



## **Solutions**

### **Study Question 1**

*Look at the graphic on the relation between the judiciary and other powers (see page 5).  
According to this graphic the executive has influences on the appointment of the judges by the Supreme Council of Magistracy.*

**a)** *Is this compatible with the principle of separation of power?*

No, it is not compatible, because the judiciary shall be independent (Article 128 I CC). This means it shall not be controlled by the executive. On the other hand the influence of the Ministry of Justice in the SCM is not very strong because it has just one vote out of nine. So according to the “Principle of Checks and Balances” such a slight influence might be still tolerable.

**b)** *What are the advantages and disadvantages of the abovementioned influences of the executive body?*

Actually, there is only a strong disadvantage because the executive gains control over the judiciary and endangers its independence being able to decide among others about appointment, promotion and punishment.

The only little advantage that could be seen is that the Ministry of Justice has the right to initiate or comment legislation about judiciary topics. So being involved with the SCM could give the Ministry of Justice a close insight into the judiciary and its problems. The Ministry of Justice as a specialized body could bring in some technical expertise.

### **Study Question 2**

*Why do all Cambodian judgments show the headline “In the Name of the Cambodian People”?  
Please give a reason for your answer and quote the relevant article(s) in the Cambodian Constitution.*

This headline is used because all power in the state - including the judiciary power - comes from the Cambodian People (Article 51 III 1 and 2 CC). Therefore Article 129 I CC regulates that all court trials are conducted in the name of the Khmer citizens.

### **Study Question 3**

*Is it necessary to established administrative courts in Cambodia?  
Please give reasons for your answer and quote the relevant article(s) in the Cambodian Constitution.*

The Cambodian Constitutions states that all administrative actions shall be controlled by the courts (Articles 39 and 128 III CC). And the Law on the Courts does not explicitly exclude administrative cases from the competency of the general courts (Municipal and Provincial Courts, Article 6 Law on the Courts).

Therefore the general Cambodian courts already have the competency to handle claims about violations of rights by the administration. So to create an administrative court is



not really necessary to provide control of the administration and to fulfill the requirements of the constitution. But it is highly recommendable to have specialized courts on administrative affairs because the general courts do not have the special skills that are needed. Additionally they already deal with a heavy workload with criminal and civil cases which they are experienced to handle.

#### Study Question 4

*Look at Article 7 of the pertinent Law on the Supreme Council of Magistracy (SCM Law) and compare it with the new Article 7 of the Draft SCM Law Amendment (see Annex) .*

*What do you think is the goal of the suggested amendment?*

The new Article 7 of the Draft SCM Law Amendment has the goal to **render the SCM more independent from the Ministry of Justice**. According to the draft the Ministry can no longer decide about the convening of the SCM and about the topics to be discussed. But now it is up to the SCM itself to convene meetings and to decide about the topics on proposal of at least three members. The SCM is also strengthened by the establishment of an own General Secretary who is elected among all judges who are not members of SCM. So the SCM does not depend in its administration work on the support of the Ministry of Justice any more.

#### Study Question 5

*Please sort the following functions:*

*Please sort the functions of the following persons into the three state powers:*

*Executive: Is s/he enforcing and executing the law or*

*Judiciary: Is s/he controlling the application of the law in single cases or*

*Legislation: Is s/he adopting binding legal norms?*

- 1) Assistant of the Court Clerk = **executive** function supporting the judiciary
- 2) General Secretary of the National Assembly = **executive** function supporting the legislation
- 3) Prosecutor = **judicial** function
- 4) Chief of the Commune Council = **both: legislative and executive** function
- 5) President of the Bar Association = **independent** function supporting the judiciary
- 6) Director of “The Khmer Institute of Democracy” = **private** function, non governmental organization = NGO
- 7) Director of Prison = **executive** function
- 8) Investigation Judge = **judicial** function
- 9) President of Council of Jurists = **executive** function, Council of Jurists is part of the government
- 10) Labor Inspector of the Ministry of Labor settling labor disputes = **executive** function
- 11) President of the Association of the Garment Factory Owners = **private**, non governmental association



## Notice:

- The **Court Clerk** and the **General Secretary of the National Assembly** are part of the judiciary respectively the legislation but they have only **executive functions** to support these institutions because they themselves neither decide cases nor make the laws.
- The **Garment Factory Association** or **The Khmer Institute of Democracy** are not part of the executive. They do not enforce laws. They are private associations outside the state institutions (= NGO = **Non Government Organization**)
- The **Chief of the Commune Council** has a **double** function: On the one hand s/he is member of the Commune Council and can adopt communal legislation. On the other hand s/he has the task to execute the decisions of the Commune Council.
- The **Council of Jurists** is part of the government (executive!) giving legal advise to the government.

## Study Question 6

*What are the main functions of the Constitutional Council?  
Please quote the relevant article(s).*

As stipulated in the general provision of Article 136 I CC the duty of the Constitutional Council is to safeguard the respect of the constitution and to interpret the constitution.

The Constitutional Council fulfills this duty by:

- 1) checking the constitutionality of drafted or promulgated laws, Articles 140 I and 141 I, II CC and Articles 17, 18 I Law on Organization and Functioning of the Constitutional Council (LoOFCC)
- 2) checking the constitutionality of organic laws, Article 140 II CC and Article 16 LoOFCC
- 3) checking the constitutionality of any acts of the authorities and state institutions, Article 19 I LoOFCC on request of individual citizens
- 4) making decisions on contested electoral cases, Article 136 II CC and Article 25 LoOFCC
- 5) consulting with the King on all proposals to amend the constitution, Article 143 CC
- 6) making decision upon NA's annulment of law which run counter the sovereignty of Cambodia, Article 92 sentence 2 CC

## Study Question 7

*One tenth of the lawmakers in the National Assembly ask the Constitutional Council to examine the constitutionality of a law related to the freedom of expression.*

**a)** *As a member of the Constitutional Council how would you interpret the word "freedom of expression"? Give a short definition of this term.*

Freedom of expression which is stipulated in Article 41 sentence 1 CC, Article 19 I, II ICCPR and Article 19 UDHR is the freedom to **seek, receive, transfer and have access to information through all kinds of media like words, print media, internet, radio or television**. It can only be restricted for the purpose to protect the rights of others (i.e. their right to preserve their reputation from defamation), moral (i.e. upholding



good traditions like respecting the elderly), public order and national security (i.e. publishing military secrets which protect national unity)

**b)** *If the National Assembly members do not agree with the decision of the Constitutional Council can they complain against the Council's decision?*

*Please give reasons for your answer and quote the relevant article(s).*

They can not complain against the Constitutional Council's decision because its decisions are **final**, Article 142 II CC and Article 23 and 34 IV LoOFCC (for electoral decisions). The Constitutional Council is the highest institution to interpret the constitution. There is no other "instance" above it. Closing a discussion with a final decision establishes a legal security that people can trust upon. Otherwise there would be endless and open discussions that only lead to insecurity and lack of orientation.

### **Study Question 8**

*Read the following articles of the Draft Law on the Statute of Judges and Prosecutors (March 2003):*

#### Article 16:

Students and government servants who also have fulfilled the following conditions may be allowed to attend the exam for selection of the training judges:

- 1) shall have Khmer nationality;
- 2) shall be at most 30 years old on the date of the examination;
- 3) shall be graduated of Bachelor of Law;
- 4) shall never be convicted to imprisonment for a felony or misdemeanor ;
- 5) shall have sufficient physical fitness to fulfill duties;

For those candidates who are civil servants of the cadre who has fulfilled the conditions may attend the examination for selection of judges, but their ages shall not be exceeding 38 years old on the date of examination.

#### Article 33:

The promotion of the judges in grade shall be based on:

- Compliance with the working disciplines;
- Good achievement of work performance;
- Good behavior and moral conduct which does not affect honor of the judiciary magistracy.
- Having completed a long-term study at any university, or faculty, or at any vocational training center
- Working in any rural, health-affected, or dangerous area.

#### Article 94:

Before taking office, judges shall take an oath of allegiance in accordance with the Buddhist religion, at the Preah Keo Morakat Silver Temple (Preah Vihear Preah Keo Morakat).

The Oath taking shall be processed according to the instructions and formula of a chief of protocol under the management of the Ministry of Royal Palace.

**a)** *Article 16 of this Draft Law lists up conditions for becoming a judge.*

*Do you agree with all these conditions? Please give a reason for your answer.*



The **age limit** in point number two of the regulation may be seen as a discrimination of older persons and their experience. But there may be good reasons for having judges who are not older than 30 years: They do not have so much practice and experience with holding influential positions and being corrupt. Moreover they are more open minded, not so much believing in authorities and not so much touched by a trauma caused by Pol Pot times. Taking this into account it is not clearly understandable why civil servants shall be granted a different higher age limit (see last sentence of Article 16).

The requirement for **physical fitness** in point number five is not a discrimination of disabled people as it is only required that the judge must be able to fulfill his/her duties (reading texts, listening, writing, attending court sessions). Handicapped persons with for example only one leg, one arm or one eye are not excluded as they can still perform these duties.

The condition (number 4) that no one could become a judge who had been convicted and sentenced to a **prison term** for felony or misdemeanor is acceptable as this does not exclude any one who may be just negligently violated a law but only severe cases of law abuse.

**b)** *Look at Article 33 of this Draft Law.*

*Do you approve all of the listed conditions for promotion or not?*

*Give a reason for your answer.*

The first three conditions are too **unclear** and therefore difficult to be evaluated without further clarifications.

What does “good behaviour” or “good performance” really mean in detail? This lack of clearness can open door for arbitrary assessments and promotions.

The condition that a **long term study at “any” university or even at a “vocational training center”** can improve the chances of promotion should be deleted. It is fine to encourage extra efforts to study and get additional knowledge but it should be related to legal knowledge or at least knowledge related to the judge’s duties.

To reward the **work in a rural area or even a health affecting area** by better chances of promotion is not problematic. It encourages judges to work where they are needed. Of course they still must have a good legal knowledge and the fact that they take risks is only one out of many factors for promotion.

**c)** *Look at Article 94 of this Draft Law.*

*Is this regulation compatible with the “Beijing Statement of Principles of the Independence of the Judiciary” (1995)?*

*Quote an article of this Beijing Statement.*

The condition that a judge must take an oath on Buddhism before s/he can conduct his/her office is a **religious discrimination**. Such a condition excludes Khmer citizen who are for example Cham Muslim or Christians from becoming a judge in Cambodia because they can not be expected to take an oath on Buddha but only to take an oath on their own religion. **Article 8 of the Beijing Statement** clearly respects the right of any judge to religious freedom and **Article 13 of the Beijing Statement** clearly rules out religious discrimination during the process of appointing judges.



## Study Question 9

Read Article 54 of the Law on the Bar.

Lawyers given functions in the Royal Government, or given mandates as deputies in the National Assembly, may remain as members of the Bar Association, but shall cease to perform the legal profession until the termination of such function or mandate.

**a)** Which human right (s) is (are) restricted by this article?

Name the human right (s) and quote the relevant article (s) precisely!

- 1) Freedom of profession, Article 36 I CC. This human right is the special human right in this case. The special human right always prevails!
- 2) But if you can not find a special human right it is always correct to refer to the general human right to personal freedom, Article 32 I CC.

**b)** Is the restriction not to be allowed to work as a lawyer when at the same time being a governmental official constitutional or not? Give reasons for your answer!

This restriction is **constitutional**.

A lawyer not only serves the interests of his/her client but s/he also has to serve justice independently by contributing to achieve not illegal but legal results.

Being a lawyer who serves the judiciary and at the same time being a governmental official as a part of the executive could **violate the principle of separation of power (Article 51 IV CC)**. Given the case a lawyer represents a client in a tax matter and the lawyer is also an employee in a state tax department a conflict of interests can quickly arise. Whom should the lawyer obey: the requests of his/her client to save as much tax as possible or his/her employer (the government) to collect as much tax as possible from the tax payers?

The restriction in Article 54 Law on the Bar does not violate the freedom of profession in Article 36 I CC because it is in “the need of the society” to avoid conflicts of interests which might breed harmful corruption and patronage.

Also Article 120 CC clarifies that a position in the government is not compatible with a position in the public service. In a broader sense a lawyer works in the “public service” as s/he above all serves justice and by that also serves the public.

**c)** Is the restriction not to be allowed to work as a lawyer when at the same time being a member of the National Assembly constitutional or not? Give reasons for your answer!

This restriction is **not constitutional**.

In this case a violation of the principle of separation of power, Article 51 IV CC is also thinkable because the duty of the lawyer to be an independent agent of justice and by that serving the judiciary might confuse with the duty of a member of the legislation. But a real conflict of interest like in question 7b) can not arise because a lawmaker is not obliged to obey to any political party's line but only decides according to his/her own conscience. This is the so called “**free mandate**” in Article 77 II CC. Every citizen whether being a tradesman, a doctor, a civil servant, etc. or a lawyer has his/her own conscience and can therefore be a lawmaker.



The more diverse the representation of professions in the National Assembly the better it is for the representation of the diverse needs of all people (Article 77 I CC).

### Study Question 10

*Article 29 of the Law on the Bar stipulates that the Bar Association shall provide funds for legal aid for poor people. Who do you think should be responsible for legal aid for the poor? Give reasons for your answer!*

Of course also lawyers should ensure that all persons have access to legal services. They should participate in **legal aid programs**. This is part of their professional obligation to serve justice.

But **legal aid is not a question of charity but a fundamental human right**. And it is the obligation of every **state** to ensure that every human right can be exercised by its citizen (see also Article 3 BPRL). Article 2 II in connection with Article 14 III lit (d) sentence 3 and Article 26 I ICCPR states that all persons are entitled without any discrimination to the **equal protection of the law** and that it is the duty of the state to give effect to this right. In other words: poor people enjoy the same protection of the law as rich people. The state must guarantee that they are represented by lawyers before the courts. If the poor people can not pay the lawyer the state must provide funds to remunerate the lawyer's service.

### Study Question 11

*Benson Samay, working as a lawyer, was appointed Cambodia's only official notary in 2001 by a sub-decree. The Bar Association expelled him from the Bar. Why do you think he was expelled?*

A notary is a legal professional responsible for drafting and officiating all legal documents. S/he therefore performs a **public function**. But Article 53 Law on the Bar states that the legal profession shall be incompatible with the performance of public functions. Benson Samay was expelled from the Bar on the grounds of Article 53 Law on the Bar to prevent potential future conflicts of interests of the public on the one side and private interests of clients on the other side.

### Study Question 12

*Does the former KR president, Khieu Samphan, have a right to get legal aid? Do not just answer with "yes" or "no" but explain your legal view and quote the relevant article of the ICCPR.*

According to **Article 14 III lit (d) sentence 3 ICCPR** the Cambodian state has to provide Khieu Samphan the assistance of a criminal defense lawyer free of charge for the trial at this national Cambodian tribunal only on **two conditions**:



- a) when such a **support is necessary in the interest of the judicial process** and (additionally)
- b) when he **can not afford such a service by his own financial means.**

Here in this case:

Condition a) (necessity of defense by a lawyer) seems to be fulfilled because in such a complicated case with such severe charges it can not be expected that any defendant simply defends him/herself without counsel.

But condition b) (lack of financial means) seems not to be clear: What is the financial situation of Khieu Samphan? Is it impossible for him to afford a lawyer? (Maybe he is shareholder of a diamond trade in Pailin?)

### **Study Question 13**

*In Cambodia, prosecutors still work closely with the investigation judge in gathering evidence and preparing a criminal case. This sort of mixing up prosecutorial and judicial function violates the Law on Criminal Procedure (1993) as well as the UN “Guidelines on the Role of Prosecutors” (1990).*

**a)** *Please quote the violated articles exactly!*

Article 98 I and II Law on Criminal Procedure (1993) and  
Principle 10 of the UN “Guidelines on the Role of Prosecutors” (1990).  
Article 2 sentence 2 and 3 UNTAC Criminal Code

**b)** *Why do you think should the prosecution be separated from the court?*

The prosecution must be **strictly separated from the court** because prosecutors and judges play fundamentally different roles:

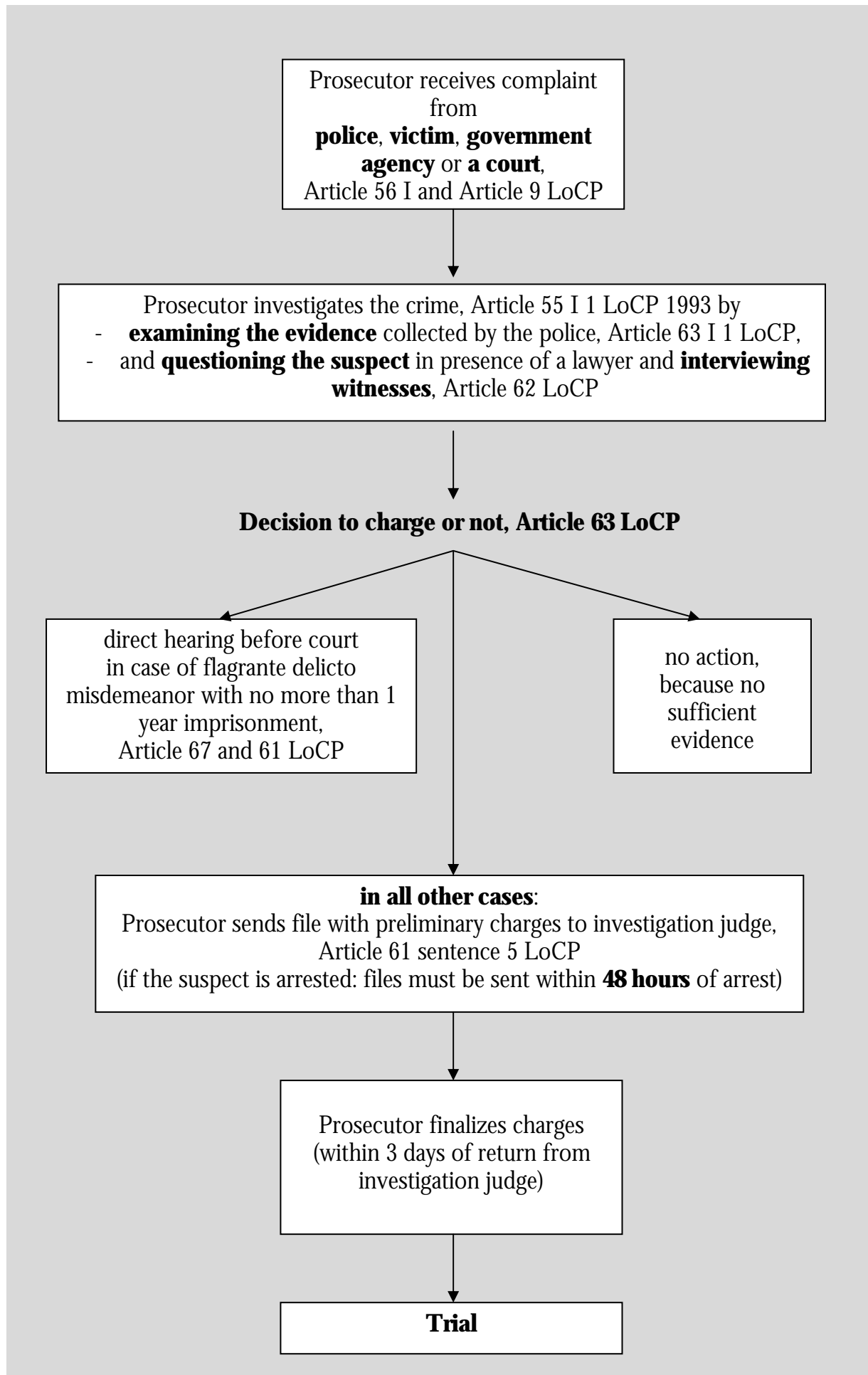
The prosecutor builds up a case against the accused and presents that case with the intention to obtain a conviction.

The judge, however, has to “find the truth”, whether that favors the prosecution or not. The judge must fairly judge the case by hearing both sides neutrally, the prosecution’s side and the defense’s side.

To underline this fundamental difference in most liberal democracies prosecutors are regarded as an independent part of the executive branch whereas judges clearly belong to the judiciary branch.

**c)** *Read the Law on Criminal Procedure (LoCP 1993) and describe shortly the action a prosecutor must take to bring a criminal case to trial!*







### Study Question 14

*What are the duties of the Court Clerk?*

His/her duties are he following:

- 1) assisting the judges and prosecutors in hearings and investigations,
- 2) keeping the case files and criminal record books,
- 3) checking the attendance and identification of parties and witnesses,
- 4) reading the rules of the court,
- 5) reporting to the judge about the presence or absence of parties or witnesses,
- 6) reading loudly the statements of absent witnesses and
- 7) taking minutes of the trial, Article 126 and 127 LoCP (statements of witnesses and accused, objection of judges and grounds of accepting/overruling the objection)

### Study Question 15

*Are Cambodian judges bound by the articles of the International Covenant on Civil and Political Rights (ICCPR)?*

**Yes.** Cambodian courts are also bound by the articles of the ICCPR

The Cambodian courts have to respect and apply the Cambodian laws. The **basic law** of Cambodia is the **Cambodian Constitution** which includes a whole catalogue of articles protecting the human rights of individuals.

Furthermore Cambodia has signed and ratified the “**International Convention on Civil and Political Rights**” (**ICCPR**) which is one of the most important human rights conventions. As the ICCPR was ratified by Cambodia it has the **same effect and rank like any other regular Cambodian law**. So it could also be called: The “Cambodian Law on Civil and Political Rights”. Therefore all Cambodian courts are not only bound by the Cambodian Constitution but additionally by the ICCPR. They have to abide to it and apply it like any other Cambodian law although the name “International Convention” may be confusing and may indicate that this is not a Cambodian regulation which needs to be applied.

### Study Question 16

*Both the Cambodian Constitution (CC) and the ICCPR enshrine many articles about the same human rights (like for example about freedom of expression: Article 19 ICCPR and Article 41 CC).*

**a)** *Why can it still be useful for a Cambodian judge to apply the ICCPR article additionally to the Cambodian Constitution article (for example in a case which is related to freedom of expression)?*

It still can be useful for Cambodian courts to additionally apply the ICCPR to fill legal gaps and to use it as a tool for interpretation.

The ICCPR convention also enshrines a lot of human rights. Mostly the rights are identical to the human rights of the Cambodian Constitution. But in many cases the



definition of the scope, meaning and possible restriction of these human rights is more detailed in the ICCPR.

So the ICCPR may not only be applied by the Cambodian Courts

- to **fill possible human rights gaps in the Cambodian Constitution**
- but also to **serve as a tool of interpretation of the human rights enshrined in the Constitution**. This can be clearly seen in Article 31 CC which indicates that the Cambodian law system shall be in accordance with the international legal standards as for example enshrined in the ICCPR.  
This means: The human rights article of the Cambodian Constitution have to be seen and interpreted in the light of the ICCPR. Article 19 ICCPR for example can provide clarity what “freedom of expression” means in detail and what the scope of this right really is. Thus the lack of detailed description of this right in Article 41 I 1 Cambodian Constitution can be cured. For example the freedom of expression also includes the free access to information and free reception of information from foreign countries and covers information transfer by all means of communication (internet, radio, etc.).

**b)** *Can a Cambodian judge base a procedural decision directly on Article 14 ICCPR?*

**Yes.** Cambodian Courts must conduct proceedings according to the fair trial principles as enshrined especially in Article 14 ICCPR

As Articles 39, 38 VIII and 128 CC only vaguely but not in detail enshrine the rights of the citizen to a fair trial the regulations in the ICCPR, especially in Article 14 ICCPR about due process and fair trial become important for the Cambodian courts to fill gaps, to clarify and to serve as tools for interpretation. They can also serve as a yardstick to check if proceedings rules in Cambodian laws like the Criminal Proceedings Code or the UNTAC Criminal Code are sufficient enough for a protection of the defendant’s rights. As long as the Civil Proceedings Code and the new Criminal Proceedings Code have not yet been adopted the courts must seek for guidance in the ICCPR to make sure their proceedings fulfill the international standards which are emphasized by Article 31 Cambodian Constitution. The rules about absentia judgements for example must be seen and applied in the light of the right of the defendant to be present (Article 14 ICCPR).

(The UN agreement on the Khmer Rouge Tribunal for example also explicitly states that in cases the pertinent Cambodian proceedings rules show gaps or are in conflict with international standards the tribunal judges may seek guidance in the rules adopted on an international level. This shows that both parties to the UN Agreement obviously think it is possible that present Cambodian proceedings rules may be unclear or may not always meet international standards).

### **Study Question 17**

*Article 31 I CC explicitly mentions the “Universal Declaration of Human Rights” (UDHR) although this declaration is not a binding international convention but only a non-binding declaration. What may be the sense of this reference to the UDHR regarding the application of human rights by Cambodian judges?*



Cambodian Courts can apply the “Universal Declaration of Human Rights” as a **tool for interpretation**.

Although the UDHR is just a “declaration” and not a binding “convention” this declaration is explicitly mentioned by Article 31 I CC. So guidance for interpretation of Cambodian human rights articles can also be sought in this declaration. For example **Article 31 III CC** which says that the exercise of rights and freedoms shall be in accordance with the law can be interpreted in the light of **Article 29 II UDHR** which says **that freedoms can only be limited by a law** (not by any other regulation).

### Study Question 18

*What can a Cambodian judge do if s/he thinks the applicable Cambodian law is unconstitutional (=not compatible with the human rights articles of the Cambodian Constitution)?*

Example:

*An article in the Family Law violates Article 31 III CC which stipulates equal rights of women and men.*

Cambodian Courts **can only apply laws which are compatible with the constitution!** In case the court would have to apply a Cambodian Law which is not compatible with the Cambodian Constitutions the court would have the duty to stop the proceedings and submit this law **through the Supreme Court to the Constitutional Council for examination (Article 19 Law on the Constitutional Council)**. If a law violates a human right of the Cambodian Constitution and therefore is unconstitutional the court **can not** apply it.

### Study Question 19

*The exercise of human rights can only be restricted by a law (Article 29 II UDHR).*

*How does a Cambodian judge have to decide if the authority imposes a restriction on the exercise of a human right but there is no Cambodian law that allows such a restriction?*

Example:

*The Ministry of Information prohibits a radio station to broadcast foreign radio programs but a Media Law does not yet exist although the Cambodian Constitution calls for such a law (Article 41 II CC).*

Cambodian Courts **can not approve restrictions on human rights without a law authorizing such restrictions:**

If restrictions on human rights are not based on a Cambodian law the court has to rule that such restrictions do not have any effect but are illegal under the Cambodian Constitution. For example as long as a media law is requested by the Constitution but does not exist no restrictions on the work of the media can be imposed by the authorities. The courts would have to judge that such restrictions are illegal because they would violate the basic law (=the Cambodian Constitution). Restrictions on the media could only be based on the Press Law or on the Criminal Code.



## Study Question 20

*According to the ICCPR restrictions on human rights can only be imposed when they are “necessary”. This means restrictions are only legal if there is no softer measure (“**principle of proportionality**”).*

*Can a Cambodian court rule that an administrative decision is illegal because the authority has not chosen the softest possible measure from a catalogue of measures provided by the law?*

Example:

*The authority totally bans a demonstration to protect the street traffic although it would be possible to temporarily divert the traffic and allow the demonstration under the condition that it only takes part on a certain time on a certain street.*

Cambodian courts **can only approve or impose necessary (proportional) restrictions on human rights.**

All human rights articles of the ICCPR state that only those limitations on human rights are legal which are “necessary” to protect another human right. So the Cambodian Courts can not approve restrictions made by the authorities which violate this “principle of proportionality”. At the same time Cambodian courts have to respect the “principle of proportionality” themselves when they directly impose a sanction.

For example a Cambodian court can not call an administrative ban of a demonstration legal as long as there are softer measures than a total ban to counter dangers deriving from a public demonstration. Cambodian courts have to check the necessity of sanctions if they themselves for example apply Article 10 V Press Law and chose an appropriate punishment. For example they must make sure that a fine for defamation is not so strong that a newspaper has to fully close down. This would be an unnecessary disproportionate restriction of the freedom of expression.

## Study Question 21

*Labor case:*

*An employee was dismissed by the employer because he allegedly regularly came late to work and took money from the company.*

*The employee denies the allegations, engages a lawyer and files a claim to the court to be reemployed or to get compensation.*

**a)** *The employer also engages a lawyer who prepares a counterplea and at the same time applies for getting a copy of the employee’s claim.*

*The judge does not grant a copy to the employer’s lawyer saying that s/he has no right of inspection of files because this is an internal affair.*

*Is this statement of the judge right or wrong? Please do not just answer the question with “yes” or “no” but give an explanation for your opinion!*

The statement of the judge is wrong.

The judge has to grant the employer’s lawyer the right to inspect the court files because they are not “internal affairs”.

The lawyer is the legal representative of the party and therefore is not only entitled (Article 14 Nr. 3 b ICCPR, Articles 7 Nr. 1 and 17 II UNTAC Criminal Code and



Article 21 of the Basic Principles on the Role of Lawyers, BPRL) but also obliged by contract to fully defend the interests of his/her client. S/he would even breach his/her contractual duty if s/he did not inspect the files.

The lawyer can properly prepare the case and defend the client's interests only if s/he has complete information. The lawyer is therefore also entitled to make photocopies of the files on his/her client's costs. For this reason every court should provide one photocopy machine or – if there isn't any - allow the lawyer to take the files to his/her law office to make copies there. The regular time for returning the files would be three days.

The right to inspect the files can be exercised during the whole procedure not only shortly before the hearing. During the hearing new files might be added like testimonies of witnesses or reports submitted by experts. The lawyer must keep him/herself updated and must continuously inspect the files to represent his/her client well.

The right to inspect the files comprises all documents in the file. The court is not entitled to exclude some documents and limit the inspection right of the lawyer.

A third person not appointed by the parties as an official representative does not have the right to inspect the files.

**b)** *The employee presents colleagues who shall testify as witnesses that he did not come late to work and did not take money from the company.*

*The judge calls the witnesses, interviews them in his/her room and writes a report on the statements of the witnesses.*

*Was the action of the judge correct or not? Please do not just answer the question with “yes” or “no” but give an explanation for your opinion!*

The action of the judge was wrong.

It is a breach of “fair trial” principle to exclude the parties and the public while hearing the testimonies of witnesses, Article 14 Nr. 3 e and d ICCPR (for criminal cases: Article 24 Nr. 1 UNTAC Criminal Code). It is a precondition for raising evidence that the parties must be given the possibility to be present during the trial. The right to examine witnesses makes it possible for both parties to check by themselves the reliability and credibility of the witnesses. Only in person they can observe and judge gestures and non-verbal communication of the witness. Both lawyers (or in criminal cases: the defense and the prosecution) must be given adequate advance notification of the examination of the witnesses to prepare well their questions.

The witness' interview can be carried out without the presence of the parties' representatives only with their consent and in very exceptional cases, for example the witness lives abroad and can be examined only by a deputy judge.

## **Study Question 22**

*Case:*

*A high ranking official is accused of murder. The witness of the prosecution does not want to give her/his identification because s/he fears about her/his personal security. Therefore, the prosecution applies to the court to hear the testimony of the witness in an anonymous way.*

*Imagine you are the judge and you have to make a decision on the prosecutor's application. How do you decide? Give reasons for your decision and quote the relevant article(s).*



In general the use of testimony from an anonymous witness violates the parties' right to examine the witnesses **personally**, Article 14 Nr. 3 e ICCPR. The use of an anonymous testimony renders the whole trial unfair. So there must be very strict limits for the use of anonymous testimonies.

In the above mentioned case the mere subjective fear of the witness of reprisals without any concrete and objective indication that s/he or his/her relatives really will be hurt in the future can not deprive the parties of their right to be present during the witness' examination and to know his/her identity. The witness must prove that his/her fear is reasonable, for example s/he can provide tapes of phone calls in which the accused threatened to kill him/her.

In our case the application of the prosecutor must be rejected by the judge.

### **Study Question 23**

*Why must the court hearing be held in public? Please explain your answer and quote the relevant article(s).*

A court hearing must be held in public, including the press, to be considered a fair trial, Articles 10 and 11 Nr. 1 UDHR, Article 14 Nr. 1 sentence 2 ICCPR, Article 128 Law on Criminal Procedure (1993).

#### **Above all public hearings shall ensure**

- public control,
- protection from arbitrariness of the court,
- information to the public how a decision is made
- protection of the public confidence in the justice system

A hearing can not be regarded as public if only a particular category of persons is allowed to attend the hearing.

### **Study Question 24**

*Are there any exceptions to the principle of public hearing? If yes, what are they?*

The public's access to hearings may be restricted in certain narrowly defined circumstances.

Article 14 Nr. 1 sentence 3 ICCPR defines the following exceptions to a public hearing:

- "morals" (i.e. cases involving sexual offenses)
- "public order" (i.e. to keep the order within the courtroom)
- "national security" (i.e. cases involving military secrets that protect the country's existence or its territorial integrity of military threats or incitements to overthrow the government)
- "interest of the private lives of the parties" (i.e. divorces, offences against minors)
- "circumstances where publicity would prejudice the interest of justice" (i.e. the public is convinced of the guilty of a person and the press tries to manipulate the judges by defaming articles)



Article 129 Law on Criminal Procedure (1993) mentions “public order” and “good tradition”. “Good tradition” is an unclear term and has to be interpreted in the light of Article 14 Nr. 1 ICCPR.

### **Study Question 25**

*Open the “Fair Trial Manual” on the internet home page of “amnesty international” = [www.amnesty.org/ailib/intcam/fairtrial/indxftm\\_b.htm](http://www.amnesty.org/ailib/intcam/fairtrial/indxftm_b.htm) and look at Chapter 17.1. of the “Fair Trial Manual”.*

*What Article of the Cambodian Constitution stipulates a regulation which is similar to the regulations that are quoted in Chapter 17.1 of the “Fair Trial Manual”?*

Article 38 V CC says: “Confession obtained by physical or mental force shall not be admissible as evidence of guilt”.

### **Study Question 26**

*What has the judge to do if the only charging evidence presented to him/her is a confession of the defendant which was extracted by beatings and torture?*

*Give reasons for your answer and quote the relevant articles!*

If the judge **can not obtain any other evidence** then the defendant has to be **acquitted**. The burden of proof is with the **prosecutor** (Article 38 VI CC and Article 14 II ICCPR) and **confessions based on torture can not be used as evidence** (Article 24 III 2 UNTAC Criminal Code and Article 38 V CC).

### **Study Question 27**

*The right to get a reasoned judgement is based on what other essential right of the defendant?*

*Quote the relevant section of Article 14 ICCPR.*

The right to know the reason of a judgement derives from the right to appeal the judgement. This right is stipulated in Article 14 V ICCPR.

### **Study Question 28**

*Why does the defendant need to know the reasons of the judgement?*

If the defendant does not know the reason of the judgement s/he can effectively not exercise his/her right to appeal this judgement. If s/he does not know on what assessment of facts and what legal views the judgement is based on s/he can not see if facts have been neglected or if there are legal errors. So s/he can not effectively criticize the judgement and point out such errors in his/her appeal.





### Study Question 29

*Why is it important that the defendant is informed early enough before the trial about the witnesses called by the prosecution?*

If the defendant is not informed in time about the witness who shall testify against him/her s/he does not have a fair chance to prepare for examining this witness during the trial or to collect information that weakens the witness's credibility. This would violate the rights which Article 14 III b and e ICCPR provides for the defendant (sufficient time and chance to prepare the defense, right to question witnesses of the prosecution and to name discharging witnesses).

### Study Question 30

*A judge can order to keep an accused person in pre-trial detention.  
What are the only two possible reasons a judge can give such an order?  
Name these reasons and quote the relevant article!*

A suspect can only be arrested and kept in prison under the following narrow conditions (**Article 14 UNTAC Criminal Code**):

- risk of escape
  - risk of non-appearance
  - **enough** reason to believe that the accused will influence witnesses or the conduct of investigation.
- } The assumption of these risks must be based on **clear factors** such as the absence of a job, a family or a permanent home.

**Article 9 III 2 ICCPR** explicitly states that it **shall not be the normal and regular case** that people awaiting trial are detained in custody.

### Study Question 31

*What order has a judge to issue in case the pre-trial detention period of 6 months is exceeded? Quote the relevant article(s)!*

Article 22 I 1 UNTAC Criminal Code clearly says that in a case of serious interference with the rights of the accused by violating the 6 months maximum period of pre-trial detention (see Article 14 IV 1 and 21 I UNTAC Criminal Code) the accused **has to be released immediately**.

Furthermore the officials responsible for that violation have to be punished (Articles 22 II and 57 UNTAC Criminal Code) from one to two years.

Moreover Article 9 V ICCPR states that anyone who has been illegally kept in detention has the right to claim compensation.

All these strict articles protect the very valuable right of personal freedom (Article 9 I 1 ICCPR and Article 32 I Alt. 2 CC).



### Study Question 32

*Why is it problematic that Article 47 Criminal Proceedings Code and Article 13 UNTAC Code allow a detention of suspects by the police for 48 hours **without** judicial approval?*

During this period there is no control by a lawyer, a family member or a doctor if the detainee is treated well or if his/her rights are abused. Such a long period without judicial control creates a significantly high risk of torture. Normally during that period police tend to force the suspects to confess and admit crimes and mistreat them until the suspects sign confessions.

### Study Question 33

*Case:*

*Party **A** claims \$ 100 USD from Party **B** before the court. A says that he granted a loan of this amount to B.*

*B rejects the claim and says that this money was never given to him.*

*A produces a loan document to the court which B had signed.*

*It is not clear whether this document is true or a falsification. The judge therefore calls witness **C** to get more information of the circumstances of the loan.*

*The judge rejects A's claim.*

*Please shortly formulate the reasons of his/her judgment!*

The reasoning could read as follows:

“According to the Civil Code Article ... A can only claim repayment of a loan from B when he has really lent the money to B and when repayment is due.

**As plaintiff** A bears the **burden of proof** that these two conditions are fulfilled.

The court rejects A's claim because he could not prove that the first condition (=giving money to B) is fulfilled.

Although A has presented a loan document that shows a signature the court is not convinced that this signature stems from B who denies this. The court has heard the witness C who was presented by A to prove his allegation. But the answers C has given to the court are not sufficient to convince the court. On the one hand it turned out that C has an own interest in this affair as A owes money to C himself. On the other hand C could only testify that he heard A and B talk in general about the possibility of a loan but C did not see that B signed a document and could not give any more details”.

### Study Question 34

*A fair judgment needs to give reasons.*

*What has the reasoning to cover to sufficiently explain the judgment?*

The reasoning of a judgement must show what the allegations and claims of the parties are. The reasoning must also show the facts that the judge considers as undisputed or as proved. It must show why the judge thinks there is enough evidence or not. Furthermore the reasoning must show exactly on what law article the decision is based and why the judge thinks that the given facts fulfill the conditions of this article.