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## **RAPE AND INDECENT ASSAULT IN CAMBODIA**

Cases of rape and indecent assault of women and especially of children are increasingly being reported to Cambodia's NGOs. At LICADHO, rape and indecent assault cases accounted for 20.22% of cases investigated in 1999, and 26.3% in 2000. LICADHO's Children's Rights Department reported an increase of these assaults on children from 60.75% of their caseload in 1999 to 61.74% in 2000. Of the cases investigated by the Children's Rights Department, 23% were committed on children ten years old or younger. This report largely focuses on rape and indecent assault of victims 18 and under. The results of this report indicate a growing threat to Cambodia's children.

Those who are most "at risk" to rape and indecent assault include street children, stepchildren, "adopted children", women and children in prison, physically and mentally disabled people, and domestic workers. However, LICADHO's findings suggest that anyone, not only the vulnerable or marginal, can be a victim of rape.

Cambodia's NGOs believe that while the number of sexual assaults<sup>1</sup> reported to them is increasing, rape and indecent assault are still under-reported. Gender inequality, a prevailing culture of impunity for perpetrators, a lack of trained investigators, inadequate legislation, and inconsistent judicial decision-making are all factors in the reluctance of victims to report and pursue rape and indecent assault offences through Cambodia's criminal justice system.

Some NGOs are addressing the growing incidence of rape and indecent assault. But most assistance to victims is available mainly under the umbrella of rehabilitation for sexual exploitation – trafficking and prostitution – or programs for street children. Most of these programs are in Phnom Penh, leaving victims in the provinces without access to counseling and rehabilitation programs.

For Cambodia to adequately and comprehensively address this crisis within the community, it is necessary for government, international organizations, non-governmental organizations and civil society as a whole to understand that:

- Rape and indecent assault are serious criminal offences.
- Perpetrators must be punished with the full force of the law.
- Victims must be supported, and treated with compassion.
- Rape and indecent assault cause grave physical, psychological and social damage to victims and their families.
- Without the attention of society as a whole, these crimes will continue to have repercussions that harm the entire community.

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<sup>1</sup> For the purposes of this report, sexual assault includes rape and indecent assault.

## **I. WHY IS RAPE UNDERREPORTED AND MISUNDERSTOOD?**

There are many reasons – cultural, social, judicial – why victims of sexual assaults are reluctant to report these crimes. Perceptions, and misconceptions, of gender and sexuality result in a broad misunderstanding of the seriousness of rape and indecent assault.

### **A. Cultural and Social Perspectives**

Sexual offences and the average victim's (and family of the victim's) reluctance to report them must be examined in the context of attitudes on gender roles, sexuality, and particularly the social value placed on a girl's virginity.

#### 1. Gender Inequality

Adding to this is the Khmer moral code of conduct, under which women are expected to defer to their husbands. Because this inequality is most evident in the family context, girls and boys learn at a very young age about gender roles, differing societal expectations for men and women, and what it means to have, and not to have, value. The inequality learned at home eventually makes its way into the community, and society in general.

For the purposes of this report, it is important to recognize that gender inequality is particularly visible in cultural and social perspectives on sexuality and virginity.

#### 2. Sexual Activity

"Men are gold, women are cloth" – this well-known Khmer saying has been interpreted by many to mean that a man can have many sexual encounters and remain untarnished, as gold still shines when cleaned; but, once a woman loses her virginity, like a white cloth that is dirtied, she can never be cleaned again.<sup>2</sup>

Male sexual activity and promiscuity is widely tolerated throughout society. Many women have been forced to tolerate that their husbands have mistresses and regularly visit brothels.

Women, on the other hand, are expected to remain virgins until marriage. If a woman loses her virginity – even if she is raped – she is considered 'damaged goods' and thus, undesirable as a wife.<sup>3</sup>

#### 3. Virginity

Sexual assault causes deep physical and psychological wounds in a victim, no matter what her age. For child victims, or particularly young victims, the shame associated with rape can be more extreme if virginity is lost. More attention is paid to the victim's loss of virginity and the effect on the family's reputation than on the wrongdoing of the offender.

These reactions make it very difficult for a victim to tell anyone that she has been raped. Victims may take several months (if ever) to report the assault; this makes gathering of evidence for prosecution almost impossible<sup>4</sup>. If the victim does tell anyone, the victim's parents may not want to report the crime to authorities because of the potential damage to the family's reputation.

Rather than bring a criminal charge against the perpetrator, the family will often encourage the victim to "settle" – either by accepting compensation from the perpetrator's family or by marrying the

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<sup>2</sup> Physicians for Human Rights, *Commercial Sexual Exploitation of Women and Children in Cambodia*, 1996. *Personal Narrative: A Psychological Perspective*, Boston, 1997.

<sup>3</sup> United Nations, Economic and Social Commission for Asia and the Pacific, *Sexually Abused and Sexually Exploited Children and Youth in Cambodia, A Qualitative Assessment of Their Health Needs and Available Services in Selected Provinces*, New York, 2000.

<sup>4</sup> See section VII Legal Perspectives – Evidence.

perpetrator. In extreme cases, a family will force the victim into prostitution since it believes she is “already spoiled.”

#### 4. Myths and Realities About Rape

Often, an accusation of rape is not taken seriously within the family, the village, or the community context because society as a whole continues to accept myths about rape. These include:

*Myth:* Women provoke rape by suggestive dress, provocative behavior, being alone at night, etc.

**Reality: No type of dress or behavior gives an offender the right to assault another person.**

This myth wrongly shifts responsibility for the assault from the offender to the victim.

*Myth:* Most rapists are strangers to their victims.

**Reality: The majority of rapes are committed by people known to the victim.**

Of the rapes investigated by LICADHO, 68.5% were committed by someone known to the victim (relatives, boyfriends, friends, other household members, neighbors); 25% were committed by casual acquaintances or strangers; and in 6.5% of the cases, the relationship to the victim was unknown.

*Myth:* Men are unable to control their sexual desires, making rape a spontaneous assault.

**Reality: Studies in the US and England<sup>5</sup> also show that most rapes are entirely or partly planned, with only 15% being spontaneous.** While many believe that rapists are sexually starved, these studies also show that **many offenders are either married or involved in consenting relationships**.

*Myth:* Women falsely accuse men of rape. One judge admitted the belief that as many as 85% of allegations were false.

**Reality: In reality, rape is one of the most under-reported of all major crimes.**

A study in the US indicated that only 2% of reported rapes were false claims, a rate consistent with other crimes. It is unlikely that a woman in Cambodia would make a false accusation of rape for three reasons: the cultural and social shame associated with rape in Cambodian culture; insensitive treatment of rape cases by authorities; and fear and mistrust of the legal system.

## **B. Breakdown of Rule of Law and a Culture of Impunity**

Cambodia’s 25-year civil war has resulted in a society that continues to suffer deep social trauma – characterized by the fragmentation of the family, social disruption, continuing poverty, and an extremely weak civil infrastructure.

### 1. Corruption

Civil servants such as police officers, court staff, and judges are severely underpaid, and often turn to corruption in order to supplement their meager salaries. In the context of rape and indecent assault cases, this corruption affects the victim in one of two ways. The victim can be encouraged to “settle” privately – either by marriage to the perpetrator or by accepting compensation; in which case a civil servant may receive a percentage of the compensation. If the victim decides to pursue the case through the legal system, her family will often have to pay civil servants at every step of the process in order to ensure that their legal duties are carried out in accordance with the Constitution.

### 2. Impunity

A lack of accountability for state representatives, powerful and wealthy people who are “well-connected”, young men who have recently turned more and more to the “safety-in-numbers” of gangs, right down to minor (under 18) offenders who, without a specific juvenile criminal justice system, often

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<sup>5</sup> Similar studies focused on Cambodian society would be most valuable in assessing the cultural and social issues surrounding rape and indecent assault.

go unpunished for their crimes. A culture of impunity has developed, and continues to thrive in Cambodia.

Indeed, impunity has been cited as one of the main reasons for what is believed to be an increase in the incidence of rape.<sup>6</sup> It is yet another reason why victims are so reluctant to report, and pursue these cases through the criminal justice system.

### **Case Example – Impunity**

In March 1999, a civilian man was playing cards with three military men. The civilian won 65,000 riel, but when he tried to leave the military men arrested him, took him to their base and beat him until he was unconscious. Meanwhile, the civilian's wife (aged 25) found out he had been arrested, and she went with her sister-in-law (aged 15) to beg the military to release her husband. They said they would only release him if the 15-year-old stayed with them. As she was worried her husband would die because he was beaten so badly, the wife agreed and took her husband home. When she arrived at her village, she asked the villagers to help her husband. A man from her village offered to go with her to help get her sister-in-law from the military men. When she arrived back at the military camp she heard the girl crying out for help. Then the man who had offered to help her, dragged the wife into the bushes and raped her. The 15-year-old girl, meanwhile, was raped all night by the military men, and was finally told to go home at 6am the following morning. Some of the villagers helped the family to make a complaint and took them to the hospital.

The deputy police inspector said that the military commander went to visit the victims in hospital one time, and after that the victims went missing and nobody knew where they were. The civilian perpetrator was arrested and detained in prison, but the military men "escaped away". On 18 August 1999 the court issued a final decision to suspend the case.

## **C. Judicial Attitudes**

In cases where a victim will seek to pursue a criminal action against a perpetrator, she will face once again the cultural and social attitudes described above, cloaked in the robes of legal authority.

Cambodia's judiciary is dominated by male judges. The judiciary's imperfect treatment of rape cases shows a rudimentary understanding of the rape legislation (which is itself inadequate); and a failure to apply the law consistently.

A common and problematic aspect of the judicial reasoning in rape cases is the unsophisticated distinction between "serious" and "simple" rapes.

Judges describe "serious", "inhuman" or "violent" rape as typically involving a young victim, multiple perpetrators, violence, victim's loss of consciousness, or rape in conjunction with another crime. "Simple" rape, on the other hand, is described as involving victims with no obvious physical injuries. Such assaults involve "mere slapping", placing the hand over the victim's mouth to keep her quiet, and/or a single perpetrator.<sup>7</sup>

Rather than applying existing laws, judges seem to rely heavily on myths about rape, conferring legal authority on these antiquated and false beliefs. Particularly alarming is a line of judicial reasoning that fails to place the responsibility for the assault on the assailant. Rather, the victim is blamed for failing to avoid the potentially dangerous situation.

<sup>6</sup> Personal interview with Lim Mony, Director of the Women's Department of ADHOC (Association Droits de l'Homme Cambodienne/ the Cambodian Human Rights Development Association), December 12, 2000.

<sup>7</sup> This section is paraphrased from the unpublished research of Christina Brandt, a student at the University of Michigan Law School, who interviewed nine members of the Cambodian judiciary about cases of rape and sexual trafficking of minors. The research was conducted in conjunction with CWCC. Comments from these interviews have been made available to selected human rights organizations for the purposes of comment only, and not dissemination. NOTE: the draft forms only the initial stages of the researcher's intended work and does not reflect the opinions of either the researcher or CWCC.

Two judges struggled with cases where victims may have had what seemed to the judge to be an unacceptably free or intimate relationship with the accused. In these cases the judges seemed to be wary of the jilted-false-accusation suits. Ultimately, however, they were convinced by the physical evidence (or the very young age of the victim) that the sex was not consensual. What ties these cases together is the impatience judges expressed with what they perceived as the poor judgment of the victim in choosing to spend too much time, or time alone, with the accused.

In one case, a 13 year-old girl had agreed to a long drive with the accused to a farm. The accused claimed to need help in gathering herbs for his pregnant wife. The girl was raped at the farm. In the opinion of the judge, the victim should have known better than to go anywhere with the husband of a pregnant woman since he was likely to be “sex-starved”; the victim should also have known better than to go to a secluded place with a man, since he was unlikely to let such an opportunity to have unpunished illicit sex go by; the victim should have heeded a Khmer proverb which states that “men can’t control their feelings”.

The attitudes expressed by the judge were not that the victims brought the rapes upon themselves by failing to guard their virtue more carefully; rather, that the events of the cases seemed to exemplify an unfortunate string of facts well known to the judges, and presumably to all Cambodians, that men really like to have sex; some men will disregard the lack of consent if they think they can get away with it; some men will take this opportunity whenever it presents itself; and a smaller number of men will actually try to create such opportunities. This analysis of male Khmer sexuality seems to underlie the “simple” or “common” rape scenario.<sup>8</sup>

#### **D. Victim’s Perspective – Effects of Sexual Assault**

There is a serious lack of understanding about the traumatic effects of sexual assault on the life of a victim. This lack of understanding is evident in victims’ reluctance to report the crimes, family reactions to the assaults, and the way sexual assault cases are dealt with by the courts.

All parts of society must be educated as to the physical and psychological fallout of a sexual assault. Effects can include the following<sup>9</sup>:

##### 1. Physical Effects

- Physical injury inflicted by the assailant
- Possible infection of HIV/AIDS
- Other sexually transmitted diseases (gonorrhea, syphilis, herpes simplex, urinary tract infections and polyps)
- [Unwanted pregnancy, or pregnancy in very young girls]
- Nausea, fatigue, tension headaches, abdominal pain, and vaginal pain.

##### 2. Psychological Effects

- Severe anxiety, fear, depression, guilt, self-blame, loneliness
- Humiliation, shame, embarrassment, lack of self-confidence, helplessness
- Decrease in appetite; chronic bed-wetting, aggressiveness
- Self-mutilation
- Suicide

##### 3. Effects on Child-Victims

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<sup>8</sup> *Ibid.*

<sup>9</sup> See the following publications: *The Situation of Sexually Abused and Sexually Exploited Children and Youth in Cambodia: A Qualitative Assessment of Their Health Needs and Available Services in Selected Provinces*, United Nations, New York, 2000. *Working with Rape Survivors: A Handbook*, Working Group of the Women’s Crisis Center Network, Penang, 1990. *The 1998 UNAIDS Report on the Global HIV/AIDS Epidemic*.

Physical and psychological effects are more severe in child victims and will negatively affect impact on their social and moral development.

The short-term effects<sup>10</sup> of post-traumatic stress disorder can include:

- In children under six, feelings of defenselessness, difficulty sleeping, loss of appetite and loss of recently acquired developmental skills (i.e., may start bed-wetting).
- In children six to 12, difficulty concentrating, feelings of guilt or helplessness, aggressiveness, psycho-somatic complaints like headaches and stomach aches.
- Children 12 to 18, who have the capacity to understand the effects of sexual abuse on their lives, will often experience feelings of severe guilt and pessimism about the future, can become rebellious, and are prone to antisocial behavior.

The long-term effects include personality changes, lack of trust, pessimism about the future, and stunting of moral development.<sup>11</sup> Children abused by adults may suffer anxiety, hyperactivity, loss of confidence, and distrust of adults<sup>12</sup>.

These are clearly life-altering effects for the victim, and indirectly, for the victim's family. Education on the severity of the crime of rape and its consequences is needed for those receiving reports, investigating crimes, and prosecuting cases.

### **E. The Trial**

For those victims who do attempt to have a case prosecuted, the actual trial is often very difficult. The complainant can be made to stand beside the person accused of raping her. A complainant may also be made to give a detailed account of the assault in front of the accused, and in the presence of total strangers. Cases where judges have shown sensitivity to the victim by closing the court during questioning have been rare, and seem to follow no set guideline.

### **F. Conclusions**

The perceptions of rape and indecent assault in the family and in the community influence a victim's willingness to report such a violation. If a sexual assault victim is to be able to recover, she must be able to confront the perpetrator with the support of her family and of the legal system.

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<sup>10</sup> *Ibid*, at page 5.

<sup>11</sup> *Ibid*, at page 6.

<sup>12</sup> Saba Raghda, *Case Presentation of Sexual Abuse*, Transculture Psychological Organization (TPO), Phnom Penh, December 15, 1998, page 4.



## II. NGO INVOLVEMENT – FROM ALLEGATION TO TRIAL

Some Cambodian non-governmental organizations (NGOs) investigate sexual assault cases and provide assistance to victims. Cases come to NGOs from a variety of sources, including: victims or their families, media, other organizations, community networks, police or other authorities, taxi drivers, or in the course of human rights education sessions in the provinces.

Once a case comes to the attention of a human rights organization, it typically proceeds as follows:

### A. Allegation

The case is given to an investigator, who conducts a field investigation. A field investigation involves talking to the victim and victim's family, witnesses, and police. The investigator carefully explains his or her role and its limitations as follows:

- The investigator explains the legal procedures available to the victim.
- The investigator cannot legally represent the victim; but can assist in putting them in contact with a legal aid NGO.
- The investigator cannot arrest the perpetrator, but can assist the victim in her contact with the police or relevant authority with the power to arrest.
- The investigator cannot rescue or remove the victim from a situation but can seek the assistance of the police or relevant authority in order to facilitate a lawful rescue/removal.
- The investigator leaves it up to the family to decide how to proceed.

The investigator explains that even if the family has already agreed to a private settlement, it can still try to have the matter prosecuted. If the family decides not to pursue the matter through the legal system, the organization's role is essentially finished. In some cases, organizations will continue to assist the victim if she wishes to receive medical care, or other assistance. Some organizations are able to provide shelter for a victim – who may have received threats, may live near to the accused, or may live in the same house as the accused if the perpetrator is a family member.

**Organizations do not get involved in settlements outside the legal system.** Most organizations will try to monitor and document case outcomes.

The following describes the process when a victim pursues the case through the legal system.

### B. Pre-Trial Investigation

The Law on Criminal Procedure provides that the Public Prosecutor receives the complaint and does preliminary investigation in order to decide whether a charge should be laid. If a charge is laid, the case will be handed over to an Investigating Judge. Once an investigating judge is appointed, his/her role is to investigate the case and determine whether the matter should go to trial. Some legal advocates<sup>13</sup> believe that court clerks will do the investigation and, sometimes without talking to all the parties, will suggest a decision to the judge. This is illegal.

Other irregularities<sup>14</sup> that are common at this stage of a case include:

#### *Delays*

- Delays in court proceedings are often the result of violations of administrative procedure on the part of court staff (e.g., failing to issue a summons; lack of communication between court staff and police regarding the issuing of a warrant).
- Few cases will proceed without outside pressure from NGOs or the media, or money from the family of the victim.

<sup>13</sup> Koing Pisey, CDP, December 2000.

<sup>14</sup> Asian Legal Resource Center, *Seminar on Cambodian Judiciary – Statement and Recommendations* (14-20 March, 1998) Hong Kong, page 7.

- Delays often leave victims disillusioned with the system or vulnerable to persuasion to accept compensation settlements. Victims are also left open to threats and intimidation by the accused, or by authorities.

#### *Failure of Police to Investigate*

- Police do not carry out their own investigative duties. They depend on the investigating judge to gather evidence.
- Police sometimes allow the accused to “escape”.
- Low salary and lack of institutional funding can lead police to demand money before doing their duties or accept bribes by the accused to drop or delay the case.

### **C. Getting the Case to Court**

- Unless a complainant (or the family) is familiar with court procedure, the help of a lawyer or human rights worker is needed to get through the complicated process. NGOs will:
  - Provide lawyers (if within their mandate) to support the prosecutor, especially in cases involving young victims
  - Assist in finding a lawyer through other (legal) organizations
  - Provide the assistance of a human rights worker
  - Help gather evidence
- The cost of the legal proceeding can be a heavy burden for a family.
  - NGOs that are able to will pay for medical examinations or for travel expenses to the court.
  - NGOs will NOT provide money for bribing the police or court staff to do their jobs.

### **D. Case Study**

The following case illustrates the difficulties faced by a complainant in the courtroom.

#### *Facts*

The complainant, a 14 year-old girl, was raped while her assailant held a machete to her throat.

#### *Pre-Trial*

Attempts to find the victim a lawyer through a legal NGO were unsuccessful.

#### *Trial*

- The defense lawyer for the accused argued that the girl was still a virgin, and that the accused was mentally ill.
- The prosecutor failed to challenge these arguments.
- The prosecutor failed to argue that the rape laws provide for equal punishment for attempted rape.
- Use of a weapon in the assault should have resulted in a sentence of imprisonment for 10-20 years.
- The accused was sentenced to three years imprisonment; two years were suspended.
- The accused was also sentenced to five years probation.
- Probation in Cambodia is meaningless; there are no probation officers or other means of following a convicted person on probation.
- Sadly, due to the small number of rape cases that ever get to trial, and the even smaller number that result in a conviction with prison time, this decision was cited as a “small victory” in the media.<sup>15</sup>

<sup>15</sup> “A Child rape victim’s small court victory”, *Phnom Penh Post*, July 23-August 5, 1999.

### III. LICADHO CASE INVESTIGATIONS

The following data provides an overview of the cases of rape and indecent assault received by LICADHO between January 1999 and March 2000, LICADHO investigated 108 sexual abuse cases. These cases represented 21.05% of LICADHO's entire caseload for the time period.

The number of cases reported and investigated in a given area will be influenced by many factors, including strength of local community networks; proximity to Phnom Penh and the number of NGOs working in the area.

#### A. Types of Violations:

\* Insert chart on page 22 of original report

The majority of sexual assaults investigated were cases of rape (70%) or attempted rape (15%). A much lower number of reports of indecent assault (4%) may be explained by the common view that no offence has taken place unless the victim loses her virginity. It is of concern that indecent assault is even more under-reported than rape, making it even more difficult to detect and intervene.

#### 1. Sexual Assault with Threats or Weapons

The Criminal Code specifies harsher penalties for cases involving threats or weapons. Threats and intimidation are serious human rights violations and cause further trauma to victims.

Of the 108 sexual abuse cases investigated, 54.6% involved threats of violence to the victim or her family and 7% were known to involve a weapon. On a few occasions, threats occurred after the assault: generally from either police or the family of the accused in an effort to persuade the victim to stop the complaint.

#### 2. Rape and Murder

LICADHO has investigated only a few cases of rape in which the victim was murdered. In one case the victim was a 4-year-old girl. Police and courts do treat rape/murder cases more seriously, but lack of police resources often leave these cases unsolved.

#### 3. Gang Rape

For the purposes of this report, a gang rape is one involving three or more perpetrators. Human rights workers believe such cases are on the increase, possibly related to wider availability of pornography in Cambodia (see Case 10). Cambodia is also seeing a growing number of gangs of young men, seduced by the sense of impunity that perpetrators enjoy as part of such a group.

Gang rapes are difficult to investigate and prosecute for many reasons. It is more difficult to identify multiple perpetrators. And because of the violent nature of such attacks, the victim often loses consciousness during the rape, making identification even more difficult.

In such cases, settlement by compensation is common. Multiple offenders give police and other authorities more opportunities to make money from bribes, or from brokering settlements.

#### **Case Example – Gang Rape**

In September 1998, 15-year-old girl went with two friends to see dancing, but on the way the two friends made a signal and six men appeared and caught the victim and dragged her to a cottage. They held her arms, gagged her, and threatened to kill her if she struggled. Other men were at the cottage, and they raped the victim one after the other until she was unconscious. When she regained consciousness, more men raped her.

In all, 15 men raped the victim, who was seriously injured. The perpetrators paid 2,200,000 riel in compensation, but the victim only got 700,000 riel, the rest of the money went to the authorities (1,000,000 riel), a witness who had seen the rape (200,000 riel), and other people involved in the handling of the case (300,000 riel).

This case was brought to the attention of LICADHO in early 1999. As of September 1999 the authorities had done nothing even though LICADHO had filed an intervention letter and made follow-up enquiries.

#### 4. Rape by Minors

##### **Most child sex offenders receive no punishment, and are not held responsible for their actions.**

This is in part because there is no juvenile justice system in Cambodia. Current criminal law does not state the minimum age of criminal responsibility. The Ministry of Justice<sup>16</sup> has said that children under age 13 do not have the capacity to discern right from wrong, while children between 13 and 18 can.

There is also concern that pornography is more widely accessible to younger audiences. There is no adequate regulation of public showing of pornographic materials. Alarming, some judges believe it would be unfair to punish Khmer men too harshly because such wide access to pornography causes “spontaneous desire” in men, who cannot help their feelings.

**A lack of rehabilitation programs or institutions adds to the problem.** There is a government-run “Youth Rehabilitation Center” in Phnom Penh, but it does not address the problem of youth sex offenders.

##### ***Case Example – Rape by Minors***

In September 1999 a 7-year-old girl “Thany” was invited to play at her neighbor’s house by another young girl, “Dara”. She was reluctant to go, and later it transpired that Dara’s 13-year-old brother had raped Thany on at least three prior occasions. Urged by her mother, Thany went with Dara to play. After playing for a while, Dara suggested they go to the pond to wash, and when they finished washing, Thany rushed to go home, but Dara called to her brother that Thany was getting away. The brother came and caught Thany, covered her mouth and dragged her to some nearby palm trees. He then told Dara to go get a mat and three *kramas* (scarves). Then the boy called over two of his friends, aged 12 and 13. Once Dara laid out a mat, the three boys forced Thany to lie down on it and tied a scarf around her mouth, then tied her hands to the end of a piece of wood which they laid across her chest. They tied her legs apart, then each boy proceeded to rape her, two times each. While this was going on, Dara was sitting a short distance away watching and keeping look out.

The boys then took Thany to the pond and again tied her and raped her two times each. Thany was traumatized by the ordeal and suffered injuries to her genital area. She was referred for medical and psychiatric treatment by LICADHO, who also intervened to get the police to arrest the boys, who until then were still living freely in the village near to the victim. On investigation it was discovered the three boys had been watching pornography at a local video bar, and it appears they copied actions they had seen on video.

The outcome to this case is that the three boys were returned home with no punishment. The victim’s family accepted \$2,300 in compensation. While Thany had tried to tell her mother of the previous rapes, her mother did not understand or do anything to intervene.

#### 5. Rape Involving Accomplices

##### **Criminal Code, Part IV Punishment – Article 64**

<sup>16</sup> Ministry of Justice, *Penal Code Commentary*, undated.

He or she who supplies the modalities of an offence, orders 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 instigator.

Article 64 provides only a punishment, not an actual offence by which an accomplice can lawfully be charged. In several cases investigated by LICADHO, accomplices who helped with the rape received no punishment.

There appears to be a growing number of women who actively help their husbands, boyfriends, friends, and even brothers to entice victims. Common use of prostitutes and the related risk of HIV/AIDS or other STDs may explain why some women assist in the assault of young girls: they are trying to protect their husbands and themselves from infection.

***Case Example – Rape Involving Accomplices***

In February 2000, a girl of 14 went to buy ice in front of the house of a 28-year-old man in her village. The man’s wife pulled the girl behind the house, gagged her and covered her head with a cloth, and then took her into the house and called her husband. The husband and wife forced the girl onto a bed, and then the wife left the room. The man raped the girl, and then pushed her against the wall until she lost consciousness. At 1am in the morning, the girl’s uncle found her in a banana tree grove behind the rapist’s house. Two days later she told her parents what had happened, and the rapist was detained. At trial, the man was found guilty of rape, sentenced to five years in prison and ordered to pay 3,500,000 riel. His wife was not charged with any crime.

**B. Occupation of the Accused**

Many (almost 30%) of the accused in the cases investigated by LICADHO were farmers or fishermen, suggesting that the accused and the victim lived in the same community.

Some 17% of the accused were government employees. Most were police, soldiers or militiamen; a smaller number were described as government officials. Rapes by such offenders often involve threats, intimidation and a sense of impunity arising out of positions of power and authority, so are more likely to be under-reported.

Others in positions of power may also take advantage of victims. A landlord may demand sexual services from a tenant. If the tenant refuses, an eviction will follow.

Fourteen percent of the accused fell under the category of “students.”

The “other” category (14%) includes an array of occupations: landlord, moto-driver, hairdresser, doctor, truck driver, mason, goldsmith, ex-monk, retired and/or unemployed persons.

**C. Ages of Victims and Accused**

\* Insert table from page 26 of original report.

Victims

LICADHO’s data is focused mainly on rape of people aged 18 and under. It is therefore difficult to draw any conclusions from the data relating to victims over 18. Analysis of victims aged 18 and under indicates that victims aged 11-15 accounted for the highest portion of all victims (38.3%) and the **average age of victims is 12 years old.**

Accused

The average age of an accused was 25.7 years old. Of accused rapists, 80.4% were males age 16-35, 12.6% were males over 35 years of age, and 7% were males under 16 years of age.

### Why Are Victims Getting Younger?

Alarming, many Cambodian men believe that sex with young virgin girls will increase sexual virility and make them “look younger and feel more energetic.”<sup>17</sup> The price for a young virgin girl can be as much as \$800 for a week. The price then decreases as a girl serves more customers.

The spread of HIV/AIDS in Cambodia may also explain the demand by men for younger and younger girls, since they are believed to be free of the deadly virus. Actually, sex with a child presents a greater risk of transmission of HIV/AIDS and other STDs, because the mucus membranes of a young girl’s vagina and a young boy’s anus are more fragile, and more likely to tear or bleed.<sup>18</sup>

### **D. Case Outcomes**

The following data highlights the lack of enforcement of the laws related to rape and indecent assault cases. An analysis of the legal issues raised by the case outcomes is provided in the following sections on Legal Perspectives.

#### No Outcome

**49% of the 108 cases investigated by LICADHO have had no outcome because they are either still under investigation by the courts, are awaiting trial, or the accused has escaped.**

The term “under investigation” suggests that the courts are taking some form of action, however, this is not necessarily the case. Whether the courts are actually investigating or not, it is unacceptable that many of these recorded cases are still “under investigation” or awaiting trial one to two years after the crime was committed.

#### Cases Gone to Trial

21% of the 108 cases investigated by LICADHO went to trial. Another 12% are awaiting trial.

#### Guilty Verdict - Suspended Sentence

18 of the 108 cases (16.5%) went to trial and resulted in a guilty verdict.

However, **28% of these guilty verdicts resulted in suspended sentences**, where the accused ultimately spent very little time in prison. The handing down of a suspended sentence indicates that either:

- **The charge was reduced to the misdemeanor offence of indecent assault** (for which a suspended sentence can be given), or
- **The judge made a sentencing error** (a rape conviction cannot give rise to a suspended sentence).

For a more detailed analysis of Sentencing problems, see Section VII Legal Perspective: Sentencing.

#### Guilty Verdict

For the guilty verdicts that did not lead to suspended sentences, the average prison term was eight years. Some of these cases received heavy media attention, a fact that may have influenced the handing down of longer sentences. This suggests that strong public opinion is a key factor in the improvement of treatment of sexual assault cases in Cambodian courts.

<sup>17</sup> Chanthol Oung, Director of CWCC, quoted in *Cambodia Daily*, Thursday, August 17, 2000, page 2.

<sup>18</sup> Larsson, Katarina. *Country Gender Profile, Cambodia, 1996*. SIDA Asia Department, Phnom Penh, p. 22.

Cases Closed / "Resolved"

Of the cases that have been "resolved" in some way and are considered closed, 41% were settled by compensation payments by the perpetrator to the victim or her family. This fact illustrates the common practice of rapists avoiding criminal penalties by paying a sum of money. The average compensation payment paid per accused was 730, 000 Riel (\$190 US). Settlement by compensation is likely a major factor in rapes that are not reported.

Similarly, 3.5% of the 108 cases were "resolved" by marriage of the victim to the accused, which is addressed in the following section on "Private Settlements".

## IV. PRIVATE SETTLEMENTS

LICADHO's investigations into cases of rape and indecent assault suggest that an alarming number of cases are settled either by compensation, by marriage of the victim to the perpetrator, or by sending the victim away. The reasons for this type of "resolution" are complex and inter-related. The result of a private settlement is that the perpetrator is not prosecuted under the law; he is unpunished, and free to rape again. The victim never receives justice.

### A. Settlement by Compensation

#### **Case Example**

One evening in December 1999, a 5-year-old girl was late coming home. The girl had been playing at a neighbor's house for quite some time. The mother called out to her daughter from her house. When the girl returned to her own home, she told her mother that their 19-year-old neighbor had just raped her at his house. The mother immediately sent her daughter to the nearby hospital for an examination and then promptly notified the commune leader.

The next day, the commune police chief began an investigation by questioning the victim in the presence of the alleged perpetrator. The 19-year-old neighbor eventually confessed in front of the police chief, the village leader, and the commune nurse that he had raped the girl. That afternoon, the district police inspector negotiated an out-of-court settlement between the victim's parents and the perpetrator's mother. In exchange for the withdrawal of a formal police complaint, the perpetrator paid the victim's family 400,000 riel (approximately US\$105). The perpetrator also paid 400,000 riel to the district police inspector.

The perpetrator was never formally charged with the rape of the 5-year-old girl to which he had confessed.

As detailed earlier in this Report, a victim faces many social obstacles in reporting an assault to family members and authorities. The obstacles do not end there. A victim's family will often prefer settlement to a public trial, which they feel will bring shame to the family. In the case of victims with little money, the cost of legal action is prohibitive. In other cases, there is simply no trust in the legal system. Also, for a family with little money and no connections, compensation may seem to be the only form of justice available to them.

Police, court staff, and other authorities often encourage settlement by compensation in order to receive a percentage. In doing so, they stand in violation of the law.

The continuation of this illegal practice has troubling consequences. Sexual offenders are not tried under the law and they remain free to re-offend. Sexual offences are not deterred by the State or by society. A most serious consequence of the compensation settlement is that it feeds the culture of impunity that gives rise to it in the first place.

Settlement by compensation should be viewed in the context of traditional Cambodian dispute resolution, particularly in rural areas. At the village level, settlement of conflicts begins with prolonged discussion, mediated by the village or commune leader, with the aim of reaching a compromise that is acceptable to both parties.<sup>19</sup>

#### 1. Compensation as Settlement is a Violation of the Law

**Under Article 38 of the *Criminal Code* it is a crime for any civil servant, official agent, or political official to solicit money, etc., in the course of their official duties.** This crime of corruption carries a penalty of three to seven years' imprisonment and a fine.

<sup>19</sup> William A. Collins, Ph.D., *Dynamics of Dispute Resolution and Administration of Justice for Cambodian Villagers*, USAid, 1997, p. 6.



**Article 129 of the Constitution states: “Only a judge shall have the right to adjudicate.** A judge shall fulfill this duty with strict respect for the law, wholeheartedly and conscientiously”.

**Article 7 of the Law on Criminal Procedure states that a public action may not be settled by a private arrangement, and that non-compliance is a miscarriage of justice,** punishable by a disciplinary measure of imprisonment of one to six months.

Article 4 of the same Law states that the **police and judiciary have no right to close a file on a criminal case they have received;** they must forward the case to a prosecutor.

## 2. Officers of the Law as Brokers of Compensation

In many cases investigated by LICADHO brokering of compensation settlements between the families of the accused and the victim was often carried out by the police or court staff, who in turn kept a portion of the settlement. Judges have even been known to adjourn trials to enable the parties to settle by compensation.

The money-making potential in these types of settlements is highly tempting because of the extremely low salaries paid to police, court staff, and judges.

There also appears to be a lack of understanding or total disregard of the fact that brokering compensation settlements is a violation of the law (Article 38, Criminal Code) punishable by fines and imprisonment. Rather, the officers perceive the settlements as “compromises” or “reconciliation”.

Sadly, it appears that many Cambodians see more deterrents than benefits in pursuing a rape charge through the legal system.

## 3. Lack of Trust in the Judiciary and the Legal System

In rural areas, many people do not know or understand legal procedure, or they simply do not trust courts, judges, and prosecutors. The court system is widely perceived as slow and uncertain, and as a tool for the powerful and wealthy. These views are reflected in such local proverbs as: “Go to court, become poor”, or “At court the rich wins, the poor loses”.

Every schoolchild knows the fable of the fox judge. Two animals in the forest both claim to have caught the same fish. They bring the disputed catch to the fox-judge to ask his ruling. The judge proceeds to divide the fish, placing each half in one pan of his scales. But the scales tip to one side, so to make the division even and just, the fox slices off a little of the heavy portion and puts it aside for himself. But now the scales tip to the opposite side, so the fox again slices off a little for himself in an effort to make the pans of the scale even. The process continues until all that is left in the pans is a few bones for the disputing parties.<sup>20</sup>

**Under the law, a victim should not have to pay any money in order to have a criminal case prosecuted.** In reality, the family of the complainant will have to pay at every step of the process if the case is ever to be heard.<sup>21</sup> Typically, money must be paid to police to gather evidence, prosecutors to investigate, and court staff to carry out their procedural responsibilities, in violation of the laws that govern all Cambodians. The burden is particularly heavy for very poor families, or families in remote areas, who have the additional expense of traveling to the nearest court.

## 4. Confusion between Criminal and Civil Actions

There appears to be some level of confusion between the aims and purposes of criminal and civil actions – by judges, lawyers, victims and accused persons alike. A clarification of this important distinction might help curb the use of private compensation settlements.

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<sup>20</sup> William A. Collins, Ph.D, *Dynamics of Dispute Resolution and Administration of Justice for Cambodian Villagers*, USAid, 1997, p 15.

<sup>21</sup> From interviews with Lim Mony (ADHOC), Lean Chinda (LAC) and Sophea Ung (CWCC), December 2000.

The following is an excerpt from the *Resource Guide to the Criminal Law of Cambodia*.<sup>22</sup>

When a crime is committed, it often may result in two legal actions: a criminal prosecution, and a civil claim for compensation or damages.<sup>23</sup>

The goal of a **criminal action** is to prosecute those accused of committing any act that is deemed a criminal offence under the law. The state is responsible for prosecuting criminal actions, through the Office of Prosecution. All crimes carry a punishment, usually a term of imprisonment or a fine. The purpose of punishment is to deter wrongdoers from committing further crimes.<sup>24</sup>

A **civil action** that occurs as a result of the commission of a crime is a legal action seeking compensation or damages for the victim(s) of a crime.<sup>25</sup> Any person who believes they have been injured by a criminal act may bring such a civil action, which may be heard at the same time as the criminal prosecution of the crime<sup>26</sup>, or in a separate civil proceeding, once the prosecution has concluded.<sup>27</sup>

## B. Settlement by Marriage:

### **Case Examples**

**Example one:** In November 1999, two girls aged 14 and 15 were walking to an art performance when two men who they didn't know very well, but who live in the same village, stopped and asked the girls to take a moto-ride with them to the pagoda. The girls refused. One of men slapped the girl of 14 on the shoulder, and the girls became afraid so agreed to go with the men. The men took the girls to a guesthouse and kept them there for the night. One man aged 28 raped the girl of 14 twice; the other man aged 21 raped the other girl once. The following day, the men left the girls at a military camp where the brother of one of the girls found them and made a complaint to the police. The man of 21 was arrested, but the other man escaped. The matter was settled by marriage between the arrested man and the girl of 15.

**Example two:** In February 2000, two girls aged 13 and 17 took two cows to a house about 70 meters away, by reason of a prior arrangement between their parents and the house owner. When they arrived there, the owner of the house was not at home, but his younger brother-in-law was. Once the girls had taken care of the cows, they were asked to help cook some food while the man went to buy sour palm juice. While he was away, the girls' younger brother aged 11 came to the house. The man came back with four of his friends. The five men, all aged 19 or 20, tied up the boy and then took turns raping the girls, using small knives to threaten them. They then let the girls go home, but later that night the five men went to the girls' house and, when they were sure their parents were not at home, each one raped both the girls again.

The following day the girls' parents returned home and the brother told them what happened. They complained to the police; four of the men were arrested, while the fifth escaped.

The perpetrator who instigated the rape (the house owner's brother-in-law) was released six weeks later because he agreed to marry the 17-year-old victim. The other three perpetrators were found not guilty and released. The perpetrator who had escaped was apprehended, found guilty, sentenced to four years in prison and ordered to pay compensation of 4,000,000 riel to the 13-year-old victim.

<sup>22</sup> *Supra* note 16, at page 48.

<sup>23</sup> For rules relating to criminal and civil actions heard together, see generally the State of Cambodia Law on Criminal Procedure 1993 ("SOC Law"), articles 2, 5, 6, 9, 10, 12-19, 33, 53, and 54.

<sup>24</sup> See, for example, article 3 of the SOC Law.

<sup>25</sup> SOC Law, Article 5.

<sup>26</sup> SOC Law, Article 9.

<sup>27</sup> SOC Law, Article 16.

According to one human rights worker<sup>28</sup>, rape cases involving middle class girls will rarely be reported to police; the families will prefer to force the rapist to marry the victim, pay compensation, or both, so as to protect the family's reputation. It is unclear from LICADHO's investigations how common marriage settlements are in rape cases. Because marriage is seen as a way of protecting a family's reputation, it is likely that most marriage settlements are not reported.

Settlements by marriage have predictable results: a man forced into marriage is not likely to be a good husband, especially to a woman he has assaulted. A woman forced to marry the man who assaulted can never be happy in that marriage.

Worse, marriage to an assailant is further punishment to the victim. The crime remains unrecognized, and the perpetrator unpunished by society or the law.

### **C. Other Settlements**

Another way of "resolving" sexual assault cases is by sending a victim away to live with family in another village. The hope is that there, where no one knows of the rape and loss of virginity, she may still be able to marry. Again, the victim is isolated, and her suffering deemed less important than family reputation.

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<sup>28</sup> Lean Chinda, LAC, July 2000.

## V. LEGAL PERSPECTIVE: LEGISLATION

### A. Legislation

#### 1. The Criminal Code<sup>29</sup>

##### **Article 33: Rape** (Statute of limitations: 10 years)

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 against a non-consenting person. If rape is accompanied by fraud, violence or threats, 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.

##### **Article 42: Indecent Assault** (Statute of limitations: 3 years)

1. Anyone who sexually offends another, unconsenting, person of either sex by touching, caressing, or any other sexual act not involving penetration, is guilty of the misdemeanor 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 a person with authority over the victim, or if the victim is under 16 years of age, the duration of these sentences shall be doubled.
3. Any person who procures, entices or leads away, for purposes of prostitution, or exploits the prostitution of a minor, even with the consent of that minor, shall be liable to a term of imprisonment of two to six years.

In circumstances where the *Criminal Code* is silent, or where the presiding judge needs further guidance on the case, there are other instruments available to assist in interpretation and application of the law. These instruments include:

#### 2. UN Convention on the Rights of the Child (CRC)

On October 15, 1992, the Royal Government of Cambodia ratified the *United Nations Convention on the Rights of the Child* (CRC), and incorporated it into the Constitution of the Kingdom of Cambodia such that Article 48 of the Constitution states:

The State shall protect the rights of the children as stipulated in the Convention on Children, in particular, the right to life, education, protection during wartime, and from economic and sexual exploitation.

The State shall protect children from acts that are injurious to their educational opportunities and welfare.

The exact legal implications of the incorporation of the CRC into the Constitution have yet to be determined and it is unclear whether the CRC can be invoked to protect the rights of children in Cambodian courts. [The fact that it is mentioned in the Constitution does require any future legislation to conform to the provisions of the CRC on pain of being unconstitutional, and therefore without force and effect. This is of particular importance as the Ministry of Justice is presently reviewing and refining a new, Draft Penal Code].

The Government's ratification requires the development of a national legal framework – not merely a Constitutional mention –, which can effectively ensure that children enjoy the rights described in the CRC<sup>30</sup>. While some have argued that the CRC can be treated as enforceable domestic law, it is of

<sup>29</sup> *Provisions Relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia During the Transitional Period* (hereinafter the "Criminal Code"). This code was drafted by the United Nations Transitional Authority in Cambodia ("UNTAC"), and was adopted by the Cambodian Supreme National Council in September 1992.

<sup>30</sup> *Cambodian Law and the Convention on the Rights of the Child: A Comparative Study*, Legal Aid of Cambodia, Juvenile Unit, Phnom Penh, 1998, p. 12.

concern that almost nine years after ratification of the treaty, no practical advances have been made with respect to adopting its principles in domestic law.

### 3. 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

The CEDAW contains provisions relevant to the sexual abuse of women. The Royal Government ratified the CEDAW in 1992 but, as with the CRC, the implementation of the protective provisions of the Convention is not evident in Cambodian courts. While Article 45 of the Constitution provides that “All forms of discrimination against women shall be abolished”, there is no formal mention of the CEDAW, as is the case with the constitutionally enshrined protection of children under Article 48.

### 4. The Cambodian Constitution (1993)

While the Constitution contains a number of articles that could be used to protect women and children from sexual abuse (as described above), it is uncertain how judges would respond to legal argument based on the Constitution. It is hoped that, with the strengthening of the rule of law in Cambodia, the courts will be more receptive to the use of Constitutional provisions in this regard.

### 5. Khmer Customs and Traditions

Custom and tradition are sources of law in Cambodia, and these may be used in resolution of disputes when statute law is silent.<sup>31</sup> The Criminal Code specifically addresses rape and indecent assault; therefore, the statute law takes precedence over custom. However, custom and tradition still impact greatly on the judicial interpretation and implementation of the provisions of the Criminal Code.<sup>32</sup>

## **B. Inadequacy of the Current Legislation**

Vagueness of terms and absence of definition provisions are the main problems with the current laws on rape and indecent assault. In particular, the definitions of “minor”, “rape”, and “consent” are either too unclear or insufficient to provide adequate protection of Cambodia’s most vulnerable citizens, women and children.

### 1. Minors and the Law

Cambodian law provides no definition of the term “minor”. Under the *Convention on the Rights of the Child*, anyone under the age of 18 is considered a minor.

The matter is confused by inconsistent reference to the term “minor” in some areas of the law, and absence of the term in others.

#### **RECOMMENDATIONS:**

- The Criminal Code should provide a clear definition of “minor”.
- Cambodian law in general should apply a standard, consistent age of minority.
- The Criminal Code should recognize statutory rape as a crime.
- Any future legislation must be drafted and enacted in accordance with the CRC and with constitutional provisions on protection of women’s rights.

### 2. Definition of Rape

Rape is defined as “any sexual act involving penetration against a non-consenting person” (Article 33, Criminal Code).

<sup>31</sup> *Ibid* note 8, at p. 190.

<sup>32</sup> See this Report’s section on “Attitudes of the Judiciary”.

Penetration:

It is unclear whether “penetration” is limited to penetration by a penis only. If that is the case, then a victim who suffers penetration by any other object will find no protection under the rape law (Article 33); and worse, will find no protection under indecent assault (Article 42), which excludes sexual acts involving penetration.

**RECOMMENDED DEFINITION: Penetration**

Sexual penetration (to any extent) by a person of either sex with any part of the body or by any object, committed on any person, without that person's consent.

Consent:

Only section 3 of Article 42 (Indecent Assault) mentions the term “consent”. The Article imposes a double penalty on a person found guilty of procuring, enticing, or leading away for the purposes of prostitution, or who exploits the prostitution of a minor, even with the consent of that minor. This section has generally been considered to address trafficking in minors; but has been overtaken by the passing in January 1996 of the Law on the Suppression of the Kidnapping and Trafficking/Sale of Human Persons and Exploitation of Human Persons (the “Trafficking Law”).

The section has sometimes been interpreted and used as a statutory rape law. While this interpretation may lead to some welcome convictions on moral grounds, it is legally unsound.

The urgent need for a clear legal definition of “consent” is illustrated by the prevailing – and mistaken – view among some judges and legal advocates that if a victim offers no resistance, then she “consented” to the act. Again, misconceptions about the nature of the crime of rape, as well as cultural attitudes about sexuality shape the interpretation of rape, and rape laws.

**RECOMMENDED DEFINITION: Consent**

Subject to a person's capacity to consent and situations where the law will not recognize consent as having been given, consent means, for the purposes of this chapter, the voluntary agreement of the complainant to engage in the sexual activity in question.

Capacity to consent should be considered in respect of the complainant's age and mental capacity.

A provision on consent should clearly indicate circumstances in which consent cannot be given. A provision on consent should also clearly indicate that a lack of physical injury does not mean that a complainant consented to the sexual activity.

Authority:

Articles 33 and 42 of the Criminal Code increase the sentence for an offence committed by a person with “authority” over the victim. It might be inferred that “authority” includes police or military personnel, and possibly also parents, grandparents, step-parents, other relatives and other people whom a victim might consider an authority figure, such as teachers, landlords and doctors. However, the term is not clearly defined, and can thus be subject to broad and inconsistent interpretation by judges.

**RECOMMENDED DEFINITION: Authority**

A comprehensive list of “persons in authority” for the purposes of these provisions should be included, so as to avoid any confused or inconsistent interpretation.

## VI. LEGAL PERSPECTIVE: JUDGES AND THE COURT SYSTEM

### A. Independence of the Judiciary

Article 51 of the *Constitution of the Kingdom of Cambodia* provides that the legislative (law-making National Assembly), executive (the government ministers and ministries) and judicial (judges) powers shall be separate. The principles of separation of powers and judicial independence are fundamental requirements for fair trial. Any interference by the executive with judicial decision-making offends the Constitution.

In practice, there is no separation of powers, and the judiciary is not independent. Cambodia's judges are often subject to unconstitutional interference by the Minister of Justice. Lack of independence undermines the legal system, and is a danger to the complainant and accused alike.

### B. Qualifications of Judges

Many judges were appointed before the introduction of the current Criminal Code. Therefore, they are still largely operating under the framework of the previous socialist justice system. Many judges also lack professional legal training.

### C. The Role of the Prosecutor

The role of the prosecutor is to argue the complainant's case, to persuade the judge that the accused should be convicted on the evidence. The prosecutor has a duty to protect the complainant's best interests. However, they sometimes behave more like defense lawyers, questioning the complainant and trying to discredit evidence that supports her claim.<sup>33</sup>

### D. Criminal Procedure

Investigations should be carried out in accordance with the law as set out in the *Criminal Law and Procedure Act of 1992* and the *Law of Procedure Act of 1993*. In reality, investigations still largely follow the socialist model, which was used between 1979 and 1992; this model puts weight almost entirely on the confession of the accused. The confession model is still widely used by police and the judiciary, and is at odds with the values of liberal democracy that are enshrined in the Constitution.

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<sup>33</sup> Lean Chinda, LAC, July 2000.

## VII. LEGAL PERSPECTIVE: EVIDENCE

All human rights workers interviewed for this report pointed to evidence gathering and use of evidence as major obstacles to gaining convictions in sexual assault cases. In the Cambodian context, the common problems with evidence are:

- Judges will look for evidence of violence or serious injury to support a victim's
- There is no existing statute on evidence in Cambodian law
- There are often no witnesses to crimes of this nature.
- Victims often wait a long time to report the crime, so "fresh" evidence is not available.
- A delay in reporting will prejudice the complainant's case.
- Police often do not investigate the case well and prosecutors do not gather evidence, they only receive it – so the victim usually needs to get a lawyer to help with evidence gathering.

### A. Medical Evidence

A medical certificate detailing the findings of a medical examination will be given the most weight in a judge's consideration of evidence. Without this certificate, a case is very difficult to prove to a court.

Problems with obtaining medical evidence and admissibility in court include:<sup>34</sup>

- The court requirement for evidence of serious injury means that a victim must visit the doctor within a day or two of the assault in order to obtain a certificate.
- Medical examinations are often delayed because of a victim's feelings of shame.
- Lack of qualified doctors to undertake this particular kind of examination.
- Often, examinations and certificates do not to satisfy the court's evidentiary standard (of penetration and serious injury, for example) in order to support a rape conviction.
- Only certificates from hospitals and doctors that are public and recognized or chosen by the courts will be accepted as evidence.
- For many victims, a medical certificate is prohibitively expensive.
- Some doctors will not undertake these examinations for fear of retribution from the rapist (a doctor in Kampong Speu was shot by the patient's rapist when he was released from prison).

### B. Judges and Medical Evidence

A medical certificate from an approved facility does not necessarily prove that a rape, recognized as such by the law, has occurred. The medical certificate can only certify that certain injuries have been sustained, whether or not the hymen has been broken. Under the law, the judge interprets the injuries sustained and makes the judicial decision as to whether the certified medical evidence supports a rape charge.

This aspect of medical evidence anchors commonly used judicial reasoning, often to the detriment of the complainant. For example:

- **Judges continue to reason that a sexual assault is not a rape unless it is evidenced by serious physical injuries** (for example, a case where the central evidentiary issue was how many stitches the victim received to her genital area).
- Such reasoning is of particular concern in cases where the rape is accompanied by threats of violence or death (common in Cambodia). In these cases, a victim under threat may not struggle enough to sustain injuries that a court will see as evidence of the rape.
- Focus on severe physical injury trickles down to the prosecutors and defense lawyers. Their legal arguments are also concentrated on the severity of injury and violent nature of the offence in order that the assault is taken seriously.
- Some judges continue to reason that there is no rape unless virginity is lost.
- Judicial reasoning around the issue of "deepness" of the penetration is of particular concern – despite the fact that "deepness" and virginity are nowhere in the Criminal Code with relation to a rape charge.

<sup>34</sup> According to an interview with Lean Chinda, Legal Aid of Cambodia, July 2000.



### **C. Other Types of Evidence Considered**

Depending on the particular circumstances of the case, a judge will give evidentiary weight to any of the following: any witness to the assault, torn or bloody clothing, physical evidence at the scene of the crime, confession of the accused.

### **D. Problems with Evidence Gathering**

- The main problem is the delay in reporting the crime, which is usually a result of the victim's feelings of shame, fear, and psychological trauma after the assault. This usually results in loss of medical or physical evidence.
- There are rarely eyewitnesses; those who exist may themselves be traumatized or afraid of speaking out.
- There is a lack of training and resources for evidence-gathering among police officers and investigating judges.
- Investigators are often motivated by money to mediate settlements rather than gather evidence.

## VIII. LEGAL PERSPECTIVE: SENTENCING

### A. Sentences for Rape

#### Article 33: Rape

Rape and attempted rape are punishable by imprisonment of five to ten years.

If accompanied by fraud, violence or threats, or committed by anyone in a position of authority over the victim it is punishable by imprisonment of ten to fifteen years.

#### Article 42: Indecent Assault

Indecent assault is punishable by imprisonment of one to three years.

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

### B. Relevant Provisions

Article 68 of the *Criminal Code* sets out circumstances the judge may consider when deciding sentences. The effect of this article is that a sentence may be reduced, even below the minimum punishment prescribed by law. The circumstances to be considered are:

- Youth of the convicted person
- Aspects of personal background of convicted person which could reduce responsibility
- Mental state of the accused, as certified by a psychologist or psychiatrist
- Any circumstances of the offence that rendered the actions of the convicted person absolutely necessary.

Article 68 also provides that for an accused under the age of 18, punishment may be reduced by half.

Article 70 of the *Criminal Code* provides:

Prison sentences, with the *exception for those for felonies*,<sup>35</sup> may be suspended totally or in part. In this case, the condemned persons shall not serve out the sentence provided that he or she does not commit one of the offences covered by the preceding articles for a period of five years after the judgment.

### C. Availability of Suspended Sentences for Sexual Assaults

Under Article 33 of the *Criminal Code*, rape is a felony, and as such, a person guilty of rape cannot receive a suspended sentence.

Article 42 defines indecent assault as a misdemeanor, and so a perpetrator of this offence can receive a suspended sentence.

### D. Problems in Sentencing

Difficulty with Article 68 can arise because the circumstances that can reduce a sentence are described in broad, unspecific terms.

Difficulty in applying Article 70 arises because there are no guidelines on how or when to suspend a sentence. Further difficulty with Article 70 is the inconsistency of terms between the Khmer language

<sup>35</sup> See Stuart Coghill, *Resource Guide to the Criminal Law of Cambodia*, International Human Rights Law Group, Cambodia Defenders Project, December 2000, at page 211. In the Khmer language version of the UNTAC Code, the exception applies only to felonies punished by forced labor; and the only felony in the UNTAC Code that carries a sentence of forced labor is "illicit traffic in narcotic drugs" (Article 39) which also only appears in the Khmer version. Based on English and French language versions of the UNTAC Code, suspended sentences are prohibited for all felonies.

version, and the English and French versions. Also, even though the law provides judges with specific rules about sentencing, in practice, judges have a significant amount of discretion when sentencing.

#### **E. Illustrating the Problems: Case 14**

The Court accepted very clear evidence that a six year-old victim had been penetrated. A rape conviction should have resulted in a sentence of five to ten years. The (female) judge reduced the charge to indecent assault (Article 42), even though that offence is described as an assault “by touching, caressing, or any other sexual act *not including penetration*”. The perpetrator was sentenced to imprisonment for one year, with six months suspended.

The judge later stated to the press that the penetration was not “deep enough” for the accused to be convicted of rape, or even of attempted rape (both under Article 33). The sentence was suspended.

This case illustrates several problems with the court system:

- Judicial interpretation: the language of “deepness” (which is nowhere in the law) reinforces beliefs that the seriousness of an assault depends not only on penetration, but on loss of virginity, and physical injury.
- Judicial discretion: Here, the judge clearly applied the law incorrectly; even though this was obviously an assault including “penetration”, she reduced the charge to indecent assault and suspended the sentence of the offender.

#### **F. Conclusion**

There are many illustrations of cases where judges correctly apply the law. But, the problem is that the law is not always applied consistently. It also appears that the offenders who get adequate or long prison sentences are those who have little money, connections or family support. The defense lawyer believes that poor offenders have received sentences longer than what the judge can legally hand down. This lawyer suggests that sentencing often comes down to money with the length of sentence in proportion to the amount an accused was willing or able to pay court staff. Some judges will also reduce a sentence if the accused pays a large sum of money to the victim.<sup>36</sup>

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<sup>36</sup> Sophea Ung, Cambodian Women’s Crisis Center (CWCC), December 2000.

## **IX. THE ROYAL GOVERNMENT OF CAMBODIA**

### ***Government Initiatives***

The Royal Government of Cambodia (RGC) has made some effort to implement the CRC and CEDAW, but these have focused mainly on sexual exploitation and not sexual abuse.

*The National Assembly's Human Rights Commission* did research on sexual exploitation and trafficking in 1996-97. The National Assembly's report called for a clear definition of who is a child in respect to offenses against children. The Draft Criminal Code does not address this matter satisfactorily. The report also recommended the preparation of a five-year plan to address the issue.

*The Ministry of Women's and Veteran's Affairs* has started a "Young Women's Crisis Center" in Phnom Penh, to take in young girls and women rescued from brothels. The YWCC, working with relevant IOs and NGOs, helps to rescue and reintegrate these women and girls. The Ministry also occasionally does advocacy about particular rape or sexual exploitation cases, especially when foreigners are involved.

*The Cambodian National Council on Children (CNCC)* was created in November 1995 by sub-decree, and is the main government body responsible for children's issues. Its role is to promote, monitor, report and coordinate activities on children. While the CNCC is supposed to be a separate government entity, the Minister of Social Affairs is the chairperson. The CNCC office is in that ministry's compound and the budget for CNCC is also under that ministry's control. Although there is supposed to be an advisory board to the CNCC made up of members from NGOs and IOs, this has never been formed. UNICEF funded the CNCC building, and continues to fund the operational costs and salary supplements of the CNCC staff. Both UNICEF and Redd Bana fund the activities of CNCC.

The CNCC, together with UNICEF, produced a plan of action for Cambodia to present at the World Congress Against Sexual Exploitation of Children held in Stockholm in 1996. The plan of action did not become operational until 1997. In Stockholm, the Cambodian government endorsed the Agenda for Action adopted by the World Congress. As part of that commitment, and pursuant to the recommendation of the National Assembly's Report (see above), the CNCC prepared a five-year plan against the sexual exploitation of children, in conjunction with NGOs, IOs and relevant government ministries. This plan was completed and adopted by the Council of Ministers on the 17 March 2000, and is now known as the *National Five Year Plan of the Royal Government of Cambodia*. This plan covers prevention, protection, recovery and re-integration with respect to sexual exploitation.

While the CNCC was established to oversee all children's rights, to date it has concentrated primarily on sexual exploitation. Many of the initiatives described in the plan could equally be applied to sexual abuse, especially in the areas of prevention, law enforcement and rehabilitation.

### **RECOMMENDATIONS TO THE RGC**

The commitment and active participation of the Royal Government of Cambodia is crucial to efforts to protect this country's most vulnerable citizens. Such efforts will be more effective and far-reaching if there is a large degree of cooperation and consultation between the government and international and non-governmental organizations.

#### **General:**

- Promote the rule of law.
- Conduct a nation-wide study on rape and indecent assault, how often such crimes are committed, how often they are reported, and whether incidence of rape is on the increase.
- Pay particular attention to the provinces and rural areas when conducting training and education on these issues.

#### **Prevention:**

- Enforce the laws related to corruption and brokering of settlements.
- Inaugurate a comprehensive education program for civil servants – especially officers of the law and officers of the courts – on rape, indecent assault and gender issues.
- Conduct public awareness campaigns through various media, and provide free airtime on public TV and radio.
- Enact legislation that clearly addresses the issues of crimes against minors, and crimes committed by minors.
- Create a juvenile criminal justice system.

#### **Protection:**

- Raise salaries of civil servants to a living wage.
- Provide free legal assistance to victims of sexual assault.
- Ensure that enough adequately trained lawyers admitted to the bar to meet the demand for legal services.
- Enact and enforce comprehensive legislation on the rules of evidence.
- Provide training for police and investigating judges on evidence gathering and admissibility.
- Strengthen and clarify the provisions on rape and indecent assault in the Draft Penal Code, which is now being reviewed.
- Provide training for medical professionals on how to detect and document evidence of sexual assault, and on the importance of dealing sensitively with a victim of sexual assault.
- Provide free medical examinations for victims of sexual assault.
- Provide free HIV and STD tests to victims of sexual assault.
- Establish emergency shelters for victims of sexual assault.
- Restrict the availability of pornography.

#### **Rehabilitation:**

- Create comprehensive training programs for mental health workers.
- Create dedicated centers and shelters for victims of sexual assault.
- Create long-term rehabilitation and re-integration programs for victims of sexual assault.

#### **Recommendations to the CNCC:**

- Establish an Advisory Board to the CNCC consisting of NGO and IO members.
- Broaden the mandate of the CNCC so that it can help ensure Cambodia's adherence to the Convention on the Rights of the Child.
- Adapt the CNCC National Five Year Plan to address not only sexual exploitation, but sexual assaults in general.
- Implement the judicial training program set out in the CNCC National Five-Year Plan

## **X. INTERNATIONAL AND NON-GOVERNMENTAL ORGANIZATIONS**

### ***NGO and IO Initiatives - Prevention***

There are many NGOs and IOs with programs on the prevention of sexual exploitation. Such programs typically include educational and training seminars, usually regarding the meaning and implementation of the trafficking laws and women's and children's rights in general. Other prevention measures include dissemination of information regarding the sexual exploitation and abuse of women and children in the media. These programs do not specifically address prevention of sexual assault outside the trafficking/exploitation context.

The UN's Judicial Mentor program provides experienced expatriate lawyers to advise to judges and prosecutors on various legal issues. This is the ONLY judicial training program currently in effect.

### ***NGO and IO Initiatives - Protection***

- Most services available for victims – usually sexually abused and exploited children – are concentrated in Phnom Penh.
- These services, where they are available, suffer from a lack of adequate resources, and a lack of trained counselors.
- Availability of emergency medical services is limited.
- Availability of shelter for victims of sexual assaults is limited.

### ***NGO and IO Initiatives - Rehabilitation***

- As part of its torture victims assistance program, LICADHO has a counselor who provides assistance to young children who exhibit trauma after being raped.
- In Phnom Penh, World Vision runs the Neavea Thmey Center (Trauma Recovery Project, World Vision's Children in Extremely Distressing Circumstances department). This unique center works with young women aged 11 to 18 who have experienced sexual exploitation or abuse.
- Counseling services available for children 10 and under and women over 20 are particularly inadequate.
- The lack of quality counseling is a major obstacle to a victim's recovery from the psychological effects of sex crimes.
- Access to qualified counselors is limited – particularly for people in the provinces.

### ***Training Initiatives***

Both international and local organizations are actively involved with the training of mental health professionals.

- The International Organization for Migration (IOM) has a program to train practicing doctors in psychiatry – the program had 10 graduates in 1998; and 10 more are expected to graduate in 2002.
- Social Services of Cambodia (SSC) is currently training people in mental health issues.
- Transcultural Psychosocial Organization (TPO) has mental health professionals working in some areas of the country. However, it will take many years before the number of trained and experienced people can meet the demand.

**RECOMMENDATIONS TO IOs AND NGOs**

**Prevention:**

- Consult with the government on training civil servants about sexual assault and gender issues.
- Conduct a nation-wide study on rape and indecent assault– in association with the relevant government offices.
- Initiate of specific training programs for civil servants and society at large – especially in the provinces.
- Promote legal literacy for those most at risk: street children, stepchildren, “adopted children”, women and children in prison, physically and mentally disabled people, and domestic workers.

**Protection:**

- Establish an information sharing and exchange program between NGOs and IOs and relevant government offices to monitor reports of sexual assault.
- Establish emergency shelters specifically for victims of rape and indecent assault.

**Rehabilitation:**

- Establish centers where long-term rehabilitation and re-integration can be provided.
- Train more counselors to deal with specific needs of sexual assault victims.
- Increase access to qualified mental health workers – especially in the provinces
- Provide qualified counselors with institutional support and resources to help as many victims as possible.