annual assembly of Instruction Judges decided to introduce a new element in various definitions: the financial counterpart<sup>15</sup>. A rape offence does not imply that the victim receives a counterpart for the sexual acts, but debauchery does. It is stated and accepted that rape is outside a commercial context, which means no exchange of a benefit or something with a material value is present. On the contrary, debauchery is inside a commercial context and thus, implies there is an exchange of money or any other favour (of material value).

### Indecent Assault

The offence of indecent assault is criminalised in the UNTAC Code<sup>16</sup>. It constitutes a misdemeanour (an offence less serious than a felony). It is characterized by any person assaulting another person by touching, caressing or committing any other sexual act, excluding penetration.

The perpetrator may receive between 1 and 3 years imprisonment. The term of imprisonment is doubled when:

- the indecent assault is accompanied by fraud, violence or threat
- the perpetrator is in position of authority over the victim
- the victim is under 16 years of age

Firstly, two elements are unclear in this definition: nothing is mentioned about the victim's consent or non-consent, and the phrase "any other sexual act" is not defined. Regarding the definition of "any other sexual act", it is in the judges' discretion during the trial to determine whether the act was a sexual act or not<sup>17</sup>. No further clarification seems to have been given.

Regarding the consent, it seems obvious that the victim does not consent to such acts; touching, caressing or kissing someone in a sexual manner has never been reprehensible when there is consent. The offender who sexually assaulted the victim knew that the victim would not consent and did not care.

Secondly, the difference between a rape and an indecent assault is easily identifiable: in a rape offence, there is penetration or attempted penetration, whereas in the indecent assault offence, the perpetrator commits sexual acts without penetration. However, the differentiation between indecent assault and debauchery is not as clear. We could say that the financial counterpart is once again the key element, however, it does not seem to be as obvious in the practice. This is a serious problem as the maximum term of imprisonment for debauchery is four times higher (20 years) than the maximum punishment for indecent assaults if there are no aggravating circumstances (5 years), and two times higher if there are aggravating circumstances (10 years). The offence the offender is charged with is important on determining the gravity of the penalty. It is important to note that some Investigating Judges recognize that the decision of whether to charge an offender with one or the other offence is problematic as the two offences include similar elements<sup>18</sup>.

In practice, the charge of sexual assault seems to be rarely used in cases involving child sex offences. Prosecutor and judges prefer the charge of debauchery<sup>19</sup> that is applicable where a perpetrator had sex with a child, whatever could be the sexual acts committed<sup>20</sup>.

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<sup>15</sup> Interview with an investigating judge, Sihanoukville, May 2006.

<sup>16</sup> Cf Annex 1, Indecent Assault, UNTAC Code, Art. 42.

<sup>17</sup> Criminal Law Resource Guide, p.334

<sup>18</sup> Interview with an investigating judge, Sihanoukville, May 2006.

<sup>19</sup> Ibidem

<sup>20</sup> As the definition of indecent assaults is more restrictive, evidences may be difficult to gather

- ii. The charges targeting earning money or profiting from placing other persons into the sex trade

### Trafficking

Trafficking is a felony criminalised in the 1996 law<sup>21</sup>.

- ✚ According to the 1996 law, the offence of trafficking is committed when a person kidnaps another person in order to traffic, sell or prostitute him/her, by enticing or any other means, promising him/her money or jewellery, or forcing, threatening or using a hypnotic drug. The consent of the person is irrelevant. The perpetrator is punished by 10 to 15 years imprisonment. This penalty increases to 15 to 20 years imprisonment when the victim is less than 15 years of age.

The same punishment is imposed on accomplices.

### Pimping/prostitution

The offence of pimping is a felony criminalised in the 1996 law and the UNTAC Code<sup>22</sup>.

- ✚ According to the 1996 law, a pimp is a head of prostitutes. He/she is a person
  - who supports or protects the prostitutes, or seeks customers for them
  - who regularly shares the benefits obtained from their prostitution
  - who trains or convinces men or women to become prostitute(s)
  - who creates relationships between prostitutes and owners of brothels or any other person who obtains benefits from the prostitution
  - who confines men or women in a place in order to force them to be prostitutes and thereafter takes his/her benefits

For such activities, the punishment is 5 to 10 years imprisonment. This punishment is doubled (10 to 20 years imprisonment) when:

- the offence is repeated
- the victim is below fifteen years of age
- the offence is committed with coercion, violence, or threat
- the offender is the victim's husband, wife, partner, father, mother, guardian
- the offender forces the victim to be prostitute outside of the country
- the victim is a foreigner in the territory of Cambodia

In addition, the restriction of civil rights and non-authorization of residence may be applied.

- ✚ According to the UNTAC Code, the offence of pimping/prostitution is committed when a person procures, entices or leads away a minor, for prostituting him/her, or sexually exploiting the minor. The consent of the child is irrelevant. The perpetrator incurs 2 to 6 years imprisonment.

The same offence is criminalised in different provisions in different manners. In that case, the previously mentioned principle should be applied, namely, the latest law prevails over the previous one/s. Therefore, with regard to the offence of pimping/prostitution, the relevant law should be the 1996 law. However, where there are gaps in the latest law, i.e. where some elements are detailed in the UNTAC Code but not mentioned at all in the 1996 law, the law enforcement and judicial officer will have to apply these provisions stipulated in the UNTAC Code to avoid there be legal gaps.

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<sup>21</sup> Cf. Annex 1, Trafficking; 1996 law, Art.3.

<sup>22</sup> Cf. Annex 1, Pimping/prostitution, 1996 law, Art.4 and 5, UNTAC Code, Art.42.

Concretely regarding the offence of pimping/prostitution, there is no mention of the victim's consent in the 1996 law, though the UNTAC Code states that the consent of the child is irrelevant. There is obviously a gap in the 1996 law related to the victim's consent. In that case, the UNTAC Code will be applied. Thus, the offence will be perpetrated even if the child victim consents to be prostitute

**The charges used to prosecute child sex offenders are either rape or debauchery instead of prostitution/pimping or trafficking. It is possible that they could be charged with pimping or trafficking, but this occurs in rare situations.**

## RESUME TABLE OF THE INCRIMINATING LAWS

	Relevant articles	Sexual act	Consent of the victim	Exchange of money / favours	Child victim	Maximum age of a child victim	Determining elements to identify the offence	Aggravating Circumstances	Punishment: imprisonment
<b>Rape</b>	UNTAC Code: Art.33, Law 2001: Art. 5	Penetration	No	No	Aggravating circumstance (A.C.)	14 years	- Violence, coercion or surprise - Penetration or attempted penetration - Non consent of the victim	- Victim: under 14 years of age child, pregnant woman, infirm, sick person - Threat with a weapon - Position of authority over the victim	- 10 to 15 years - aggravated rape: 15 to 20 years
<b>Debauchery</b>	Opening a place: Law 1996: Art.7 Debauchery acts: 1996 Law: Art. 8	Opening a place: none Debauchery acts: any (penetration, touching, caressing, kissing...)	Irrelevant	Yes	Part of the offence	15 years	Opening a place: - Place where debauchery is committed  Debauchery acts: - Victim: child under 15 years of age - Sexual acts	- Repeated offence	Opening a place - 1 to 5 years - 5 to 30 millions riel fine (repeated offence: doubled)  Debauchery acts - 10 to 20 years (repeated offence: maximum)
<b>Indecent Assault</b>	UNTAC Code: Art.42	Touching, caressing, any other excepted penetration	No	No	A.C.	16 years	- Touching, caressing, any other sexual act - No penetration - Non consent of the victim	- Victim under 16 years of age - Fraud, violence or threat - Position of authority over the victim	- 1 to 5 years - aggravated indecent assaults: doubled
<b>Trafficking</b>	Law 1996: Art.3	None	Irrelevant	Yes	A.C.	15 years	- Kidnapping - Moving people from a place to another, selling, or prostituting them - Promise of a counterpart or threat	- Victim under 15 years of age	- 10 to 15 years - victim under 15 years of age: 15 to 20 years
<b>Prostitution/ Pimping</b>	1996 Law: Art.4 and 5	None	Not mentioned but apparently irrelevant	Yes	A.C.	15 years	- Supporting, protecting, training, confining prostitute(s) - Sharing the benefits - Being intermediary between prostitutes and owner of brothels / customers	- Victim: under 15 years of age, or foreigner in Cambodia - Offender: victim's husband, wife, boy/girlfriend, father, mother, or guardian - Coercion, violence, or threat - Repeated offence - Prostituting victim abroad	- 5 to 10 years - aggravated pimping: 10 to 20 years

### iii. Lacunas/Gaps in the laws

#### Definitions

The difficulties with reference to the definitions of child sex offences have already been pointed out. In conclusion, we can state that the definitions are vague, unclear or completely absent.

The identified problems are:

- Rape: difficulty in determining whether the child consented or not and thereafter to qualify the offence of rape
- Debauchery: no definition of "opening a place for debauchery" / no definition of the act of debauchery / confusion with the offence of rape when the victim did not consent
- Indecent assaults: definition too large due to the term "any other sexual act" / confusion with the offence of debauchery
- Pimping/prostitution: conflict between the 1996 law and the UNTAC Code / no mention of the victim's consent in the 1996 law

Gaps in the definitions together with the lack of clarity in the laws lead to difficulties for prosecutors, Investigating Judges, and policemen in determining the offence, charging the offender, and searching for the relevant evidences.

#### Age of consent

Age of majority and age of consent are different. The age of majority refers to the age over which the victim is not considered as a child anymore but as an adult. The age of consent is the age below which a child is not able to give informed consent for having sexual intercourse or any other sexual activities.

There is no legal definition of a child in Cambodian laws, neither is there an explicit statutory age of consent.

Regarding the age of majority, Cambodia signed and ratified the United Nation Convention on the Rights of the Child (CRC), which stipulates in article 1, that a child is any person below 18 years of age. This provision has not been enshrined in the national laws, although it is stated in the Cambodian Constitution that the State shall protect the rights of children as stipulated in the CRC and shall recognize and respect Covenants and Conventions related to children's rights<sup>23</sup>. However, Cambodian courts apply the age of majority as 18 years of age, in accordance with the CRC. In Cambodia, we can therefore state, a child becomes an adult when he/she is 18 years old.

The age of consent is not legally defined. The law on marriage and family fixes the minimum legal age for marriage at 18 years old for women and 20 for men, but does not give any guideline as to age of consent. The articles criminalizing rape and indecent assaults mention a minimum age of the victim<sup>24</sup>; however this age can not be interpreted as determining the age of consent because for both offences it is stated that the victim is non-consenting. This minimum age could therefore only be interpreted as the age below which the victim is considered as more vulnerable.

However, according to the 1996 law, the crime of debauchery is committed and the crime of trafficking is aggravated when the victim is under 15 years of age, regardless of

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<sup>23</sup> Cambodian Constitution, Art.48 and 31

<sup>24</sup> Raping a child below 14 years of age or committing indecent assaults on a child below 16 years of age constitute aggravating circumstances.

his/her consent. Thus by implication, the accepted age of consent for having sexual relations is interpreted by the court officials as **15 years of age**.

Two problems arise: firstly, it is sometimes extremely difficult to determine the age of the child as many children in Cambodia do not know exactly how old they are (neither do their families) and they rarely have reliable official documents that could prove their age<sup>25</sup>. Secondly, this age limit could be a problem in cases where the child is abused for a long time and the offence is discovered when he/she is already 15 years old.

**Ex:** a girl met a foreigner when she was 13 years of age. The foreigner began to have sexual intercourse with her, for money and favours of material value. Three years later, when she is sixteen, APLE discovers she is abused. The sexual acts committed during the previous year can not be considered as an offence (according to the law, the previous year she incurred the capacity to consent freely to have sexual intercourse). APLE will only have a case of debauchery if they can to prove that the sexual acts were also committed when the girl was between thirteen and fifteen years of age. However, such evidence is almost impossible to obtain: the girl continues to have sex with the man so all the internal or external injuries she may have could be a result of sexual intercourse at the age of 15.

### Pornography

“Child pornography means any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes”<sup>26</sup>.

No law or provision in the Cambodian legislation incriminates child pornography. As a result, any person can freely, without being liable to any punishment take a child home and ask him/her to undress and lie on a bed in sexual positions, and take pictures or videos of this child. It occurred in many APLE cases that pictures of child pornography were found at the offender’s house. These pictures can neither be used to charge the man for pornography, nor prove the man had sex with the child (in cases where the man is not in any of the photographs). It remains possible to use them as informative elements for the court during the trial, however, this is trifling the seriousness of the act of pornography.

**Ex:** On 13 December 2005, Damien Walker, an Australian citizen, was arrested after having been monitored by APLE investigators. Hundreds of pictures of naked children were found on his laptop. At the police station, Damien Walker confessed having taken those pictures. He further explained that he was extremely concerned about some pictures taken whilst he was doing a sexual act with a boy. He wanted to keep the pictures of that act. The pornographic pictures seemed to be his motivation for committing that act, however, he received no further punishment for the act of pornography. He was convicted to 10 years imprisonment for debauchery.

It is questionable whether the offence of indecent assault could be used or not in case of pornography. As a matter of fact, indecent assault means touching, caressing, or committing any other sexual act except penetration. Considering that the phrase “any sexual act” is not defined, “it is at least arguable that the words “any other sexual act”

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<sup>25</sup> Interview with a policeman.

<sup>26</sup> United Nations, Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, A/RES/54/263, 25 May 2005, entered into force on 18 January 2002, Art.2.c)

may include sexual acts not involving contact with the victim (for example, indecent exposure)<sup>27</sup>. Could the definition be widened to include pornography? This consideration is only hypothetical as the offence of indecent assault has never been invoked by any court to incriminate pornography.

### c. The other protagonists

It should be possible to prosecute all the persons that are indirectly involved in the child sex offence, namely: the motor-taxis that provide ofnumberfenders with children, the owners of guesthouses that accept men who bring children with to rented rooms, parents that know their child is having sex for money and benefit from it or even encourage children to do so, etc...

All these persons are indirectly participating in the commission of a child sex offence but are never prosecuted for these acts. However, the law states that persons who benefit from child sex offences could be charged with pimping<sup>28</sup> or complicity<sup>29</sup>.

## 2. Procedure

### a. Presentation

The criminal procedure is detailed in two laws:

- The UNTAC Code
- The Law on criminal procedure adopted in 1993

The UNTAC Code was a temporary law. UNTAC jurists wrote it in a very short time, setting up the essential elements of criminal law and criminal procedure, thinking this law would be revised and completed by the new government of Cambodia as soon as it was established and able to draft a more thorough piece of legislation. As a matter of fact, one year later, in 1993, the Law on criminal procedure was adopted. However, this law is unclear and sometimes conflicts with the UNTAC Code articles. Therefore, the same problems as mentioned below arise, namely, which law will prevail over the other. Additionally, the police and judicial officers' behaviour is a burden on investigative procedures which are within their mandate.

The NGO LICADHO pointed out the criminal procedure law enforcement problems in stating:

"There remains no law which clearly defines the role of trial judges, investigating judges, prosecutors and clerks"<sup>30</sup> "Like the judiciary, law enforcement suffers from lack of independence, corruption and low level of professionalism. There is poor coordination between the police and the courts, including a lack of collaboration, trust and respect. Police may be reluctant to pursue the investigation of a case, may fail to enforce existing laws, refuse to intervene in instances of mob-justice, and refuse to enforce court orders. When the police do take action, criminal procedures set out in law are rarely followed adequately. Cases of arrest without a warrant (...) are frequent. Rather than collecting

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<sup>27</sup> Criminal Law Resource Guide, p.335

<sup>28</sup> 1996 law, Art.4 and 5, UNTAC Code, Art.42.

<sup>29</sup> 1996 law, Art. 3 and 6, UNTAC Code, Art. 69

<sup>30</sup> LICADHO, *Cambodian Human Rights report 2004: a brief on current human rights issues*, July 2004, p.20.



evidence, investigating and supporting impartial trials, the focus of police often falls to extraction of confessions and convictions.”<sup>31</sup>

The following parts explain the criminal procedure in the law and in practice, and the limits these impose on the law enforcement, with special attention to child sex offences.

b. The procedure before the trial

i. The protagonists of the criminal procedure before the trial

The protagonists of the criminal procedure before the trial are:

- the judicial police<sup>32</sup> (where the offence is related to human trafficking or child sex offences, the Anti-trafficking department can be mandated to investigate on the case<sup>33</sup>)
- the prosecutor
- the investigating judge

Please note, with regard to the police<sup>34</sup> charged with combating child sex offences: *Before 2000, human trafficking was widespread and the police were not concerned with child sex offences and child trafficking. In order to change this, in 2000, the Law Enforcement Against Sexual Exploitation of Children Project (compiled by amongst others: the Ministry of Interior and the Ministry of Justice, UNICEF, World vision, Cambodian Criminal Justice Assistance Project and International Justice Mission) initiated the creation of two criminal police offices: one working on juvenile protection and the other on human trafficking.*

*The purpose was capacity building: the project was aimed at helping the judicial police in fighting against child sex offences, sexual exploitation and human trafficking, by organizing seminars, advocacy campaigns and policemen training. The project officers identified policemen who were willing to get involved in the fight against the exploitation of children and thereafter created an informal network of policemen in provinces who were given the task of investigating cases in collaboration with NGOs.*

*As a result of this project's success, an Anti- Human Trafficking and Juvenile Protection Department was created in 2002. In the beginning, the two offices dealt primarily with the sexual exploitation of women and children and human trafficking. However, overtime it became apparent that child sex offences were a huge problem in Cambodia, and that incest, rape, indecent assaults and debauchery were more prevalent than trafficking and therefore these crimes were included in the Anti-trafficking department prerogatives.*

*The project has been implemented in five provinces: Phnom Penh, Sihanoukville, Siem reap, Battambang, and Bantey Meanchey. There has been a great improvement in the fight against human trafficking, exploitation and child sex offences: in 1999 35 offenders were arrested for one of these crimes, against 400 in 2004; and more than 1000 law enforcement officers are trained a year.*

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<sup>31</sup> LICADHO, *Cambodian Human Rights report 2004: a brief on current human rights issues*, July 2004, p.21.

<sup>32</sup> Law on Criminal Procedure, Art. 35

<sup>33</sup> The Anti-trafficking and Juvenile Protection Units are present only in 5 provinces of Cambodia (see below). In the provinces where there is no Anti-trafficking unit, the police mandated to investigate child sex offence cases is the judicial police

<sup>34</sup> The information on the Police and Anti- Human Trafficking Department was provided by a policeman of the Anti-trafficking department, and a UNICEF Child Rights Protection Officer

## ii. Description of the procedure before the trial

The criminal procedure laws are complex and unclear. As a result, judicial police, prosecutors and investigating judges use the law as far as it is explicit; however, they inevitably go back to practice when the law is unclear and/or difficult to understand<sup>35</sup>. In order to make the procedure understandable, it will be detailed by using both legal and practical elements<sup>36</sup>.

The criminal procedure before the trial will be considered in chronological order from the moment the offence is reported to the police, to the moment the investigating judge transfers the complete file to the Court.

This period could be divided in five stages.

- *First stage*: the offence is discovered
- *Second stage*: the police investigate and/or transfer the file to the prosecutor
- *Third stage*: the prosecutor conducts a further investigation if needed, prepares an introductory indictment making reference to specific facts and legally characterizing the infraction, and transfers it and the file to the investigating judge with an eventual proposal of pre-trial detention of the offender
- *Fourth stage*: the investigating judge investigates if necessary and then decides whether to impose a pre-trial detention or not, and then reviews the charges
- *Fifth stage*: the investigating judge forwards his conclusions on the charges to the prosecutor, who examines the investigating judge's new proposal (if there is one), the prosecutor thereafter either validates it or proposes other charges, and then transfers the file to the investigating judge for the last time. The investigating judge finally decides which charges will be kept in that case, and transfers the file to the Court for the trial to begin.

### Stage 1: The discovery of the offence<sup>37</sup>

The very beginning of an investigation is the discovery of the offence. The offence can be discovered in two manners: someone reports the crime to the police (most of time at the police station), or the police discover the offence directly on the crime scene. This is a flagrante delicto.

- 🗣️ The victim, witness(es), NGOs or any other person can report to the police, the prosecutor, or the investigating judge (but this is very rare). When reporting the offence, the victim explains what happened to her/him in a formal complaint or merely in an oral report<sup>38</sup>.

According to the law, reporting the offence does not necessary mean making a formal complaint. This means that the police and the prosecutor do not need to get a formal complaint to investigate a case<sup>39</sup>. It is well stipulated that the judicial police have the right to conduct official inquiries on all penal offences, except some offences for which

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<sup>35</sup> This seems to be the consensus among the legal workers and law enforcement officers. All the interviewed persons agreed with this statement.

<sup>36</sup> All the information regarding the criminal procedure in practice was obtained during the interviews

<sup>37</sup> Law on criminal procedure, Art. 45 (report to the police), art. 56 (report to the prosecutor), art. 69 (report to the investigating judge)

<sup>38</sup> Sim Souyong, Pa Ngoun Kea, Lay Putheara, *Children in the Cambodian Justice System*, Protection of Juvenile Justice, p.29 to 33. (Pages 30 to 33 contain examples of complaints forms)

<sup>39</sup> This principle is linked to the fact that the criminal field has the purpose of building rules to maintain the social order, and the judicial system is the guarantor of the respect of these rules. When a rule is infringed, the social order is threatened. For that reason, where the victim does not want to complain about the offence he suffered from, the police and prosecutors must still investigate and bring the offender before the Court so as not to release someone that could be a threat to the social order.

the law requires a complaint from the injured party prior to the inquiries<sup>40</sup>. However, it is not specified that a complaint is necessary in the articles relating to the child sex offences mentioned above.

In practice, the law is not always applied and it is common that the police or the prosecutor refuse to conduct investigations until the victim has filed a complaint. Moreover, prosecutors and investigating judges usually close the case when the victim withdraws his/her complaint.

Therefore, in practice, a complaint is needed for an investigation to be conducted<sup>41</sup>.

- 🚩 When the police discover the offence on the crime scene, we talk about a flagrante delicto. There is a flagrante delicto<sup>42</sup> where:
  - the suspect is observed by the police committing a crime, or is pursued by a public hue and cry
  - the suspect is identified at the scene of a crime by witnesses or the victim
  - the suspect attempts to flee the scene of the crime

The definition of the flagrante delicto is problematic as the time limit after which the discovery of the offence will thereafter not constitute a flagrante delicto is not specified.

**Ex:** the police arrive at a murder scene and a witness tells the policemen that the suspect fled. The policemen follow the direction showed by the witness for 3 hours and finally find a man with a bloody knife in his hand. This constitutes a flagrante delicto. But does it constitute a flagrante delicto when the policemen find the man 3 days later?

Moreover, according to the law the offence must have certainly been committed, or the suspect must be seen fleeing. What happens when the suspect is not fleeing and nobody saw the suspect committing an offence?

In practice, the existence of substantially incriminating evidences is assimilated to a flagrante delicto. Substantially incriminating evidence is evidence that is specific and consistent enough to indicate that the suspect participated in the commission of the crime<sup>43</sup>.

**Ex:** an investigator working for APLE saw a man entering a guesthouse room with a child. Hiding in another room, the investigator called the Anti-human Trafficking and Juvenile Protection Unit, who arrived 45 minutes later. The investigator and the police knocked on the suspect's door. When the suspect opened the door, he was dressed, but the child was lying naked on the bed. Could it constitute a flagrante delicto of an offence of debauchery, considering that nobody can affirm the offence has been committed?  
In this case, the police considered there were substantially incriminating evidence because the child was lying naked on the bed, and the man was monitored for several days by APLE investigators, who suspected him to be to be a child sex offender. The police acted therefore as if it was a flagrante delicto, and brought the suspect and the child to the police station in order to interrogate them.

The possibility of assimilating the existence of substantially incriminating evidence to a flagrante delicto has been corroborated by several legal workers interviewed.

Apparently, when the situation is uncertain, it is on the police's initiative to decide whether there is a flagrante delicto or whether there is substantially incriminating

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<sup>40</sup> Law on criminal procedure, Art. 45

<sup>41</sup> Interview with APLE lawyer

<sup>42</sup> UNTAC Code, Art. 18

<sup>43</sup> UNTAC Code, Art. 19.1

evidence or not. However, the judge might consider the determination of a flagrant delicto differently and therefore record that the police followed the incorrect procedure which is therefore detrimental to the case.<sup>44</sup>

*Note: the status of limitations (or the time one has to complain to the police before losing the right to prosecute the offender), is three 3 years for misdemeanours (indecent assault, opening a place for debauchery), and 10 years for felonies (rape, debauchery, trafficking, pimping).<sup>45</sup> Once this period of time has passed the offender is exempt from being prosecuted for these acts. In many countries, this period of time runs from the day the victim has reached either the age of majority or the age of consent. Cambodian laws and jurisprudence are apparently silent on the subject; the starting of this period is therefore assumed to be the moment the offence is committed.*

#### Stage 2: The police investigates or transfers the file to the prosecutor

As stated before, the offence can be discovered by someone's report or by a flagrante delicto. There are two different processes for investigation depending on the way the offence was discovered.


*See next page*

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<sup>44</sup> UNTAC Code, Art 22

<sup>45</sup> UNTAC Code, Art. 30

FLAGRANTE DELICTO	REPORT OF VICTIM(S) / WITNESS(ES) / NGOs / OR ANY OTHER PERSON
<p>Police have the <b>right to conduct the investigation</b>. They investigate to gather information, elements, and evidences in order to prove the suspect committed an offence. In that purpose, <b>they can</b>:<sup>46</sup></p> <ul style="list-style-type: none"> <li>• <b>Take anything</b> on the scene of the crime that would be useful for the investigation: documents (ex: pictures of naked children), objects (ex: used condoms), etc...</li> <li>• <b>Search</b> the suspect's house or any other relevant place. A warrant is not necessary and search can be made at anytime of the day or the night.</li> <li>• <b>Arrest</b> and bring the suspect to the police station, eventually with the victim and/or witness(es)</li> <li>• <b>Interrogate</b> the suspect, the victim and witness(es)</li> <li>• <b>Keep the offender in custody</b> for a maximum of 48 hours</li> </ul> <p>After having investigated, thereafter the police submit their report to the prosecutor with all the objects produced in evidence</p> <p><u>NB</u>: In a case involving a flagrante delicto, the police are given a right to conduct the investigation, however, this is not an obligation. If they cannot conduct the investigation by themselves or if they think it would be better for the investigation to be conducted by the prosecutor, the police officers can immediately transfer the file to the prosecutor</p>	<p>Police do not have <b>the right to conduct the investigation</b>.</p> <p>They must immediately <b>transfer the file to the prosecutor</b> who will conduct the investigation by directing and authorising the police actions.</p>

 Custody at the police station

On the contrary to the provisions related to the pre-trial detention, the provisions related to the 48 hours custody at the police station do not mention the right of the suspect to meet with his lawyer.

 No right to file the case<sup>47</sup>

The officers of the judicial police have no right to file the case. They are required to forward their report to the prosecutor. In practice, the police often refuse to investigate and file the case as a result of receiving money from the suspect, believing the evidence

<sup>46</sup> UNTAC Code, Art. 13 (custody), 18 (arrest), 20 (searches); Law on criminal procedure, Art. 38 (judicial police's role), 46 (searches), 47 (arrest / custody), 44 (transfer of the case to the prosecutor)

<sup>47</sup> Law on criminal procedure, Art. 48

would be impossible or too difficult to gather, recommending that the victim solve the case outside the judicial system, or merely not willing to work.

Stage 3: the prosecutor investigates the case where required and sends the introductory indictment to the investigating judge

After having received the report on the case and the file from the police, the prosecutor either conducts an extensive or partial investigation, depending on whether the police have investigated after a flagrante delicto or not.

FLAGRANTE DELICTO: The police have conducted an investigation	NO FLAGRANTE DELICTO (report / complaint), or FLAGRANTE DELICTO without investigation from the police
<p>Where the police have made a <b>complete investigation</b> (all the required evidence is in the file, the suspect is in custody, the victim and the witnesses are known and have been interrogated, etc...), the prosecutor does not conduct a further investigation, but finalizes the file by:</p> <ul style="list-style-type: none"> <li>• <b>registering</b> the case<sup>48</sup></li> <li>• making a <b>charge</b>, an introductory requisition which indicates the specific facts and the legal characterization of the offence<sup>49</sup> (Ex: M. X is presumed responsible of the offence of debauchery)</li> <li>• <b>further interrogations of</b> the suspect, the victim and witnesses</li> </ul> <p>When the file is finalized, the prosecutor <b>sends</b> it with the introductory requisition to the investigating judge. He may <b>petition</b> the investigating judge to decide a pre-trial detention of the offender<sup>50</sup></p>	<p>Where there is a flagrante delicto but the <b>police did not investigate</b> and transferred the file immediately to the prosecutor, or where there is <b>no flagrante delicto</b> and the police then transferred the file, the prosecutor conducts all the investigations by:</p> <ul style="list-style-type: none"> <li>• <b>registering</b> the case<sup>51</sup></li> <li>• making a <b>charge</b> (introductory requisition)<sup>52</sup></li> <li>• issuing a <b>search warrant</b> for the police to search the suspect's house or any other relevant place and confiscate any objects to be produced in evidence and necessary for determining the truth<sup>53</sup></li> <li>• issuing an <b>arrest warrant</b> for the police to catch the suspect<sup>54</sup></li> <li>• <b>interrogating</b> the victim, the suspect, and any persons who may provide useful information<sup>55</sup></li> </ul> <p>When the file is complete, the prosecutor <b>sends</b> it with the introductory requisition to the investigating judge. He may <b>petition</b> the investigating judge to decide a pre-trial detention<sup>56</sup></p>

<sup>48</sup> Law on criminal procedure, Art. 58

<sup>49</sup> UNTAC Code, Art. 13.2; Law on criminal procedure, Art. 60

<sup>50</sup> Law on criminal procedure, Art. 60, 62; UNTAC Code, Art. 13.2

<sup>51</sup> Ibid footnote 39

<sup>52</sup> Ibid footnote 40

<sup>53</sup> Law on criminal procedure, Art. 62

<sup>54</sup> Ibidem

<sup>55</sup> Ibidem

<sup>56</sup> Ibid footnote 41

#### Filing the case<sup>57</sup>

If the prosecutor thinks the alleged acts do not constitute a criminal offence, he/she shall close the case and inform the plaintiff he did so. The prosecutor may always change his/her decision.

#### Stage 4: the investigating judge makes further investigations if needed and examine the charges and the proposal of pre-trial detention

When receiving the file and the introductory requisition from the prosecutor, the investigating judge examines the case<sup>58</sup> and further **interrogates** the victim, the suspect and witnesses<sup>59</sup>.

- The investigating judge can proceed to a further **investigation** if he/she considers it is necessary after reviewing the existing elements in the file<sup>60</sup>. He/she can then:
  - issue an **arrest warrant** if it has not been done yet<sup>61</sup>,
  - issue a **search warrant** when he/she thinks new important elements for determining the truth or proving the facts could be discovered<sup>62</sup>,
  - call for one or several **experts** (paid by the court)<sup>63</sup>

*Note: the only one case where the investigating judge would be directly in charge of the investigation is when he/she was present at the scene of the crime<sup>64</sup>*

- Where the prosecutor proposed a **pre-trial detention** of the offender, the investigating judge examines whether:
  - there is a risk that the suspect will escape or will not appear in court. This risk is regarded where the offender has no family, no house or no job that would oblige him/her to stay
  - there is a reason to believe the suspect will influence the victim, witnesses, or the investigationIf there is a probability that one of these elements exists, the judge may decide to keep the suspect in prison prior to the trial<sup>65</sup> and give his/her decision to the prosecutor in order for it to be executed. (The pre-trial detention is usually for a maximum of 4 months and can not exceed 6 months<sup>66</sup>)
- The investigating judge examines the **charges** proposed by the prosecutor and decides whether to keep the charges or to change them.

#### Stage 5: the end of the investigating phase and the final charges

When he/she has decided to keep the charges or to make a new proposal, the investigating judge forwards the file to the prosecutor, who then examines the new

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<sup>57</sup> Law on criminal procedure, Art. 59

<sup>58</sup> Law on criminal procedure, Art. 69

<sup>59</sup> Law on criminal procedure, Art. 75, 81, 82, 83, 84, 85, 86.

<sup>60</sup> UNTAC Code, Art. 13, Law on criminal procedure, Art. 62. *Note: the investigating judge can only investigate an act which corresponds to the charge determined by the prosecutor. If he/she thinks that a new act is punishable under another charge, he/she has to send the file back to the prosecutor in order him/her to propose a new charge for that act before investigating (except if this act does not constitute a new offence but only an aggravating circumstance): Law on criminal procedure, Art. 71*

<sup>61</sup> UNTAC Code, Art. 19.2 and 19.3

<sup>62</sup> UNTAC Code, Art. 20.3, Law on criminal procedure, Art. 87

<sup>63</sup> Law on criminal procedure, Art. 88

<sup>64</sup> Law on criminal procedure, Art. 62

<sup>65</sup> UNTAC Code, Art. 13.3, 14, Law on criminal procedure, Art. 79

<sup>66</sup> UNTAC Code, Art. 14.4

proposal, makes a charge in writing (where he either decides to keep the previous charges or accepts the judge's proposal) and refers it back to the investigating judge.<sup>67</sup> The investigating judge is then absolutely free to determine the qualification of the crime.

When the file is complete, the investigating judge sends it to the provincial or municipal court for the trial to begin.


#### Filing the case


The investigating judge can, at any moment, close the case if he/she thinks evidence is insufficient, and issue a non-suit order and an order to release the suspect.<sup>68</sup>

**This procedure should be respected during the investigation. If the police, the prosecutor or the investigating judge do not respect the legal procedure, the suspect must be release for procedural error<sup>69</sup>. As it will be explained below, the law is not as clear as the procedure detailed in this report; many things remain uncertain, which increases the risks of procedural errors.**

### iii. The problematic question of the evidence

It is the role of the police to gather evidence that helps to determine the truth and prove the existence of the offence<sup>70</sup>. However, evidence is, for many reasons, difficult to find and gather when a child sex offence has been committed.

 The first important piece of evidence is the witnesses' testimonies<sup>71</sup>. However, in terms of child sex offences, witnesses are very rare. Some persons may have seen the victim talking or walking or even entering a room with the suspect, but they almost never have seen the suspect having sex with the child.

 The second important piece of evidence is the child testimony or complaint, but these are fragile and can be changed or withdrawn for several reasons.

Firstly, children may feel ashamed or guilty for what happened, thinking it was their fault and are therefore reluctant to speak about the abuse. Moreover, children are extremely easily influenced by adult pressure and as a result they might change their statements if an adult ask them to do so.

Secondly, where the offence is debauchery, children or their families are often supported by the offender. They may then feel either guilty of denouncing a person who helps them, or moreover they might be scared of not receiving benefits if the offender is arrested. It is important to note that "children understand how much they stand to lose from a paedophile's arrest so they tend to protect customers (...). They refuse to cooperate (...) or they simply aid the flight of their customers."<sup>72</sup>

Thirdly, targeted children and their families (when they have one) are often very poor. It is then easy for the offender to offer them money in order them to change their testimonies or withdraw their complaint.

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<sup>67</sup> Law on criminal procedure, Art. 89

<sup>68</sup> UNTAC Code, Art. 13.3, Law on criminal procedure, Art. 90

<sup>69</sup> UNTAC Code, Art. 22

<sup>70</sup> Law on criminal procedure, Art. 38

<sup>71</sup> Interview with an investigating judge, Sihanoukville

<sup>72</sup> Ibid, *Street Paedophilia in Cambodia*, p. 32.



Fourthly, as children and families are poor and often uneducated, they may not know how to read or may not understand legal papers and procedures. It is therefore likely that an offender might ask friends to meet the child or the family and ask them to sign papers they do not understand, that are in reality attestations of complaint withdrawals.

**Ex:** In many of APLE's cases the children withdrew or changed their testimonies. It is thought that the children or their families were submitted to pressure from the suspect or other persons acting in the name of the suspect. However, this was difficult to prove. It has been once discovered: APLE was working with LICADHO on a case. When visiting the children's families LICADHO was told by at least three families that four men came to show them two letters and ask them to fingerprint it (complaint withdrawal letters and complaint against LICADHO). Some of them did and some did not. One mother fingerprinted a letter thinking it was an invitation from the prosecutor. Some other families refused to talk about the case to LICADHO, saying either that they did not know anything about it, or that they did not want to talk about it. The suspect was released a few hours after his arrest for lack of evidence.

NB: the children testimonies cannot prove the offence if not corroborated by other evidence<sup>73</sup>.

🌈 The third important piece of evidence is the medical examination that proves the existence of internal or external injuries or the presence of corporal elements or liquids due to the offence. This can be compromised for the following reasons.

Firstly, the examination has to be made extremely rapidly, or these injuries and elements may disappear. For instance, where the child has been penetrated without condom (which is often the case), the offender's semen can be found on or into the child's body. If the child is examined several days later, he/she will probably have already bathed which would potentially remove traces of semen.

Secondly, regarding the injuries, the longer the child takes to make a complaint, the more difficult it is to prove that the injuries are a result of abuse perpetrated by a specific person. The examination can show injuries exist but cannot prove who inflicted such injuries.

Thirdly, the child often has no obvious injuries or marks where he/she gave his/her consent (consent which is obviously irrelevant for prosecution for children under 15 years of age) to the offender (this is often the case in debauchery offences). Additionally, if the offender did not penetrate the child or used a condom or sexually caressed the child, it is unlikely that a medical examination will provide further evidence.

🌈 It is stated in the law that the reports of the judicial police shall be considered as authentic evidence to the contrary, and judges shall consider the essence of the report truthful and accurate as long as contradictory evidences are not brought to light<sup>74</sup>. However, policemen are often bribed and asked to change the content of the report. In such a case, they can change the victim's or witnesses' statements, or remove some evidence registered in the report. This can be a serious burden.

Evidence is extremely important, not only because it proves the suspect's guilt during the trial, but also because in practice it is needed for the procedure. When prosecutors and investigating judges refuse to issue warrants or when the police refuse to investigate further, they often argue that there is a lack of evidence.

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<sup>73</sup> Interview with an investigating judge, Sihanoukville

<sup>74</sup> Law on criminal procedure, Art. 42

**Ex:** In one case, the police told APLE that with no conclusive evidence they would not pursue the case further (despite it being stipulated in the law that the police do not have the right to close a case or stop an investigation. They should always forward the file to the prosecutor).

In another case, where the suspect was in pre-trial detention, the investigating judge explained that he would probably release the suspect because he did not have enough evidence to send the case to the court (this has happened in many previous cases). It is important to say that in this case, it took 90 days for the prosecutor to issue an arrest warrant and he refused to issue a search warrant because of a lack of evidence (although the search warrant has the purpose to search the suspect's house and find more evidences).

In most cases where the suspect is released for lack of evidence, the main existing evidence is the children testimonies. However as a result of pressure, children withdraw or change their statements which leads a judge to doubt the credibility of the testimonies.

The evidence usually needed in cases of child sex offences are tabled below.

## EVIDENCES OF CHILD SEXUAL OFFENCES<sup>75</sup>

TYPE OF OFFENCE	EVIDENCES	PROBLEMS IN GATHERING EVIDENCES
<b>Rape / Attempted Rape</b>	<ul style="list-style-type: none"> <li>▶ Victim(s) testimonies</li> <li>▶ Witness(es) testimonies                             <ul style="list-style-type: none"> <li>• parents, relatives, friends, others...</li> </ul> </li> <li>▶ Medical evidences                             <ul style="list-style-type: none"> <li>• injuries to genital</li> <li>• presence of perpetrator's sperm, hair, DNA on victim</li> <li>• victim's bites or scratches on perpetrator's body</li> <li>• medical examination or reports showing victim had intercourse or was penetrated by object</li> </ul> </li> <li>▶ Physical evidence                             <ul style="list-style-type: none"> <li>• perpetrator's sperm, clothes, underwear, hair or shoeprints at location of alleged crime</li> <li>• signs of struggle or fight</li> <li>• victim's hair, handprints, shoeprints or underwear with perpetrator</li> </ul> </li> <li>▶ Confession</li> </ul>	<ul style="list-style-type: none"> <li>• Children/parents reluctant to testify (victim often feel ashamed)</li> <li>• Policemen bribery</li> <li>• Medical evidences hard to get when the rape has been committed several days before (or more): sperm and any other body's elements and marks disappear.</li> <li>• Medical examination expensive and extremely rarely paid by the judicial system</li> </ul>
<b>Debauchery</b>	<ul style="list-style-type: none"> <li>▶ Victim(s) testimonies</li> <li>▶ Witness(es) testimonies                             <ul style="list-style-type: none"> <li>• parents, relatives, friends, neighbours, flat owner, guesthouses owners or receptionists, other</li> </ul> </li> <li>▶ Medical evidence                             <ul style="list-style-type: none"> <li>• medical examinations or reports showing the victim had intercourse or was penetrated by an object</li> <li>• presence of perpetrator's sperm, hair, DNA on victim</li> <li>• injuries to genitals</li> <li>• wounds, scars or injuries on child</li> </ul> </li> <li>▶ Physical evidence                             <ul style="list-style-type: none"> <li>• perpetrator's sperm, clothes, underwear with the child</li> <li>• child's sperm, clothes, underwear at the perpetrator's place or any other location of the alleged crime</li> <li>• letters, e-mails written by the perpetrator showing strong feelings or sexual desire for the child</li> <li>• photos of child with the perpetrator touching or caressing him/her</li> <li>• pictures or videos of child with or without the perpetrator, naked, in a sexual position or having a sexual activity (either hard or electronic copies) (at the perpetrator's or any other place)</li> <li>• Evidence of support to child/family: money transferred on family's account, land/house, clothes, jewels, school supplies, motorbike, (etc.) bought by the perpetrator</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Children/parents reluctant to testify: guilt of denouncing the offender, fear of loosing money/ favours</li> <li>• Flagrant Delicto rare: warrants needed for searches and arrests (longer investigation, more difficulties to gather evidences)</li> <li>• Policemen bribery to hide evidences</li> <li>• Medical evidences hard to get when offence was several days before (especially when no penetration: no sperm or internal injuries)</li> <li>• Medical examination expensive, not paid by the judicial system</li> <li>• Pictures/videos, letters/emails, proofs of support to the child/family: not evidences if not corroborated by</li> </ul>

<sup>75</sup> The main part of table data on evidences needed is from: LICADHO, *Guide to Law on Child Trafficking and Sexual Exploitation*, Draft March 2003.

		other elements
<b>Indecent Assault</b>	<ul style="list-style-type: none"> <li>▶Victim(s) testimonies</li> <li>▶Witness(es) testimonies <ul style="list-style-type: none"> <li>• parents, relatives, friends, other</li> </ul> </li> <li>▶Medical evidence <ul style="list-style-type: none"> <li>• medical examinations or reports</li> <li>• wounds, scars or injuries on child</li> </ul> </li> <li>▶Physical evidence <ul style="list-style-type: none"> <li>• perpetrator's shoeprints, clothes or underwear at location of alleged crime</li> <li>• victim's handprints, marks or scratches on perpetrator</li> <li>• signs of struggle or fight</li> </ul> </li> <li>▶Confession</li> </ul>	<ul style="list-style-type: none"> <li>• Children/parents reluctant to testify (victim often feel ashamed)</li> <li>• Policemen bribery to hide evidence</li> <li>• Medical examination expensive, not paid by the judicial system</li> <li>• Medical evidences hard to get when no injuries or marks neither on child nor on perpetrator</li> </ul>
<b>Prostitution / Pimping</b>	<ul style="list-style-type: none"> <li>▶Victim(es) testimonies</li> <li>▶Witness(es) testimonies <ul style="list-style-type: none"> <li>• parents, relatives, other customers, friends, etc...</li> </ul> </li> <li>▶Medical evidence <ul style="list-style-type: none"> <li>• wounds, scars or injuries on child's body or genitals indicating use of force to perform sex for clients</li> </ul> </li> <li>▶Physical evidence <ul style="list-style-type: none"> <li>• child is dressed in outfits not suitable for the relevant living environment</li> <li>• child's hair and face are made in a manner unsuitable for the relevant living environment</li> <li>• child's manners communicate the offer of sexual services</li> <li>• presence of customers who procure sexual services from child</li> <li>• evidence of advertising sexual services (signs, internet ads, etc.)</li> </ul> </li> <li>▶Confession</li> </ul>	<ul style="list-style-type: none"> <li>• Children/parents reluctant to testify (often feel ashamed of child prostitution, and/or afraid of losing money if the child stops prostituting)</li> <li>• Policemen bribery to hide evidences</li> <li>• Medical examination expensive, not paid by the judicial system</li> <li>• Medical evidences hard to get when no use of force, or no marks/injuries, or when sexual intercourse happened several days before</li> </ul>
<b>Pornography</b>	<ul style="list-style-type: none"> <li>▶Victim(s) testimonies</li> <li>▶Witness(es) testimonies <ul style="list-style-type: none"> <li>• parents, relatives, friends, photograph developer, etc...</li> </ul> </li> <li>▶Physical evidence <ul style="list-style-type: none"> <li>• photos or video tapes / VCDs of nude children or children being sexually exploited</li> <li>• publicity showing movies with nude children or child performing sexual acts</li> <li>• records or financial receipts of perpetrator's purchase or possession of pornographic materials</li> </ul> </li> <li>▶Confession</li> </ul>	<ul style="list-style-type: none"> <li>• Children/parents reluctant to testify (often feel ashamed of child prostitution, and/or afraid of losing money if the child stops prostituting)</li> <li>• Policemen bribery to hide evidences</li> <li>• When pictures/videos found on internet: difficulties to know the perpetrator</li> </ul>

#### iv. Burdens

Several problems arise in the pre-trial procedure which limit conducting a proper investigation, namely: the lack of clarity in the laws, the difficulty in gathering evidence and the lack of funding for investigations, the law enforcement and judicial officers' reluctance to cooperate, the officer's lack of knowledge of the laws and technical skills of investigation, the lack of special concern in children interrogations, the extra-judicial settlements, and corruption.

##### The lack of clarity in the laws

The procedure as described in both the UNTAC Code and the law on criminal procedure is unclear.

Firstly, the problem of prevalence (which law will prevail over the other) explained above regarding the criminal laws arise. The first law dealing with criminal procedure is the UNTAC Code. It was revised in 1993 by the law on criminal procedure, and thus if the principle is applied, the later law should be applied in isolation. However, this is impossible because the UNTAC Code contains provisions that are not mentioned in the law on criminal procedure and should undoubtedly be taken into consideration. Moreover, the two piece of legislation are closely linked and cannot be separated, as a matter of fact, the law on criminal procedure refers in some provisions to the UNTAC Code. This is therefore confusing and leads to problems in the implementation of the law, especially when the provisions of the two laws are in contradiction.

Secondly, even if the law on criminal procedure had the purpose of clarifying and filling the gaps of the UNTAC Code provisions, several elements of this law are stated but not explained and detailed. The application therefore becomes extremely difficult.

Thirdly, until the adoption of the law on criminal procedure in 1993, the law provisions dealing with criminal procedure were so weak that the law enforcement and judicial officers used to merge law provisions and practice. This habit is still present and seems to be difficult to abandon. Moreover, the habits and the ways to enforce the criminal procedure are different according to the provinces<sup>76</sup>, thus it leads to a lack of coherence in the law enforcement.

The examples below show how hard it is to understand the law provisions, and to enforce a clear and constant criminal procedure.

- 🚦 The difference between the procedure where there is a flagrante delicto and the procedure where there is no flagrante delicto

According to the law, the element determining which procedure should be applied is the existence or the non existence of a flagrante delicto.

Firstly, the term flagrante delicto is not explained in the law on criminal procedure but is in the UNTAC Code, so both pieces of legislation must be used here.

Secondly, the limited time after which an act will not be classified as a flagrante delicto is not documented and is rather a reflection of the policemen's appreciation, which obviously causes problems.

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<sup>76</sup> Interview with APLE lawyer

Thirdly, the different roles of the judicial police and the prosecutor in cases where there is or where there is not a flagrante delicto are confusing, and in practice the officers either determine whether there has been a flagrante delicto themselves, or are reluctant to use the flagrante delicto procedure.

**Ex.1:** judicial and law enforcement officers use article 18 of the UNTAC Code for the definition of flagrante delicto. Logically, they take into consideration this Article and the following ones which determine when a flagrante delicto is constituted. This leads in practice to the extension of the flagrante delicto procedure to the situation where there is substantially incriminating evidence.<sup>77</sup> However, substantially incriminating evidence is not mentioned in the article related to arrest in the case of flagrante delicto but in the following one that begins with "in all other cases". This means that the article related to substantially incriminating evidence excludes a contrario the flagrante delicto cases.

**Ex.2:** as the differences between the flagrante delicto and the non flagrante delicto procedures are not clearly explained, policemen often mix the two procedures. In one APLE case involving a flagrante delicto, policemen argued that they could not conduct searches between 6:00 PM and 6:00 AM even though this constraint is not valid in flagrante delicto procedures.

**Ex.3:** In one case the police requested an arrest warrant from the prosecutor despite the fact that there existed a flagrante delicto. This slows down the arrest procedure and permits the offender to escape. According to article 47 of the law on criminal procedure, the police have the right to arrest offenders caught red-handed in the act. However, Article 62 of the same law stipulates that in cases where the committed crime is flagrante delicto, the prosecutor may issue an order for the suspect to appear through arrest. Thus, two articles of the same law are in contradiction, and it is unsurprising that the police are reluctant to risk overstepping their mandates.

#### 🚔 The arrest warrant or order to appear through arrest

Under the law, when the prosecutor requires a suspect to be remanded he/she may issue an arrest warrant (or order to appear through arrest), and transmit it to the police in order for them to catch the suspect.

In practice, the process is more complicated. It has been observed that while sometimes the prosecutor issues an arrest warrant, other times he/she proceeds as follows:<sup>78</sup>

1. *Two summonses to appear:* the prosecutor issues a first summons to appear that will be given by the police to the suspect, requesting the suspect to appear and mentioning the offence he is suspected of having committed. A second summons is issued if the suspect does not appear.
2. *Two orders to appear:* where the suspect did not appear after the two summonses, the prosecutor issues a first order to appear, then a second one if the suspect still does not appear.
3. *Authorization to catch the suspect:* when the suspect does not respond to the prosecutor's orders, the prosecutor issues an authorization for the police to catch the suspect. The duration of this authorization is one month.
4. *Arrest warrant:* when, after one month, the police do not catch the suspect, the prosecutor issues an arrest warrant.

<sup>77</sup> Interviews with an investigating judge, Sihanoukville, APLE's lawyer, and with a representative of Protection of Juvenile Justice.

<sup>78</sup> This process has been described by APLE's lawyer and corroborated by other legal workers. The names of the documents have been translated from Khmer into English by a lay person, and may not represent the exact legal terms. According to APLE's lawyer, this has been detailed in the 1980's in a declaration from the Ministry of Justice.

NB: In cases of serious offences, the prosecutor could issue directly an authorization to catch the suspect.

It is obvious that this process can be extremely long, and the suspect never caught, especially when he/she is a foreigner likely to fly back to his/her native country. Although the prosecutor seems to have the option of issuing immediately an authorization to catch the suspect, this procedure is still complicated and voluntary or involuntary errors are possible.

The main reason why prosecutors may choose this process is the lack of clarity in both the law on criminal procedure and the UNTAC Code regarding when an arrest warrant should be issued and what its contents should be; this applies especially in cases where there is no flagrante delicto (the majority of cases). The same problem arises with search warrants.

This may constitute a pretext for prosecutors and investigating judges to follow an incorrect procedure. The following examples show the damaging consequences that such behaviours may have.

**Ex1:** In one APLE case, the prosecutor issued a letter, handed over by the police to the suspect, requesting the suspect to attend to the court four days later for an interview regarding charges of debauchery. A few hours later, the suspect left his house and never returned. APLE does not know whether the error was involuntary, but it remains that if the prosecutor had followed the law and issued an arrest warrant, the suspect would not have been able to flee.

**Ex2:** In another case, an APLE project officer was told by an investigating judge that a search warrant could not be issued because there was not enough evidence in the file, despite the fact that it is not mentioned in the law that a certain quantity of evidence is needed for the issuance of a warrant. As a consequence, whilst the investigating judge was trying to gather more evidence, the suspect's friend removed all the compromising documents, objects, pictures etc, (that could actually have constituted the aforementioned evidence) from the suspect's house.

It is concluded therefore that the lack of clarity in the two piece of legislation, when combined with the potential unwillingness of the prosecutors or investigating judges to work properly, can lead to grave errors in the procedure and to the failure of prosecutions.

#### The difficulties in gathering evidence and the lack of resources available for investigations

The difficulties in gathering evidence have been explained in depth above. An additional problem is added to these difficulties: the lack of funding for investigations.<sup>79</sup> Firstly this problem reduces the capacity of law enforcement officers to conduct proactive investigations. Without adequate funds, policemen, prosecutors and investigating judges cannot use medical, chemical or physical techniques to find and evaluate evidence. This means for instance that they are not able to request experts to analyse DNA (which can be crucial evidence in cases of child sex offences), or to use sophisticated electronic devices for surveillance. As a consequence, "investigating judges commonly explain that they do not have money or time to conduct evidence-gathering missions, so they must rely heavily on police reports."<sup>80</sup> This leads to the problem of the reliability of police reports (in cases where there is bribery for example).

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<sup>79</sup> There was a consensus on this issue between the investigating judge, the policeman and the UNICEF Child Protection Officer interviewed.

<sup>80</sup> LICADHO, *Rape and indecent Assault in Cambodia 2004*, March 2004, p.13.

Secondly the lack of resources demonstrates the government's unwillingness to considerably improve the skills of the police in investigating foreigner-perpetrated child sex offences. One could not say that the government wants to protect child sex offenders, but rather that there is a concern that Cambodia does not get a 'police-state reputation'<sup>81</sup> by monitoring all foreign tourists, as this would limit the development of tourism activities in Cambodia and as such reduce the income available for the state.

#### The unwillingness of law enforcement and judicial officers to cooperate and properly perform their duties

The lack of cooperation can be found at three levels:

- between police and prosecutors or investigating judges
- between prosecutors and investigating judges
- between NGOs and police, prosecutors or investigating judges

"There is a poor coordination between the police and the courts, including a lack of collaboration, trust and respect"<sup>82</sup> Cooperation between NGOs working on/with the judicial system and law enforcement or judicial officers is sometimes difficult, either because the officers do not want NGO involvement in a case (and discover bribery for instance), or because they merely do not have the will to properly perform their duties. In many APLE cases the lack of cooperation was obvious.

**Ex:** in one case, it took almost two months for the prosecutor to issue an arrest warrant. He stated that the police had asked the suspect for copies of his passport and visa as these were needed to issue the arrest warrant, although in reality this had not been done. He also accused NGOs of being responsible for child sex offences as they should take better care of children. Finally the prosecutor said that he was not issuing the arrest warrant because the law regarding debauchery was unclear and he did not know whether oral and anal sex amounted to debauchery under the 1996 law, though foreigners had already been charged with debauchery for such acts. These arguments were obviously wrong and dishonest and had the purpose of delaying the issuance of the warrant and ousting APLE from the case process.

The cooperation between law enforcement and judicial officers and NGOs seems to be particularly fragile in Sihanoukville (with the exception of a few officers). As a matter of fact, the Sihanoukville NGO Response Network noted that "despite request and interviews, the courts and police stations of Sihanoukville would or could not produce arrest records, court papers or other documentation regarding child sexual exploitation in Sihanoukville for [their] pilot project"<sup>83</sup>.

However, the lack of cooperation is not systemic and in many other APLE cases the police cooperated during the investigation and arrest of suspects, especially in Phnom Penh where the Anti-trafficking and Juvenile Protection Unit is more proactive. But even where law enforcement and judicial officers have the will to work in collaboration with NGOs, there is always the risk that limits and pressure will be imposed by their supervisors or other persons in the upper levels of the government.<sup>84</sup> "Police, judges and prosecutors who investigate controversial cases may be subject to intimidation and may fear retaliation for a judgement which is not in the favour of a powerful party"<sup>85</sup>. Threats of pressure from superior powers can therefore be the origin of their unwillingness to work,

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<sup>81</sup> Interview with the UNICEF Child Protection Officer.

<sup>82</sup> Ibid, LICADHO, Cambodia human rights report, p.21

<sup>83</sup> Sihanoukville Response network, A networking group to combat child sexual exploitation, *Final Report for Project PKP/KH/7/03*, April 2005, p.5

<sup>84</sup> Anonymous source

<sup>85</sup> Ibid, LICADHO, Cambodia human rights report, p.21



as they would prefer to avoid being exposed to reprimand from supervisors, loss of employment or even worse consequences.

#### Poor legal knowledge and inadequate technical skills for investigations among law enforcement and judicial officers

Firstly, the lack of legal knowledge makes it impossible for law enforcement and judicial officers to respect the criminal procedure and to understand children's rights when they do not know or understand the content of legislation.

It has been noticed that during interviews conducted for the survey, responses given to questions dealing with the criminal procedure sometimes differed according to the person interviewed. It is important to note that the interviewed person often did know the Cambodian legislation and that the differences in the information obtained were mostly due to the lack of clarity in the laws, which make the criminal procedure hard to understand.

The lack of knowledge among law enforcement officers is generally due to the lack of legal training.<sup>86</sup> As a matter of fact, although all police officers must undergo formal training (which is not enough to provide extensive legal knowledge), there is no need, before entering the police force to attempt to legal training or pass legal exams.<sup>87</sup> Legal training is provided after entry into the police force by the Ministry of interior, the Law Enforcement against Sexual Exploitation of Children Project, other NGOs, and even sometimes foreign police officers. However, training can not be held for all policemen of all provinces, and therefore in one hand some policemen are not targeted, and in another hand the policemen's legal knowledge will differ from one policeman to another and from one province to another.<sup>88</sup>

It is thus difficult for police officers to follow in investigations the exact criminal procedure as detailed in the law.

This lack of knowledge can also be found amongst the judicial officers.<sup>89</sup>

Secondly, in addition to the lack of legal knowledge, police officers have rarely attempted training on skills and techniques of investigation, making proactive investigations difficult.<sup>90</sup> This can lead to poor investigations, and the release of suspects for lack of evidences or procedural errors.

#### A lack of special consideration when interviewing children

The methods used to interview children and adults are usually the same. There is no special care or specific process followed when the victim is a child, mainly because police officers, prosecutors and investigating judges have no knowledge of child psychology or how to behave with a child victim of a sex offence.<sup>91</sup>

Therefore when interviewing children, police officers, prosecutors and judges are often rude or ask inappropriate or insensitive questions, which can lead to the child staying silent and refusing to testify about the offence.

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<sup>86</sup> Policemen working for the Anti-trafficking and Juvenile Protection department come from many different provinces and often previously worked for other departments (the administrative police for instance) and thus have no knowledge of criminal law: interview with a policemen from the Anti-Trafficking and Juvenile Protection Unit.

<sup>87</sup> Interview with a policeman from the Anti-Trafficking and Juvenile Protection Unit.

<sup>88</sup> Cf Annex 3: policemen's knowledge of the law in different provinces, PJJ Workshop report 2005.

<sup>89</sup> Interview with the UNICEF Child Protection Officer and representatives of the NGO PJJ

<sup>90</sup> Interview with the UNICEF Child Protection Officer

<sup>91</sup> Interview with representatives of the NGO PJJ.

### Extra judicial settlements<sup>92</sup>

Extra judicial settlements are common-place and consist of a proposal to the victim or the child victim's family that an arrangement be made outside of the judicial system, which usually means offering a compensation of a material value in order that the victim either not complain or withdraw his/her complaint.

The extra judicial settlement can be initiated by:

- Policemen, prosecutors, judges, or clerks, who receive a benefit from the suspect to make the victim withdraw his/her complaint by offering money. In such a case, they drop the charges against the suspect and close the case (sometimes even hiding or destroying evidence). The clerks' role includes registering all the documents on cases in files; they can therefore easily remove or replace them.
- Lawyers, who receive a benefit from the suspect to convince the victim either not to complain or to withdraw his/her complaint.
- The suspect, who meets the victim and/or the victim's family or asks other persons to meet with them to propose a compensation in exchange for the withdrawal of the complaint or the guarantee that the victim will not complain.
- The victim or the victim's family, who do not care whether the suspect is prosecuted but simply want compensation, or do not trust the judicial system and are afraid not to receive compensation once the offender is prosecuted.

In many APLE cases, the prosecution was stopped because the victims withdrew their complaints. It is usually impossible to prove whether they have been offered money, but there is often no doubt about this, especially in cases where children's families were visited by suspects and immediately withdrew their complaints or refused from that moment to talk any more about the alleged offence.

The practice of extra judicial settlements is illegal.<sup>93</sup> It leads to impunity for child sex offenders and therefore encourages them to abuse children as they know they do not risk being convicted. It discredits the judicial system by making an extra judicial settlement a more efficient way to get compensation, and it pushes victims to distrust justice and to restrict the damage of the offence to money.

*NB: it is however important to remember, as has already been mentioned, that according to the law, the complaint withdrawn should not stop the prosecution.*

This practice involves corruption as the suspect sometimes gives money to law enforcement or judicial officers.

### Corruption

It is well known that corruption is a serious problem in Cambodia at any level of the government. In many of the examples given throughout the report, corruption was underlying. Regarding the criminal procedure, corruption leads to complaint withdrawals, release of offenders, disappearance or destruction of evidence, changes in testimonies, slowness of investigations, loss of official documents such as warrants or abandonment of the file until the end of the time limit for pre-trial detention, etc.

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<sup>92</sup> Ibid, LICADHO, Rape and Indecent Assaults, p.15

<sup>93</sup> Law on criminal procedure, Art. 3

**Ex:** in a case from the NGO Protection of Juvenile Justice, children were accused of rape and thus faced between 15 and 20 years imprisonment. Before the trial, the judge told the children's families that he could release them in exchange for 1 million riels<sup>94</sup>(250 US\$).

Corruption constitutes a huge burden on the prosecution of child sex offenders.

v. Resume schemes of the procedure before trial in law and in practice

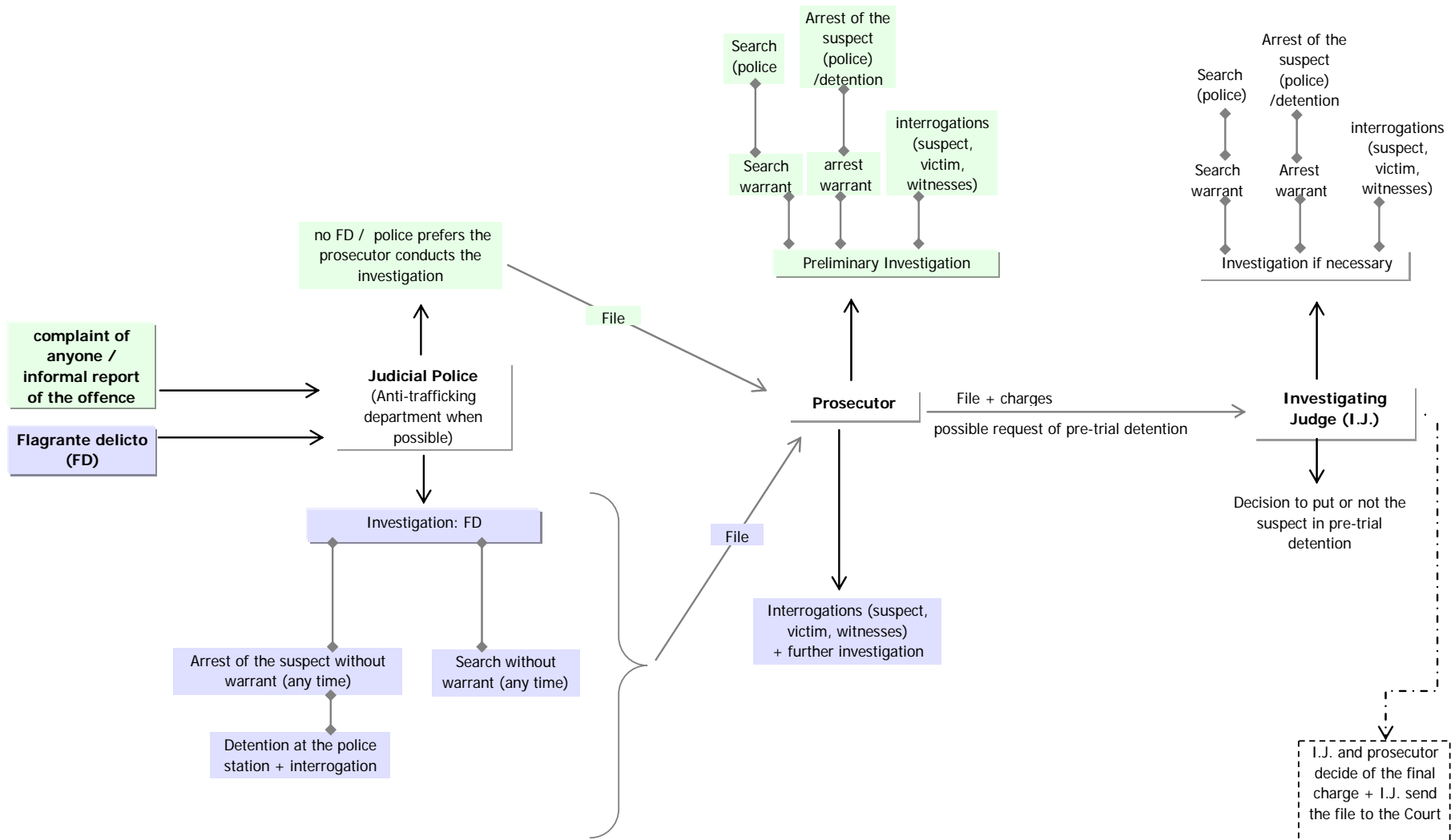
See the schemes on next pages.

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<sup>94</sup> Interview with representatives of the NGO PJJ

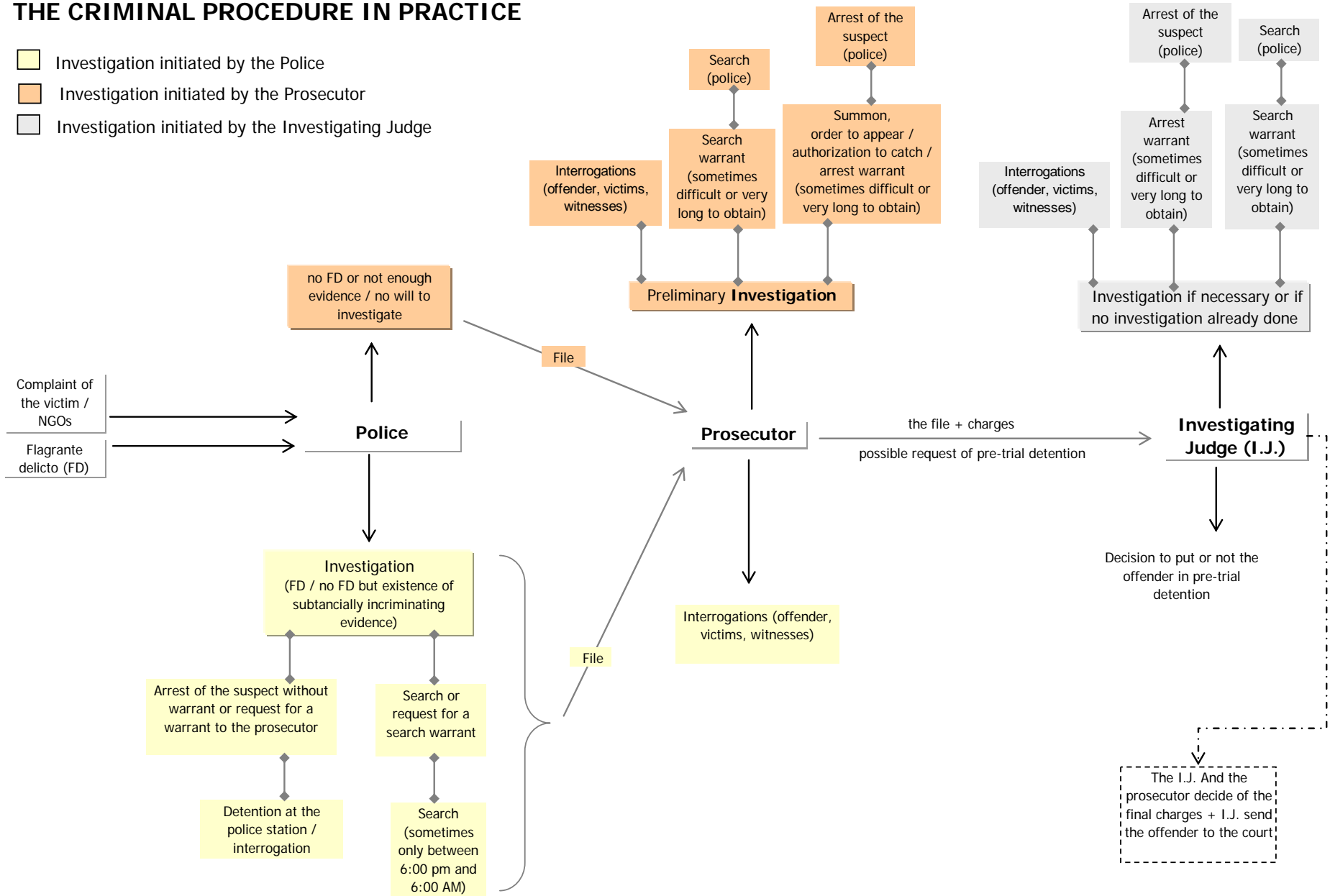
# THE CRIMINAL PROCEDURE IN THE LAW

- Procedure in case of formal or informal complaint
- Procedure in case of flagrante delicto



# THE CRIMINAL PROCEDURE IN PRACTICE

- Investigation initiated by the Police
- Investigation initiated by the Prosecutor
- Investigation initiated by the Investigating Judge



## vi. The role of NGOs

As in many humanitarian or development sectors, NGOs play a large role in the fight against child sex offences and human trafficking in Cambodia.

The government's difficulties in addressing the situation have led local and foreign organizations to perform functions that should be carried out by the Ministry of Justice and local law enforcement and judicial officials. For example, APLE's staffs are mainly investigators who monitor foreigners suspected to be child sex offenders. However, monitoring suspected offenders, collecting information and evidence, taking pictures of offenders and their victims, and obtaining testimonies should be the role of the police. Regular citizens shouldn't have the right to monitor other citizens. However, NGOs' help is invaluable as the judicial system is not strong, organized or funded enough to perform these duties in an autonomous manner.

Several other NGOs or International Organizations are making up for the weaknesses of the judicial system by:<sup>95</sup>

- providing legal assistance, including the NGOs Protection of Juvenile Justice, Cambodian Defenders Project, Legal Aid of Cambodia and Legal Support for Children and Women;
- training police officers and Court officials on criminal laws and procedure, such as Protection of Juvenile Justice, Cambodian Defenders Project, LICADHO, World Vision, UNICEF and many others; and
- engaging in social work and victim reintegration, among which are Friends/Mith Samlanh, M'lop Tapang, and Chab Dai Coalition.

Facing the reality at present, these organizations are a real guarantee that something is done to address child sex offence issues in Cambodia.

Consequently, it is important that organizations like APLE assist where the judicial system shows deficiencies by doing pro-active investigations, and it is even more important that organizations work in close collaboration with the law enforcement and judicial system offices, in order to reach the expected results: arrests and prosecutions of child sex offenders.

## c. During and after judgment

### i. During the trial

This section will not focus on the development of the trial as APLE main activities cease once the investigation phase is finished, but will deal instead with specific issues that are considered important for the fight against child sex offences.

#### The secret hearing

It has already been stated that there are no specific processes in place for child interrogations during the investigation phase. The same problem arises during trial. The child or his/her representative has in theory the right to ask for a secret hearing.<sup>96</sup> However in practice this is almost never utilised and the child often has to give a detailed explanation of the sexual acts he has been subjected to in front of the general public and

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<sup>95</sup> We apologize to all NGOs and International Organizations that are performing invaluable work on law enforcement, legal aid and child reintegration for not having mentioned them here.

<sup>96</sup> UNTAC Code, Art. 23; Ibid, Children in the Cambodian justice system, p.27

the offender himself. Moreover, courts officials are often not competent in interrogating a child and fail to take into account his/her trauma and the child psychology. As a result children may feel embarrassed or afraid to testify in front of the offender and other adults that will potentially judge them, and this may increase their trauma and lead them to change their statements.

Judges should systematically take the issue of child testimonies into consideration and offer child victims the possibility of testifying in secret hearings, both for the well-being of the child and to avoid any kind of influence on their testimonies.

#### Compensation to child victims or their parents

The main interest of a trial for child victims' families is probably compensation. Considering the absence of social structures to help children and their families after the trial, it is obvious that the trial will not improve their lives except if they can get compensation. Moreover, the families of child victims of debauchery are often supported by the offender, either receiving direct benefits from him, or benefiting from what the child earned. They will lose those benefits when the offender is convicted and imprisoned, and thus need compensation, at least to replace the financial assistance given by the offender.

The law on criminal procedure explains the process of applying for compensation through a civil action,<sup>97</sup> which, according to the law, "is for the purpose of claiming reparation for damages caused by an act of offence"<sup>98</sup>.

Where there is an offence, two separate actions are to be made at the same time:<sup>99</sup> the criminal action, which constitutes the prosecution and judgement of the offender in order to determine his guilt, and the civil action, which determines (if the offender is convicted) the amount to be given to the victim or his/her representatives for the damages caused, in accordance with the gravity of the offence.

This means that exercising a criminal action is the responsibility of the prosecution department<sup>100</sup> and filing a civil action is the prerogative of the victim.<sup>101</sup>

Although the process is clear and well detailed in the law, in practice "the compensation is often not paid (and the court order not enforced by authorities), especially when a perpetrator is in prison"<sup>102</sup>, or the compensation is paid once the offender gets out of prison (sometimes 15 or 20 years later). When the offender dies or escapes from prison, there are no public funds to pay compensation to the victim.<sup>103</sup>

Consequently, victims and their families almost never consider that the trial will provide a positive outcome for them.

It has been discussed above that where the families lose benefits from the offender, they may accept an extra judicial settlement. Ensuring that the victims' families will get compensation for damages suffered if the accused is convicted would certainly stop the majority of extra judicial settlements.

*NB: in no case may the renunciation of a civil action stop or suspend the prosecution of the offender.*<sup>104</sup>

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<sup>97</sup> Law on criminal procedure, Art.5 to 19

<sup>98</sup> Law on criminal procedure, Art. 5

<sup>99</sup> Law on criminal procedure, Art. 16. NB: the two actions can also be made before the same judge and not be separated, but according to the PJJ representatives, it is better for the victim to separate the two actions (civil and criminal)

<sup>100</sup> Law on criminal procedure, Art. 8

<sup>101</sup> Law on criminal procedure, Art. 14

<sup>102</sup> Ibid, Rape and indecent assault in Cambodia, p.18

<sup>103</sup> Interview with representatives of the NGO PJJ

<sup>104</sup> Law on criminal procedure, Art.33

### In absentia trials or default judgements

APLE activities consist of investigating foreign child sex offenders. It often happens that while APLE or the police are investigating a case, the suspect flees Cambodia (flying back to his own country for instance). In that case, two solutions are possible: the police of the foreigner's native country can be awarded (this solution will be examined below in the part dealing with extra territorial laws); or the offender can be judged in Cambodia without his presence (this is an in absentia trial or default judgement).

Trials in absentia are detailed in the law<sup>105</sup>. Where the offender does not appear for the trial, the court shall proceed as if the accused was present. The notification of the judgement is then posted at the last known domicile of the accused, broadcasted on national radio and published in the official newspaper. This notification of the judgment by default transforms the judgment into a true judicial decision.<sup>106</sup> The accused has two months to appeal the decision, and if he does not appeal at the end of the two months, the judicial decision is final and will be applied as soon as the offender is found.<sup>107</sup>

This means that the foreign offender will be apprehended and imprisoned if he returns to Cambodia.

**Ex:** one of the suspects monitored by APLE has been judged by default. Michael Lewis Clark, an American citizen, was arrested in June 2003 and charged with debauchery. He was suspected of abusing between 40 and 50 Cambodian children over a period of several years. US Customs had been working with APLE on the case, and on 9<sup>th</sup> September 2003, Michael Clark was sent to the USA for prosecution. In June 2004, an American Court sentenced him to 8 years imprisonment. One week later, the Phnom Penh municipal Court judged him in absentia, sentenced him to 15 years imprisonment and imposed a fine of \$4000 USD for crimes of debauchery committed against 2 boys in Cambodian territory.

### ii. After the judgment

When the offender is convicted and the sentence enforced, two issues of concern arise: the first one is to help the child to reintegrate, and the second one is to ensure the offender will not commit child sex offences again once out of prison.

Unfortunately, there are no governmental processes to address these issues at an extrajudicial level in Cambodia. That is, there are no social and medical structures that help the child to be reintegrated, and there are no medical structures that can provide long term psychological treatment to the offender (although this exists in very few countries and thus will not be debated here).

#### The reintegration of the child

All medical and social workers assisting child victims of sex offences state that these children feel confused and psychologically disturbed. The first and most obvious trauma comes from the sexual acts the child has been subjected to.

But many less obvious traumas occur. The relationship between the child and the child sex offender is often a long term one, where the offender introduces himself to the child (and sometimes to the child's family) as a "god-father".<sup>108</sup> The offender builds a relationship of trust and friendship with the child. The child could then feel guilty by betraying the man in testifying what happened to the police. Children could also feel confused about the world of adults: who is good and who is not? The offender hurts

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<sup>105</sup> Law on criminal procedure, Art. 111 to 124

<sup>106</sup> Law on criminal procedure, Art. 117

<sup>107</sup> Interview with representatives of the NGO PJJ

<sup>108</sup> A man who helps poor families by providing them money and other benefits.



them, but also rewards them with money or favours; police and NGOs workers remove them from their pain, but also arrest the one who was supporting them.<sup>109</sup>

Those children require help once the trial is finished. They need psychological and social support to be able to begin a new "normal" life. If not, they risk turning again into sex trade.

Unfortunately, the Cambodian judicial system has not taken charge of children's reintegration after judgment, and has not organised collaboration with social and medical structures to do so. Children at the end of the trial are then once again left to their own devices and often fall into a new child sex offender's hands.

In APLE's cases, it has sometimes been noticed that children seen in one sex offender's company are the same as those involved in previous cases. In Sihanoukville for instance, APLE investigators have discovered that the same children were involved in three different cases. The offenders who abused them have not yet been judged, but we can assume that even if the sex offender is convicted, if nothing is done to help those children they will continue to offer their bodies for money again and again.

Another consequence of child victims returning to the streets after trials is the lack of faith among those children and their families in the legal system and any procedures involving the police or the justice system that may arise.

Thus, Cambodia faces a vicious circle: the less the judicial system helps the children, the less they cooperate, and the less they cooperate, the less they will be helped.

This issue should be considered as a priority. Prosecuting child sex offenders is essential, but children should be the central consideration, as stated in the CRC.<sup>110</sup>

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<sup>109</sup> For the relationship between offenders and victims and the consequences of sexual abuse on children, see Caroline GRILLOT's report for APLE (mentioned above).

<sup>110</sup> Convention on the Rights of the Child, Art. 3.1: *"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration"*  
Art.3.2: *"States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being (...), and, to this end, shall take all appropriate legislative and administrative measures."*

### III International tools

#### 1. The International Convention on the Rights of the Child and its Optional Protocol

The main international instruments that protect children against sex offences are:

- 🇰🇲 The International Convention on the Rights of the Child (CRC), in force since 1989 and ratified by Cambodia in 1992. The CRC requires that children be protected from all forms of sexual exploitation and sexual abuse (such as enticing or obliging them to have sexual activities, exploiting them for prostitution or other forms of illegal sexual activities or using them for the production of pornographic materials.)<sup>111</sup>
- 🇰🇲 The Optional Protocol to the CRC on the sale of children, child prostitution and child pornography, in force since 2000, signed but not ratified by Cambodia. It stipulates that all States Parties shall criminalize these activities within their national legislation.<sup>112</sup>

These international instruments have to be enshrined in Cambodian legislation in order that the Courts are able to use the provisions they contain (although Cambodian Courts do refer to the CRC to determine the age of a child as 18 years maximum). However the Cambodian State has not ratified the Optional Protocol to the CRC and though it has ratified the CRC, the provisions relating to child pornography have not been enshrined in the Cambodian legislation. As a consequence, child pornography is not an offence in Cambodia.

#### 2. Extraterritorial laws and Extradition

Foreign child sex offenders who abuse children on Cambodian territory are sometimes not prosecuted in Cambodia either because the sexual act they perpetrated does not constitute an offence under Cambodian legislation (such as pornography), or because Cambodian law enforcement and judicial officers would not or could not prosecute them. In such cases, many countries have adopted extraterritorial laws that allow the offenders to be judged in their native countries for the acts they have committed in another country.

The extraterritorial laws<sup>113</sup> permit the judicial officers of a country to charge the country's nationals or residents for crimes they committed in foreign countries. There are two main criteria (according to the country): double criminality and double jeopardy.

- 🇰🇲 The double criminality provisions require the act for which the accused is charged within his country to be an offence in the country where it has been committed.<sup>114</sup>

**Ex:** a Danish man commits a rape in Cambodia. This offender can be prosecuted in Denmark because rape is an offence according both the Danish and the Cambodian criminal laws.

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<sup>111</sup> Art. 34

<sup>112</sup> Art. 1

<sup>113</sup> APLE/LICADHO, *Extraterritorial Legislation and the Sexual Exploitation of Children*, Briefing paper, June 2005; Ministry of Interior and Law Enforcement Against Sexual Exploitation of Children Project, *Understanding Child Sexual Exploitation*, 2000; p.11 to 13.


<sup>114</sup> Ibid, APLE/LICADHO, *Extraterritorial Legislation and the Sexual Exploitation of Children*, p.6

The foundation of this condition is the fundamental human right according to which an act can not be a crime if it is not stated in the law and thus someone can not be convicted for an act that is not criminalized in the law.

Regarding the fictive example of the Danish man, this principle means that the Danish man could not be charged for rape in Denmark if:

1. rape was an offence in Denmark but not in Cambodia (because in such a case the act was not punishable when the men committed it); or
2. rape was an offence in Cambodia but not in Denmark (because the Danish jurisdictions would not be competent as they are required for judgment to refer to Danish law)

*NB: the offence does not need to be criminalized with the same name in both criminal legislations, it is sufficient that the definition of the act is similar.*

 The double jeopardy principle means that someone who has been judged and convicted or acquitted for an offence shall not be judged and punished again for the same offence.

This principle applies only where the acts are exactly the same. However it is possible to judge the same person for different acts even when they happened at the same time.

**Ex:** a French citizen in Cambodia takes two little boys to a guesthouse, has sex with them and takes pictures of them naked on the bed. The man is judged in Cambodia and convicted of debauchery for having had sex with the boys. The French jurisdictions can not judge him again for having had sex with the two boys but can judge him for pornography (for having taken pictures of the naked boys).

*NB: Double criminality is not required in French extraterritorial laws.*

These two conditions of double criminality and double jeopardy are not present in the extraterritorial laws of all countries; some extraterritorial laws contain none of these conditions or only one of the two.<sup>115</sup>

There are various situations where the offender can be prosecuted in his native country. Here are two examples of such situations:

- When the offender has returned to his country, the Cambodian police know the exact identity of the offender and an arrest warrant has been issued, the police can send the file to the authorities in that country or to INTERPOL<sup>116</sup> for them to arrest the offender.
- When the offender is on Cambodian territory and the Cambodian police or the federal police of the offender's country decide it would be better for the offender to be judged in his native country, they can work together and the federal police officers can request the extradition of the offender.<sup>117</sup>

*NB: In both cases the case will be referred to the diplomatic authorities of the offender's country.*

In practice regarding child sex offences, it is very rare that foreign police and judicial authorities get involved and collaborate with Cambodian law enforcement and judicial officers.<sup>118</sup> Apparently, the liaison police most involved in such cases are the English and American ones.

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<sup>115</sup> You can find in Annex 3 examples of the criteria needed in 12 countries.

<sup>116</sup> Interview with a policeman from the Anti trafficking and Juvenile Protection Unit.

<sup>117</sup> Ibid, Understand and Investigating Child Sexual Exploitation, p.13

<sup>118</sup> Interview with the UNICEF Child Protection Officer

## IV. Conclusion and recommendations

### 1. Conclusions

#### The laws

Both the criminalizing and procedural laws are unclear and incomplete and therefore poorly implemented. We can state firstly that the criminalizing laws should be revised in order to fill the gaps regarding age of consent, criminalization of pornography, definition of debauchery and other offences. Secondly, the laws on criminal procedure should be revised in order to detail further the law enforcement and judicial officers' role, to completely and clearly differentiate the procedure where there is and where there is not a flagrante delicto, and to describe very clearly certain processes such as the complaint or report of the offence and the issuance of warrants.

A draft of a new Criminal Code exists but has not at this stage been adopted. It will be important to update this report when the new criminal code comes into force, as it will contain some important changes such as the criminalization of pornography.

#### The practical burdens

"The combination of poor facilities, low salaries, executive interference, lack of education and training, and weak and poorly enforced legislation has created a judicial system in which people have no confidence and which daily fails in its duties and responsibilities."<sup>119</sup> Problems include accumulating procedural errors and inaction, corruption and failures in sentence enforcement.

It is the government's responsibility to solve these problems (for example, by providing more training and funding for salaries and investigations), and the NGOs' duty to temporarily assist the government in these tasks.

#### The international community

NGOs' activities are not always well coordinated and even sometimes incoherent. Where many NGOs work in the same field or on the same issues, it occurs very often that each NGO organizes its own programs without connecting its activities with others. This can even sometimes lead to competition between different NGOs in obtaining donor funds. Moreover, it is very difficult for foreign NGOs to work on a country's legal and judicial system without the temptation or the reflex to refer to the models they know (the Common law or Latin law systems for example). These NGOs risk bringing with them their country specific mentalities and values. This is usually a great concern, and these NGOs take almost always into account the country specificities, mentalities and values. However they are anyhow performing a transitional and temporary role and it remains difficult to conduct activities in a field should normally belong to the State's administrative powers. The risk is that the government disengages from these activities.

Considering these elements, NGOs should cooperate in their efforts and work closely with the government and the Khmer institutions.

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<sup>119</sup> Ibid, *Rape and indecent Assault in Cambodia 2004*, p.10

## The international tools

Regarding the international conventions, it is only the government that can sign, ratify and enshrine the international instruments related to the protection of children from sexual abuse.

Regarding extraterritorial legislation, extraditing foreign offenders and judging them abroad is not an ideal solution for the improvement of the Cambodian judicial system, but considering the current capacities of that judicial system, it is understandable that foreign countries prefer their nationals to be extradited.

However, this is not a priority issue as extraditions are very rare. The most important action is to increase the cooperation of foreign diplomatic and law enforcement officials with Cambodian law enforcement and judicial officers for investigations and prosecutions of foreign child sex offenders within Cambodia. The purpose is to actively help the Cambodian judicial system and permit the prosecution of offenders in Cambodia, without facing all the problems discussed throughout the report.

## **2. Recommendations to APLE**

Considering all the elements analysed in the report, it is recommended that APLE:

- 🚩 Widens its investigation focus to other suspects that are not the nationals of 'Western' countries (such as Japanese, Chinese, and Korean nationals).
- 🚩 Follows up old cases in order to find out what happened to the offenders and reopen cases where the offender has not been prosecuted.
- 🚩 Lists carefully the legal process used in each case in order to point out procedural errors and eventually conduct regular meetings with the Police chief to discuss these errors with him.
- 🚩 Strengthens its collaboration with other NGOs for:
  - sharing information with those working in the same field in order to cover more cases and be aware of all existing cases;
  - cooperating in training organized by other NGOs for law enforcement and judicial officers to share experiences;
  - constructing a large network gathering all NGOs able to work on child sex offences at any level; and
  - preventing children from engaging with child sex offenders by: referring these children to NGOs working in the field of social work and reintegration, and organizing advocacy meetings in schools and pagodas (places where a lot of children go and meet people that have a great influence over them)
- 🚩 Educates children involved in APLE cases and their parents in order that they understand the grave nature of the offences and its consequences, therefore advocating against them being involved later in other relationships with child sex offenders.

## V ANNEXES

### 1. ANNEX 1 : ARTICLES CRIMINALISING CHILD SEX OFFENCES

- **UNTAC Code:** the 1992 *Provisions relating to the Judiciary and Criminal Law and Procedure applicable in Cambodia during the transitional period*
- **1996 Law:** the 1996 *Law on the Suppression of the Kidnapping, Trafficking and Exploitation of Human Beings*

### **RAPE**

#### **UNTAC Code: Article 33**

1. Anyone who rapes or attempts to rape another person of either sex is guilty of rape and shall be liable to imprisonment for a term of five to ten years.

2. Rape is any sexual act involving penetration carried out through violence, coercion or surprise. If rape is accompanied by threats with a weapon, or if it is committed on a pregnant woman or a person suffering from illness or mental or physical infirmity, or by two or more offenders or accomplices, or if it is committed by anyone in a position of authority over the victim, the punishment shall be a term of imprisonment of ten to fifteen years

#### **Law on aggravating circumstances: Article 5**

1. Anyone who rapes or attempts to rape another person, of either sex, shall be guilty of rape and shall be condemned from ten (10) to fifteen (15) years in jail.

2. Rape is all acts of penetration of sexual organ or all other means by force, cruelty, or surprise. If the rape is committed on a pregnant woman by threats with weapons, on a sick person or mental or physical infirmity or minor of under 14 years of age, by one or more perpetrators or by accomplices, or if it is committed by any person in a position of authority over the victim, the punishment to be applied shall be the imprisonment with labour of fifteen (15) to twenty (20) years.

#### **COMPLICITY: UNTAC Code: Article 69**

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

### **DEBAUCHERY**

#### **1996 Law: Article 7**

Any person who opens a place for committing debauchery or obscene acts shall be punished by imprisonment from one (1) to five (5) years and by a fine of five million (5,000,000) riel to thirty million (30,000,000) riel. In the case of repeated offences, the above punishment terms shall be doubled.

#### **1996 Law: Article 8**

Any person who commits acts of debauchery involving a minor below 15 years old, even if there is consent from the concerned minor, or even if the person has bought such minor from someone else or from a pimp, shall be punished by ten (10)

to twenty (20) years in prison. In case of repeat offences, the maximum punishment term shall be applied.

The court may, in addition to the above principal punishment, apply a sub-punishment by restriction of civil rights and by the non-authorization of residence.

## **INDECENT ASSAULT**

### **UNTAC Code: Article 42**

1. Any person who sexually assaults another person of either sex by touching, caressing or any other sexual act not involving penetration, is guilty of the misdemeanour of indecent assault and shall be liable to a term of imprisonment of one to three years.

2. If the indecent assault is accompanied by fraud, violence or threat, or if it is committed by any person with authority over the victim, or if the victim is under 16 years of age, the duration of these sentences shall be doubled.

### ***COMPLICITY: UNTAC Code: Article 69 (Cf above: Rape)***

## **PROSTITUTION / PIMPING**

### **1996 Law: Article 4**

Any person shall be considered a pimp (male or female) or head of prostitutes:

1. who supports or protects one or more other persons, by whatever means, with knowledge in advance of the act of prostitution of such person(s) or seeks customers for such person(s) for the purpose of prostitution, or;

2. who regularly shares the benefits obtained from acts of prostitution in any form, or;

3. who brings men or women by whatever means for training and convincing them to become male or female prostitutes, or;

4. who acts as an intermediary in any form to create relationships between male and female prostitutes and the head/owner of a brothel, or with a person who provides benefits for the prostitution of other persons, or;

5. who confines men or women in his/her house, or any place, in order to force them to commit prostitution to earn money for him/her.

### **1996 Law: Article 5**

Any male or female pimp (or head of prostitutes) shall be punished with five (5) to ten (10) years imprisonment. In the case of repeated offences, the above punishment terms shall be doubled.

A pimp shall be subject to ten (10) to twenty (20) years imprisonment if he or she:

1. commits an offence on a minor, below 15 years of age, or;

2. commits an offence by using coercion and violence, or by a threat or a weapon, or;

3. who, as a husband, wife, boy/girlfriend, father or mother or guardian, forces a man or woman to commit acts of prostitution, or;

4. who forces a victim to commit acts of prostitution outside of the country, or forces a victim who is a foreigner to commit acts of prostitution on the territory of the Kingdom of Cambodia.

The court may, in addition to the above principal punishment term, apply a sub-punishment by restricting the civil rights of the guilty and by the non-authorization of residence.

**UNTAC Code: Article 42**

3. Any person who procures, entices or leads away, for purposes of prostitution, or sexually exploits a minor, even with the consent of that minor, shall be liable to a term of imprisonment of two to six years.

**COMPLICITY: 1996 Law Article 6:**

Accomplices or those who attempt to commit offences as stated in Articles 4 and 5 above shall also be subject to the same punishment term as that of the perpetrator(s).

**TRAFFICKING**

**1996 Law: Article 3**

Any person who lures another person, male or female, minor or adult of whatever nationality by ways of enticing or any other means, by promising to offer any money or jewellery, whether or not there is consent from that other person, by ways of forcing, threatening or using of hypnotic drugs, in order to kidnap him/her for trafficking/sale or for prostitution, shall be subject to imprisonment from ten (10) to fifteen (15) years. The perpetrator shall be punished by imprisonment from fifteen (15) to twenty (20) years, if the victim is a minor of less than 15 years old.

Those who are accomplices, traffickers/sellers, and/or buyers shall be subject to the same punishment as that of the perpetrator(s).

Those who provide money or means for committing offences shall also be considered as accomplices.

All modes of transportation, all materials and all properties which are used during the commission of offences shall be confiscated as State's property.



## 2. ANNEX 2: Policemen's knowledge of the law in different provinces: table from the PJJ Workshop Report 2005

Provinces	Topic	Date	Participants	Result of Pre-test	Result of Post test
Koh Kong	Implementing the Law on Combating Child Sexual Trafficking in Cambodia	March 02-03, 2005	46 trainees	28%, 38%, 35%, 14%, and 0%, as very poor, poor, fair, good and very good respectively	9% 14% 49% 25% 3% as very poor, poor, fair, good and very good respectively
Siem Reap	Implementing the Law on Combating Child Sexual Trafficking in Cambodia	May 11-12, 2005	40 trainees	23%, 36%, 16%, 19%, and 6% as very poor, poor, fair, fairly good, and very good respectively	0% 8% 13% 38% and 41% as very poor, poor, fair, fairly good and very good respectively
Ratanakiri	Implementing the Law on Combating Child Sexual Trafficking in Cambodia	June 15-16, 2005	59 trainees	25%, 40%, 21%, 12%, and 2%, as very poor, poor, fair, good and very good respectively	6% 10% 48% 30% and 6% as very poor, poor, fair, good, and very good respectively
Sihanoukville	Children in Cambodia's Justice System	July 20-21, 2005	61 trainees	11%, 34%, 34%, 13%, 8%, and 0% as very poor, poor, fair, fairly good, good, and very good respectively	0% 15% 31% 38%, 14% and 2% as very poor, poor, fair, fairly good, good, and very good respectively
Banteay Meanchey	Implementing the Law on Combating Child Sexual Trafficking in Cambodia	July 26-27, 2005	50 trainees	12%, 34%, 43%, 11%, and 0% as very poor, poor, fair, good an very good respectively	4% 19% 31% 35% and 11% as very poor, fair, good, and very good respectively
Kompong Thom	Implementing the Law on Combating Child Sexual Trafficking in Cambodia	September 28-29, 2005	42 trainees	24%, 46%, 30%, and 10% as poor, fair, good, and very good respectively	14% 29% 45% and 12% as poor, fair, good, and very good respectively
Svay Rieng	Children in Cambodia's Justice System	October 26-27, 2005	51 trainees	18%, 41%, 25%, 14%, and 2% as very poor, poor, fair, good, and very good respectively	5% 11% 39% 35% and 10% as very poor, poor, fair, good and very good respectively
Banteay Meanchay	Implementing the Law on Combating Child Sexual Trafficking in Cambodia	December 05-06, 2005	52 trainees	2%, 37%, 43%, 18%, and 0% as very poor, poor, fair, good, and very good respectively	1% 10% 19% 47% and 23% as very poor, poor, fair, good, and very good respectively

### 3. ANNEX 3: THE EXTRATERRITORIAL LAWS CRITERIA OF APPLICATION IN 10 DIFFERENT COUNTRIES<sup>120</sup>

#### AUSTRALIA

<b>Criminal legislation applied</b>	Crimes Amendment Act of 1994 (on child sex tourism)
<b>Relevant offences related to child sex offences</b>	Sexual offences or inducing sexual offences with a minor, Sexual conduct or inducing sexual conduct with a minor
<b>Double criminality condition</b>	Not required
<b>Double jeopardy condition</b>	Not required
<b>Status of Limitation</b>	No status of limitation for crimes (felonies)
<b>General extradition agreement with Cambodia</b>	No. Adhoc (for a specific case) agreement possible

Note 1: the offenders have often been prosecuted only where the evidences could be found in Australia, because overseas investigation is possible for the Australian police only where a Mutual Assistance treaty exists between Australia and the other country, but such a treaty does not exist with Cambodia.

Note 2: "The consulate office does not take any role outside of relaying information concerning a complaint from the complainant to the relevant office, i.e. the prosecutor's office"<sup>121</sup>.

#### CANADA

<b>Criminal legislation applied</b>	Bill C-27 (adopted in 1997) and Bill 15-A (adopted in 2002)
<b>Relevant offences related to child sex offences</b>	Child pornography, procuring child sexual activity, permitting child sexual activity, child prostitution, sexual interference, invitation to sexual touching, sexual exploitation, anal intercourse, bestiality, indecent acts.
<b>Double criminality condition</b>	Not required

<sup>120</sup> Ibid, APLE/LICADHO, Extraterritorial Legislation and the Sexual Exploitation of Children, p.16 to 60; Understanding and Investigating Child Sexual Exploitation, p. 11 to 13

<sup>121</sup> Ibid, APLE/LICADHO Extraterritorial Legislation and the Sexual Exploitation of Children, p. 19

<b>Double jeopardy condition</b>	Required
<b>Status of Limitation</b>	No status of limitation for serious crimes
<b>General extradition agreement with Cambodia</b>	No. Adhoc (for a specific case) agreement possible

## Denmark

<b>Criminal legislation applied</b>	Section 7 and 8 of the criminal code, and sections 216 and 235 of the Chapter 24 of the criminal code.
<b>Relevant offences related to child sex offences</b>	Sexual intercourse with a child under 15, prostitution with a child under 18, benefiting from prostitution, sexual intercourse with a child under 18 who has been entrusted to the offender, child pornography
<b>Double criminality condition</b>	Required
<b>Double jeopardy condition</b>	Required
<b>Status of Limitation</b>	<u>2 years</u> : for offences punishable with less than one year imprisonment <u>5 years</u> : for offences punishable with less than four years imprisonment <u>10 years</u> : for offences punishable with less than ten years imprisonment
<b>General extradition agreement with Cambodia</b>	No. Adhoc (for a specific case) agreement possible

Note 1: Denmark does not have an embassy or consulate on Cambodia. The Cambodian authorities have then to work with the Danish diplomatic authorities in Bangkok.

## France

<b>Criminal legislation applied</b>	Penal code and 1994, 1998 and 2003 amendments, art. 225-12-1, 227-22, 227-23
<b>Relevant offences related to child sex offences</b>	Prostitution of minors, corruption of minors, child pornography
<b>Double criminality condition</b>	Not required
<b>Double jeopardy condition</b>	Required

<b>Status of Limitation</b>	<u>3 years</u> : for a misdemeanour <u>10 years</u> : for crimes
<b>General extradition agreement with Cambodia</b>	No. Adhoc (in a specific case) agreement possible

Note 1: French authorities refuse to collaborate for investigating on cases where the only one evidence is witnesses, because this evidence is not reliable enough and the investigation cost will be too high.

## Germany

<b>Criminal legislation applied</b>	Criminal code amended in 1993, sections 174 to 184
<b>Relevant offences related to child sex offences</b>	Sexual abuse of dependant, sexual abuse of children, promoting the engagement of minors in sex, encouraging prostitution, seduction, child pornography.
<b>Double criminality condition</b>	Not required for sex offences
<b>Double jeopardy condition</b>	Not required
<b>Status of Limitation</b>	<u>5 years</u> : for sexual abuse charges, encouraging sexual acts by minors, and sexual abuse of young persons <u>10 years</u> : for sexual abuse of children <u>20 years</u> : for sexual coercion and rape
<b>General extradition agreement with Cambodia</b>	Yes

## Italy

<b>Criminal legislation applied</b>	Law of 08-03-1998, n°269, and criminal code (article 600, 600 bis, ter and quarter)
<b>Relevant offences related to child sex offences</b>	Sexual intercourse with a minor, child prostitution, child trafficking, child pornography, child sex tourism
<b>Double criminality condition</b>	Not required
<b>Double jeopardy condition</b>	Unknown (but required for within the national territory)
<b>Status of Limitation</b>	To the judge's discretion
<b>General extradition agreement with Cambodia</b>	No

Note 1: there is no Italian embassy or consulate in Cambodia. Italy is represented by France.

## Netherlands

<b>Criminal legislation applied</b>	Criminal code sections 230 to 250
<b>Relevant offences related to child sex offences</b>	Act outraging public decency to minor, child pornography, sexual intercourse with a child, child prostitution, supplying offering or showing harmful pictures to a minor, indecent acts with a child, incest or indecent act with entrusted child
<b>Double criminality condition</b>	Required
<b>Double jeopardy condition</b>	Required
<b>Status of Limitation</b>	12 years from the age of majority of the child (16 years old)
<b>General extradition agreement with Cambodia</b>	No. Adhoc (for a specific case) agreement possible

Note 1: there is no Dutch embassy in Cambodia

## Sweden

<b>Criminal legislation applied</b>	Chapter 6 if the criminal Code
<b>Relevant offences related to child sex offences</b>	Child sexual exploitation, child sexual molestation, seduction of youth, child prostitution, child pornography
<b>Double criminality condition</b>	Not required
<b>Double jeopardy condition</b>	Required
<b>Status of limitation</b>	Runs from the moment the child turns to 15 years of age
<b>General extradition agreement with Cambodia</b>	No. Adhoc (for a specific case) agreement possible

Note 1: there is no Swedish Embassy in Cambodia.

## United Kingdom

<b>Criminal legislation applied</b>	Sex offenders Act of 1997
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<b>Relevant offences</b>	Sexual intercourse with a child, child buggery, indecency with a child, child prostitution, child pornography
<b>Double criminality condition</b>	Required
<b>Double jeopardy condition</b>	Required
<b>Status of Limitation</b>	Runs from the moment the child turns to 15 years of age
<b>General extradition agreement with Cambodia</b>	No. Adhoc (for a specific case) agreement possible

Note 1: cases has to be referred to the British liaison police based in London.

## United States

<b>Criminal legislation applied</b>	Part III-A of the Crimes Amendment Act, (Amendment: Child Sexual Abuse Prevention Act (1994), Trafficking Victims Protection Act (2000), Sex Tourism Prohibition Act (2002), Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act (2003))
<b>Relevant offences</b>	Child sexual abuse Engaging in illicit sex with a minor overseas, child trafficking, child sex tourism (tour operators), etc...
<b>Double criminality condition</b>	Not required
<b>Double jeopardy condition</b>	Not required when the first judgment was abroad
<b>Status of Limitation</b>	No status of limitation for child sex offences
<b>General extradition agreement with Cambodia</b>	No. Adhoc (for a specific case) agreement possible

Note 1: "Generally, officials (...) will conduct a preliminary investigation in Cambodia if there is evidence that the offender could have committed the offence"<sup>122</sup>. The officials will collaborate for gathering evidences.

Note 2: "the consulate office has the authority to obtain evidence abroad regardless of whether a mutual assistance treaty is agreed upon. (...) The consulate is also responsible for facilitating extradition requests"<sup>123</sup>.

<sup>122</sup> Ibid, Extraterritorial Legislation and the Sexual Exploitation of Children, p.59

<sup>123</sup> Ibidem