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CAMBODIA AND THE RIGHT TO BE PRESENT: TRIALS *IN ABSENTIA* IN THE *DRAFT CRIMINAL PROCEDURE CODE*

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This paper analyses Cambodia's proposed new criminal procedure laws in relation to trials *in absentia*. Cambodia has always allowed trials *in absentia*, since its colonial days, but it is argued that recent developments in other states and in international law and practice limiting trials *in absentia* should be followed by Cambodia. It is argued that trials *in absentia* in Cambodia are likely to infringe upon the human rights of Cambodian citizens, and that they are *prima facie* no longer acceptable to the international community unless certain strict requirements are adhered to. The government of Cambodia should take into account international law, as well as its own *Constitution* and treaty obligations, when deciding whether the continuation of trials *in absentia* are appropriate for the country. The paper also analyzes potential conflicts between Cambodia's criminal procedure law and the international standards that must apply to Cambodia's special court to try former Khmer Rouge leaders, the Extraordinary Chambers. The repercussions of this conflict are discussed.

I. INTRODUCTION

Controversy over trials *in absentia* has arisen in many domestic and international jurisdictions, but is now raising its head in the Kingdom of Cambodia as it goes through the process of revising its criminal procedure laws. The different approaches adopted by common law and civil law jurisdictions mean that there is little consensus and much controversy on the issue.

Cambodia's current law, based on its French colonial history, allows trials *in absentia* and they are not infrequently held. However, as Cambodia prepares its new *Criminal Procedure Code*[1] ('*Draft Code*') thought must be given to whether old laws are necessarily good laws. The *Draft Code* presupposes that trials *in absentia* will continue to be conducted in Cambodia, without any close analysis of the prevailing international climate or the obligations imposed by the *Constitution of the Kingdom of Cambodia*[2] on the Cambodian government.

This paper analyses recent developments in trials *in absentia*, as well as current national law and practice of a number of states, against the backdrop of international

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1 Issued to the public in January 2004. Unofficial translation into English by United Nations, Cambodia Office of the High Commissioner for Human Rights (on file with authors) [*Draft Code*].

2 Online: Cambodian Parliament <http://www.cambodian-parliament.org/english/Constitution_files/constitution.htm>. Note that this version does not contain several minor amendments to the Constitution made in 2004.

law and practice. It is argued that trials *in absentia* in Cambodia are likely to infringe upon the human rights of Cambodian citizens, and that they are *prima facie* no longer acceptable to the international community unless certain strict requirements are adhered to. It is argued that the government of Cambodia should take into account international law, as well as its own constitution and treaty obligations, when deciding whether trials *in absentia* are an appropriate judicial process for the country. The paper also analyzes potential conflicts between Cambodia's criminal procedure law and the international standards that must apply to Cambodia's special court to try former Khmer Rouge leaders, the Extraordinary Chambers. The repercussions of this conflict are discussed.

II. What are Trials *in Absentia*?

In lay terms, the expression "*in absentia*" is Latin for "in the absence of". The legal definition is not different.[3] The use of this term in English dates from the early 1800s.[4] However, there can be different circumstances giving rise to a trial in the absence of the defendant. These different circumstances cause controversy about what is and what is not to be considered a "trial *in absentia*" in different jurisdictions.

There appears to be at least two distinct situations where a trial is referred to as a trial *in absentia*. The first is when the accused had been present at least at the arraignment and indictment stages (and often the beginning of the trial as well) and then absconded. In this scenario it can be proven that the accused was properly served, and thus informed about the charges brought against him or her, and had an opportunity to obtain legal advice and contemplate his or her defense. The resulting failure to attend was a conscious decision by the accused not to be present at the trial: a *prima facie* waiving of the right to be present. The second situation is when the accused has never been present at any stage of the proceedings. This scenario poses questions as to whether the accused was properly served and whether there is a reason to believe that the accused knew or should have known about the fact that charges had been made against him and the nature of these charges.

Unless a clear waiver can be proved, a trial *in absentia* in the second scenario is not acceptable to the vast majority of states. It is certainly easier to legitimize cases where the accused absconded at a certain stage of the trial. Most states and even some international judicial bodies may, in the judges' discretion, allow a trial to go ahead in these circumstances. In this paper, both scenarios are categorized as trials *in absentia*, although it is agreed that the clearest cases of the first scenario should not be attacked as an infringement of human rights.

III. General Principles Against Trials *in Absentia*

The basis of arguments against trials *in absentia* is founded on human rights theory. Although human rights theory has been impacting on Western European law for hundreds of years, over the last 50 or so years it has developed significantly, such that there is now a trend against trials *in absentia*.

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[3] Christine Ammer, *The American Heritage Dictionary of Idioms* (Boston: Houghton Mifflin, 1997).

[4] *Ibid*.

In modern times, the main argument against a trial *in absentia* is that the right to be present at trial is an integral part of the right to defend one's self.[5] If an accused is not present at the trial, he or she is unable to give evidence, or challenge the evidence put forth by the prosecution, whether by examining witnesses,[6] presenting alternative versions of the truth or pleading mitigating circumstances. Judges recognize that when a defendant is not present, conviction is generally inevitable.[7] Thus, judgments *in absentia* are less authoritative.

Further, if the defendant is absent and unrepresented, there is a significant risk that a conviction will be unsafe and unreliable because of the lack of examination of prosecution witnesses by the defendant or his or her representative, and of evidence for the defense.[8] Where the accused is absent, the judicial process becomes vulnerable to error and abuse.[9]

There is a broad understanding that the right to be present at one's own trial is directly linked to the guarantee to be presumed innocent until proven guilty by a court of law. It has been noted that an accused's right to be presumed innocent "might be badly tarnished by a prior conviction resulting from a trial *in absentia*."[10]

In certain jurisdictions, courts have been known to mete out judgment *in absentia* in political cases for the purposes of public condemnation. It has been argued that these "show trials" diminish the court's authority by creating an image of a "powerless institution delivering hollow judgments."[11] Trials *in absentia* are perceived as a sign of judicial weakness—the practice has always been a last-resort measure.[12]

A practical argument is that there is no point in having trials *in absentia*, as any punishment imposed cannot be effected until the accused surrenders.

Finally, it is argued by some that a trial *in absentia* removes pressure to locate and apprehend the accused—police may not focus on arresting the absconded accused because their attention moves on to the next crime.[13] This is a real issue, particularly in countries where police resources are stretched.

Amnesty International takes the view that one exception to the accused's right to be present is if accused persons deliberately absent themselves from the proceedings *after* they have begun, or have been so disruptive that they have had to be removed from the courtroom temporarily. In such cases, video or audio links should be employed to allow the accused to follow the proceedings. Further, Amnesty

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5 Amnesty International, *Fair Trials Manual* (London: Amnesty International Publications, 1998) [AI, *Fair Trials Manual*] at para. 21.1, online: Amnesty International <http://www.amnesty.org/ailib/intcam/fairtrial/fairtria.htm>; Susan Lamb, "Point/Counterpoint: Should the Indicted War Criminals Be Tried In Absentia? The Accused Must Speak for Themselves" (on file with the authors).

6 See the *European Convention on Human Rights*, 4 November 1950, 213 U.N.T.S. 221 [the *European Convention*], art. 6(3)(d).

7 *R v. Hayward (John Victor)* [2001] EWCA Crim 168 [*Hayward*] at para. 34; see also *ibid*. at para. 3.

8 Lamb, *supra* note 5 at para. 3.

9 Lamb, *supra* note 5 at para. 4.

10 Lamb, s*upra* note 5 at para. 7.

11 Lamb, s*upra* note 5 at para. 8.

12 *Ibid.*

13 Herman Schwartz, "Point/Counterpoint: Should the Indicted War Criminals Be Tried In Absentia? Only Convictions will Produce Justice" (1996) 4(1) H.R. Brief at para. 6, online: American University Washington College of Law <http://www.american.edu/TED/hpages/human/schwar41.htm>; Dianne F. Orentlicher, "Taking Exception" (1996) 4(1) H.R. Brief at para. 1, online: American University Washington College of Law <http://www.american.edu/TED/hpages/human/orentl41.htm>.

International is of the view that if some countries insist on continuing with trials *in absentia*, the verdict should be automatically quashed if an accused is apprehended after a trial in which he or she was convicted *in absentia*, and a completely new trial held before a differently constituted court.[14] This view is certainly supported by case law in common law countries.[15]

On the other hand, civil law countries argue that trials *in absentia* are necessary for the effective and efficient running of the criminal justice system.[16] Trials *in absentia* may necessitate less investigatory work by police, less time for trial and less expense. Other arguments in favour of trials *in absentia* include the rights of victims to have the accused brought to justice and the difficulties with obtaining/preserving evidence if the accused is not caught within a reasonable period of time.

Proponents argue that trials *in absentia* at least produce a "full airing of the evidence", and if the accused has retained or appointed counsel, then all the evidence may be tested properly in any event.[17] However, this argument is clearly flawed, as the accused's version and testing of the prosecution's evidence is crucial. The prosecution's case will always be persuasive until the accused is heard. The argument has more force if the defendant unequivocally waives his right to appear, thus invoking the right to silence and refusing to give the court the benefit of his evidence. Nonetheless, it is naive to think that a witness's untested testimony can constitute a "full airing".

Certainly, the development of *in absentia* trials in civil law countries was not in contemplation of a rights-based approach to the law, like the common law, but rather in "the inquisitive search for the substantial truth."[18] This fundamental difference in approach a couple of hundred years ago has resulted in the modern controversy over trials *in absentia*. The authors are of the view that it is the rights-based approach that now has the upper hand in international law and arguably this approach is more appropriate for developing domestic legal systems.

IV. Trials *in Absentia* in Light of Contemporary Domestic Law

Trials *in absentia* have had a long history in domestic law: in civil law countries in the ordinary course, and in common law countries only sparsely and limited to extraordinary cases.

In common law countries, there is no trial *in absentia* in the ordinary course.[19] This has been the way for hundreds of years. It is a requirement of the common law in both the United Kingdom and Australia that the accused be present throughout his trial for a serious offence.[20] However, the right to be present is waived if, in the course of the trial and while on bail, the defendant absconds, or while in custody, the defendant escapes from custody—the judge then has a discretion as to whether

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[14] AI, *Fair Trials Manual, supra* note 4 at para. 21.1 and 21.2.

[15] See *e.g*. Australia and the United Kingdom, see *Hayward*, s*upra* note 7.

[16] Evert F. Stamhuis,"Absentia Trials and the Right to Defend: The Incorporation of a European Human Rights Principle into the Dutch Criminal System" (2001) 32 V.U.W.L.R. 715, online: Université de la Polynésie française <www.upf.pf/recherche/IRIDIP/RJP/RJP7/08Stanhuis.doc>.

[17] *Hayward*, s*upra* note 7 at para. 3.

[18] Stamhuis, s*upra* note 16 at 4.

[19] *Lipohar v. The Queen; Winfield v. The Queen* [1999] H.C.A. 65, *per* Gaudron, Gummow and Hayne JJ.

[20] *Lawrence v. The King* [1933] A.C. 699; *ibid*.

to continue the trial or not.[21] If a judge does decide, in his or her discretion, to allow the trial to continue, there still must be in practical terms no unfairness to the accused apart from that brought about by his waiver.[22]

In the United States, this common law position has been codified into federal constitutional guarantees of due process[23] and a constitutional right of the accused to confront witnesses.[24] This has been interpreted to mean that the defendant must be present in the courtroom at every stage of his or her trial (in a federal case).[25] Rule 43 of the *Federal Rules of Criminal Procedure*[26] states, however, that a defendant waives his right to be present if he is voluntarily absent after the trial has begun.[27] On the other hand, if the accused absconds during the pre-trial phase, the trial cannot continue.[28]

In contrast, civil law jurisdictions have long used trials *in absentia* as a normal part of their criminal law system.

The French national policy governing trials *in absentia* is set out in the *French Code of Criminal Procedure*.[29] The *French Code* allows for trials *in absentia* in felony cases, but upon capture of the suspect, he or she has the right to a retrial.[30] However, the *French Code* also states that if an accused person is given proper notice and fails to appear, he or she can be tried as if they were present.[31]

Germany does not allow trials *in absentia*, the logic being that interrogations of the defendant by the judge are a central feature of civil law criminal trials.[32] But Germany is in the minority in Europe.

Many other European Union ('EU') states, including Belgium, Italy, Spain and the Netherlands allow trials *in absentia*, with similar safeguards as France. Despite the safeguards, such trials have been disapproved of by the European Court of Human Rights ('ECHR'), which criticized various states' procedures as unfair, and sent the cases back for new trials.[33] Further, with the formation of the EU and opening of borders between European states, new issues of extradition of accused persons have arisen which impact upon trials *in absentia*. In 2000, a EU Non-Governmental Organization ('NGO'), Fair Trials Abroad, in response to a communication from the

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[21] *R v. McHardie* [1983] 2 N.S.W.L.R. 733; *R v. Berry* [1897] 104 Law Times 110; *R v. Browne* [1906] 70 Justice of the Peace Reports 472.

[22] *Hayward*, *supra* note 7.

[23] U.S. Const. amend. XIV, online: U.S. House of Representatives <http://www.house.gov/Constitution/Amend.html>.

[24] U.S. Const. amend. VI, online: U.S. House of Representatives <http://www.house.gov/Constitution/Amend.html>.

[25] *Illinois v. Allen* (1970) 397 U.S. 337 at 338; *Lewis v. United States* (1892) 146 U.S. 370.

[26] 18 U.S.C. (2004).

[27] U.S., *Federal Rules of Criminal Procedure*, r. 43, online: U.S. House of Representatives <http://judiciary.house.gov/media/pdfs/printers/108th/crim2004.pdf>.

[28] *Crosby v. United States* 506 U.S. 255 (1993).

[29] Online: Legifrance <http://www.legifrance.gouv.fr> [*French Code*].

[30] *Ibid.,* arts. 627-632, online: Legifrance <http://www.legifrance.gouv.fr>; Rachel K. David, "Ira Einhorn's Trial in Absentia: French Law Judging United States Law" (2003) 22 N.Y.L. Sch. J. Int'l & Comp. L. 611 at 611.

[31] *Ibid.,* arts. 627-632; David, *ibid.* at 616.

[32] Schwartz, *supra* note 13 at para. 9.

[33] See *e.g. Lala v. The Netherlands* (1994) 18 E.H.R.R. 586, *Colozza v. Italy* (1985) 7 E.H.R.R. 516 [*Colozza*], *Poitrimol v. France* (1993) 18 E.H.R.R. 130 [*Poitrimol*], *Van Geyseghem v. Belgium* [1999] ECHR 5, all cases online: European Court of Human Rights <http://www.echr.coe.int/>.

Council of Europe and the European Parliament, supported the suggestion that the European states must do away with the law and practice of trials *in absentia.* The communication stated that:

> We cannot understand arguments for the continued existence of trials in absentia involving European Union citizens within the European Union. With the development of fast track extradition, the procedure—which in practice almost inevitably involves abuse of ECHR—becomes an anachronism. Currently most EU member states do not permit trials in absentia unless the trials have at least commenced in the presence of the accused.[34]

The position in Russia has recently changed quite dramatically. On 1 July 2002, a new *Code of Criminal Procedure*[35] came into effect which, in a complete turn around from previous law and practice, forbids any type of trial *in absentia*.[36] It also provides for many other rights of the accused and is intended to give Russia "a criminal procedure that corresponds to that of world standards and of civilized countries."[37] Whether this new liberal criminal procedure is actually being implemented in practice is another issue.

States that do allow trials *in absentia* without safeguards tend to be those that have less developed legal philosophy in terms of rights of the accused. For example, Tunisia,[38] Egypt,[39] Jordan,[40] Lebanon[41] and Mauritania[42] all allow trials *in absentia* and have, in the recent past, convicted citizens in this way.

V. Trials *in Absentia* in Light of Current International Law

Despite many exceptions in domestic jurisdictions, it cannot be denied that the right to be present at one's trial is now well established at international law. It is the rights-based approach that appears now to be pre-eminent in international law. Some of the most important international instruments, as well as customary international law, encapsulating this principle are discussed below.

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[34] Fair Trials Abroad, "Mutual Recognition of final decisions in criminal matters: Response To The Communication From The Commission To The Council And The European Parliament", online: Statewatch <http://www.statewatch.org/news/sept00/16ftamut.htm>.

[35] *Infra* notes 36 and 37.

[36] Nick Paton Walsh, "Russian Defector Convicted In *Absentia*" *The Guardian* (26 June 2002), online: Guardian Unlimited <http://www.guardian.co.uk/russia/article/0,2763,744010,00.html>.

[37] Stephen Lee Myers, "Russia Glances to the West for its New Legal Code" *New York Times* (1 July 2002) (Lexis).

[38] See *e.g.* Amnesty International, "Tunisia: Fear of Torture/Possible arrests/Possible prisoners of conscience", AI Index: MDE 30/002/2002, online: Amnesty International <http://www.amnesty.org.>.

[39] See *e.g.* Amnesty International, "Further information on EXTRA 56/98 (EUR 11/01/98, 14 August 1998) and follow-up (EUR 11/01/99, 27 January 1999 and MDE 12/16/99, 20 April 1999)—Death Penalty", AI Index: MDE 12/006/2000 and "Canada: Forcible Return/Risk of Torture", AI Index: AMR 20/002/2002, and "Austria: Risk of Forcible Return/Torture", AI Index: EUR 13/001/2002, all online: Amnesty International <http://www.amnesty.org.>.

[40] See *e.g.* Amnesty International, "UA 290/00 Death penalty/Torture/Unfair Trial 20 September 2000", AI Index: MDE 16/005/2000, online: Amnesty International <http://www.amnesty.org.>.

[41] See *e.g.* Amnesty International, "Public Statement: Lebanon. Lack of Judicial Review is a Denial of Fair Trial", AI Index: MDE/18/05/99, online: Amnesty International <http://www.amnesty.org.>.

[42] See *e.g.* Amnesty International, "Mauritania: Serious attack on freedoms of expression and association", AI Index: ENGAFR380051998, online: Amnesty International <http://www.amnesty.org.>.

A. *The* International Covenant on Civil and Political Rights[43] ('ICCPR')

The *ICCPR* states in Article 14(3) that "in determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality", and subsection (d) states that the accused has the right to be "tried in his presence". No preceding or subsequent article provides for an exception to this rule. Therefore, the argument that *ICCPR* provides for the right of the accused to be tried in his/her presence appears unimpeachable.

The above interpretation was corroborated by the United Nations' Secretary-General in his recommendation on the establishment of the International Criminal Tribunal for the former Yugoslavia, where he states that:

> [A] trial should not commence until the accused is physically present before the international tribunal. There is a widespread perception that trials *in absentia* should not be provided for in the statute [of the International Criminal Tribunal for the former Yugoslavia] as this would not be consistent with Article 14 of the International Covenant on Civil and Political Rights.[44]

However, international courts have also interpreted the same article as being qualified rather than absolute. For instance, in *Mbenge v. Zaire*,[45] ('*Mbenge*'), one of the earliest cases addressing trials *in absentia*, the UN Human Rights Committee stated that Article 14(3) of the *ICCPR* and "other requirements of due process enshrined in article 14 cannot be construed as invariably rendering proceedings *in absentia* inadmissible irrespective of the reasons for the accused person's absence."[46] The Committee acknowledged that in some cases trials *in absentia* are "permissible in the interest of the proper administration of justice."

Although neither the Committee nor the Secretary-General has any explicit authorization from the text of the *ICCPR* to interpret it, in our view the judgment of the Committee in *Mbenge* is the more persuasive authority.

The *Mbenge* case makes it clear that trials *in absentia* do not breach the standards set down by the *ICCPR*. *Prima facie*, trials *in absentia* are allowed as long as the rights of the accused are not infringed or the accused explicitly waives those rights.

B. *The European Convention on Human Rights of 1950*

The *European Convention*[47] does not specifically state that the accused has a right to be present at his or her trial like the *ICCPR*. However, Article 6 of the *European Convention* was interpreted by the ECHR in *Colozza v. Italy*[48] as having this meaning. The Court stated that "the object and purpose of the Article taken as a whole"

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[43] 16 Dec. 1966, 999 U.N.T.S. 171 [*ICCPR*].

[44] *Report of the Secretary-General pursuant to Para 2 of Security Council Resolution 808 (1993)* (UN Doc: S/25704) (3 May 1993), at para. 101, online: Official Documents System of the UN <http://daccessdds.un.org/doc/UNDOC/GEN/N93/248/35/IMG/N9324835.pdf?OpenElement>.

[45] (1983), Case No. 16/1977, UN Doc Supp No. 40 (A/38/40) at 134, online: University of Minnesota Human Rights <http://www.server.law.wits.ac.za/humanrts/undocs/session38/16-1977.htm> [*Mbenge*].

[46] *Supra* note 41, para. 14.1.

[47] *Supra* note 6.

[48] *Supra* note 33.

is to ensure that a person charged with a criminal offence is entitled to take part in the hearing.[49]

The ECHR has clearly stated that in order to waive the right to be present, the waiver must be established in an unequivocal manner:

> Proceedings held in an accused's absence are not in principle incompatible with the Convention if the person concerned can subsequently obtain from a court which has heard him a fresh determination of the merits of the charge in respect of both law and fact. It is open to question whether this latter requirement applies when the accused has waived his right to appear and to defend himself, but at all events such a waiver must, if it is to be effective for convention purposes, be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance.[50]

"Minimum safeguards" has been held by the ECHR to mean the court must hear the accused's lawyer if he or she has one. In *Poitrimol v. France*,[51] the defendant, defended by counsel, was tried in his absence. However, his appeals to the local Court of Appeal and the Court of Cassation were rejected as those courts refused to hear his lawyers. This was held by the ECHR to be a breach of Article 6 of the *European Convention*.

C. *The* American Convention on Human Rights[52] ('American Convention')

Article 8(2)(d) of the *American Convention* states that an accused has the right to defend himself personally or to be assisted by legal counsel of his own choosing. Inherent in this right is the right to be present at trial. In 1978, the Inter-American Commission criticized a trial in Panama which proceeded when the defendant was obstructed from attending the hearing.[53]

D. *International Tribunals*

Historically, the first international tribunals, which were created to try Nazi and Japanese war criminals and their collaborators, allowed trials *in absentia* if the accused "has not been found or if the Tribunal, for any reason, finds it necessary, in the interests of justice, to conduct the hearing in his absence".[54] International legal practice has since moved away from the International Military Tribunal's ('IMT') endorsement of trials *in absentia*. As discussed above, this is reflected in the *ICCPR* and other international instruments that were drafted, signed and ratified by states parties following the closure of the IMT in 1946.

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[49] *Ibid.* at para. 28.

[50] *Poitrimol, supra* note 33 at para. 31.

[51] *Supra* note 33.

[52] November 22, 1969, 1144 U.N.T.S. 123 [*American Convention*].

[53] Inter-American Commission, *Report on the Situation of Human Rights in Panama*, OEA/Ser.L/V/11.44, doc 38, rev 1, 1978, c.4, online: Inter-American Commission of Human Rights <http://www.cidh.org/countryrep/Panama78eng/chap.4.htm>.

[54] *Charter of the International Military Tribunal*, United States, Provisional Government of the French Republic, United Kingdom and Government of the Union of Soviet Socialist Republics, 8 August 1945, 82 U.N.T.S. 279, art. 12, online: Yale University <http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm>.

Neither the International Criminal Tribunal for the Former Yugoslavia ('ICTY') nor the International Criminal Tribunal for Rwanda ('ICTR') allows trials *in absentia*. Article 21(4)(d) of the statute of the ICTY states that the accused has the right "to be tried in his presence, and to defend himself in person or through legal assistance".[55] Article 20(4)(d) of the statute of the ICTR is in identical terms.[56]

Other statutes for international tribunals, learning from experiences in Yugoslavia and Rwanda, made precise stipulations to ensure there would be very limited trials *in absentia*. The Special Court for Sierra Leone, for instance, incorporated a specific provision allowing two exceptions to the prohibition on trials *in absentia.* Rule 60 states that "[a]n accused may not be tried in his absence" but goes on to say that if the accused has made an initial appearance and later absconds or refuses to appear, then the trial may continue *in absentia*. Further, if the Court is satisfied that the accused has expressly or impliedly waived his or her right to be present, then the trial may also continue in these circumstances.[57] As yet, there has been no cases interpreting or applying these provisions.[58]

The *Rome Statute of the International Criminal Court*[59] ('*Rome Statute*') specifically states that an accused must be present at his or her trial.[60] It goes on to talk about the very strict exception to this rule in Rule 63(2):

> If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.

There is no exception if the defendant flees. The only part of the court proceedings that a defendant may waive his right to attend is the confirmation of charges hearing.[61]

Thus, it can be seen that while international law in general takes a permissive approach to trials *in absentia* and then addresses possible violations of rights, international tribunals have taken a prohibitive approach, allowing only for very minimal exceptions.

E. *Customary International Law*

It can be seen from the above that trials *in absentia* are not outlawed by international law but are disapproved of, particularly by international tribunals and courts. They

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[55] *Statute of the International Criminal Tribunal for the former Yugoslavia*, 28 May 1993, 32 I.L.M. 1192, art. 21(4)(d), online: United Nations <http://www.un.org/icty/legaldoc/index.htm>.

[56] *Statute of the International Criminal Tribunal for Rwanda*, 8 November 1994, (1994) 33 I.L.M. 1598, art. 20(4)(d), online: International Criminal Tribunal for Rwanda <http://www.ictr.org/ENGLISH/basicdocs/statute.html>.

[57] *Rules and Procedure—Special Court for Sierra Leone,* r. 60, online: The Special Court for Sierra Leone <http://www.sc-sl.org/scsl-procedure.html>.

[58] All decisions of the Special Court for Sierra Leone are available online: The Special Court for Sierra Leone <www.sc-sl.org>.

[59] 1 July 2002, 2187 U.N.T.S. 90 [*Rome Statute*], online: United Nations <http://www.un.org/law/icc/statute/romefra.htm>.

[60] *Rome Statute*, *ibid.*, art. 63(1).

[61] See the *Rules of Procedure and Evidence of the International Criminal Court*, r. 124-126, available online: International Criminal Court <http://www.icc-cpi.int/library/basicdocuments/rules(e).pdf>.

are tolerated as long as sufficient safeguards exist to ensure the rights of the accused are protected.

Customary international law is made when *opinio juris* (state opinion) and state practice coincide in a large majority of states. Despite the fact that European civil law states that do allow trials *in absentia* have publicly agreed that there should be no trials *in absentia* at international law, they do not agree when it comes to domestic law. A vast majority of states, including France, Belgium and the Netherlands, have signed up to the *Rome Statute*,[62] which outlaws trials *in absentia* except in extremely limited circumstances where the defendant persists in refusing to participate, as discussed above.

Despite this principle, it is clear that state practice does not reflect a *prima facie* ban on trials *in absentia* as set out in the *Rome Statute*. Therefore, it cannot be argued that there is a rule of customary international law prohibiting such trials.

VI. Cambodian Laws on Criminal Procedure Currently in Force

In the Cambodian context, a number of cases have been decided *in absentia* in the past, where the accused had no knowledge of the charges brought against him or her. It is arguable that these cases violate not only the rights of the accused at international law, but also existing Cambodian law.

A. *The Constitution of the Kingdom of Cambodia*

The *Constitution* states in Article 31[63] that "[t]he Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women's and children's rights".

Although the *Constitution* fails to limit the "human rights related covenants and conventions" to those that Cambodia is a signatory to, it is arguable that this clause only intended that the Cambodian government should give recognition and respect to the human rights instruments Cambodia was a signatory to at the time of the adoption of the *Constitution*, as well as those that have been acceded to subsequently. Even using this narrower interpretation of the *Constitution*, there are a plethora of covenants and conventions related to human rights that the government has signed, ratified and acceded to which now impliedly bind the state.[64]

The *ICCPR* was signed and ratified by the Kingdom of Cambodia before the adoption of the *Constitution*, as was the *International Covenant on Economic Social and Cultural Rights*.[65] Other international human rights instruments that were signed and

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[62] As at May 2005, 98 countries were States Parties to the *Rome Statute* and 139 states were signatories. Ratification status is available online: United Nations <http://www.un.org/law/icc>.

[63] United Nations, Cambodia Office of the High Commissioner for Human Rights, "A Selection of Laws Currently in Force in the Kingdom of Cambodia", 2d. ed., Unofficial Translation January 2002, at 1.

[64] Whether international conventions are self-executing is not clear at the present time. There is no domestic law which provides guidance on this issue and there is dissention among Cambodian judges as to whether or not to apply international conventions as domestic law without them having been executed by the legislature. Judicial discretion has so far applied in Cambodia.

[65] 19 December 1966, 993 U.N.T.S. 3 (entered into force 26 August 1992) [*ICESCR*]. Cambodia signed and ratified both the *ICCPR* and the *ICESCR* on 26 May 1992. See "Status of Ratifications for Principle

ratified before the *Constitution* came into effect were the *International Covenant on the Rights of the Child*,[66] the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* [67] and the *Convention on the Elimination of Discrimination Against Women.*[68] The *International Covenant on the Elimination of Racial Discrimination* was ratified soon after the *Constitution* came into force.[69]

B. United Nations Transitional Authority in Cambodia Law[70] ('UNTAC Law')

The *UNTAC Law* is Cambodia's criminal legislation drafted and implemented by the UN in 1992 when the UN Transitional Authority was in control of the country. It was always meant to be a temporary law to apply during the transitional period.[71] Interestingly, the *UNTAC Law* makes it clear that trials *in absentia* are legal and lawful and presumes that they are not forbidden at any stage of the criminal proceedings. Article 4(4) of the *UNTAC Law* adds a 15-day period to the original time allotted for appeal if "*judgment was pronounced in absentia*", thus pre-supposing the practice of trials *in absentia.* Article 5 further corroborates the legislative intent of the framers by presuming that appeals may be heard *in absentia*.[72] The article reiterates the previous guarantee of an additional 15 days allowed to the accused to appeal to the Supreme Court from the Appeal Court if the judgment was pronounced *in absentia.* There is no provision for a retrial if the accused is apprehended after the 15 additional days, and no rules about waiver or the rights of the accused.

There would appear to be two reasons for which trials *in absentia* were incorporated in the *UNTAC Law* of 1992. One reason was the fact that the only example in international law in 1992 was the Nuremberg and Tokyo tribunals, which specifically

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International Human Rights Treaties" (as of 9 June 2004), online: Office of the UN High Commissioner for Human Rights <http://www.unhchr.ch/pdf/report.pdf>.

66 20 Nov. 1989, 1577 U.N.T.S. 3. Ratified on 14 November 1992, *ibid*.

67 10 December 1984, 1465 U.N.T.S. 85. Ratified on 14 November 1992, *ibid*.

68 18 December 1979, 1249 U.N.T.S. 13. Ratified on 14 November 1992, *ibid*.

69 7 March 1966, 660 U.N.T.S. 195. Ratified on 28 December 1983, *ibid*.

70 Formally called *Provisions Dated September 10, 1992 Relating To The Judiciary and Criminal Law and Procedure Applicable in Cambodia During the Transitional Period*, *supra* note 63 [*UNTAC Law*].

71 The law was adopted as the law criminal law for what is referred to in the preamble as "the transitional period". No guidance of what is understood by "transitional period" for the purposes of the law in question was provided. However, the wide spread understanding of transitionality of the law resulted in drafting of new criminal and criminal procedure codes which were outsourced to a French drafting team in 1999 and resulted in draft laws in 2000. The drafts were examined sent back to the original drafters for amendments. The new draft was finalized by in early of 2004. Throughout this entire period the UNTAC remained the applicable criminal law and a combination of the UNTAC and the 1993 revision of the 1989 *Law on Criminal Procedure in the State of Cambodia* remained the valid authority on criminal procedure.

72 The relevant parts of art. 5 state: "In accordance with the wishes of the Party 'State of Cambodia', the current Supreme Court in Phnom Penh shall be improved so that it may comply with the requirements of art. 1 above and perform the following functions:

a. it exercises judicial review of the law;

b. it reviews appellate judgments on petition by the Attorney General, the convicted party, the intervening party or by their counsel within a period of two months from the day judgment is pronounced in the appellate court if the accused is present for sentencing; an additional fifteen days are added to this period *if the judgment was rendered in absentia*; …".

authorized trials *in absentia.* Secondly, existing practices instilled by the Vietnamese occupational forces allowed trials *in absentia*, and prior to that trials *in absentia* were also allowed by Cambodia's former colonial ruler, France. It is not clear which of the two was the driving force behind the incorporation of the said provision in the *UNTAC Law*. Whatever the reason for incorporation, it is arguable that these sections of both the *UNTAC Law* and the *Kram Dated February 8, 1993 on Criminal Procedure* (see below) could have, in certain circumstances, become unconstitutional upon the adoption of the new *Constitution* in 1993.

The *UNTAC Law* was perceived by its framers as provisional and was expected to be expeditiously replaced by a new law—thus far this has not been achieved.[73] Although it could not have been expected of the framers of the *UNTAC Law* to draft a law that would conform to all international standards within the very short time available to them for drafting, there is a strong argument that these steps should be made now though new legislation.

C. *Kram Dated February 8, 1993 on Criminal Procedure*[74] ('SOC Law')

The *SOC Law* is the current criminal procedure law in Cambodia and was intended to supplement the bare bones of the *UNTAC Law*. Article 114 states:

> Even though the accused does not appear, the court shall proceed as if the accused is present by hearing the witnesses' testimony, examining all the documents and information that may lead the court to find out the truth. The court may dismiss the absent accused when it finds that there is not enough evidence. In case of sentencing, the court may also decide to allow extenuating circumstances for the accused. In other words, the non-appearance of the accused during the hearing shall not constitute an aggravating circumstance.

Article 115 provides that when a defendant is sentenced by default (in his or her absence), the sentence shall become null and void "when the accused opposes the decision of the court within 15 days from the day of the reception of the decision notification." If the notification cannot be made in person, the law provides that "the decision may be opposed till the terms of limitation for punishment expires."

However, Article 116 states that:

> If the accused no longer resides at the previously indicated location and if the judiciary police in charge of notifying cannot locate his/her new residence, the notification of the judgment by default shall be posted at the last known domicile of the accused. This notice shall also be posted at the Khum or district office of the people's committee and be announced on national radio and published in the official newspaper.

Article 119 provides that the notification shall preferably be made in person and only if the accused cannot be found after diligent effort shall measures be taken as provided in Article 116. However, once Article 116 has been complied with, the

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[73] Efforts to draft a penal code and a criminal procedure code began in 2000. They were then suspended for some time and re-started in 2003.

[74] *Supra* note 63 at 840 [*SOC Law*].

judgment becomes final and the 15-day time limit for filing an opposition to the decision begins to run, even though it cannot be conclusively proved that the now convicted person has had notice of the charges, the trial or the judgment. Therefore, in practice the rights of the accused are often infringed.

A further obstacle to the accused receiving a new trial is that even once an opposition is filed, it may not be considered "relevant" by the court, and thus a new trial will not be granted.[75] Finally, if the accused does not attend a new trial granted to him, the previous judgment will stand.[76]

Article 178 allows for a person convicted *in absentia* to appeal the decision (rather than file an opposition and have a new trial). However, the appeal must be filed within 2 months after the end of the period for filing an opposition.

Therefore, currently trials *in absentia* are specifically allowed in Cambodia and special rules are provided. On paper, the law seems harsh, but not necessarily unfair, unless the accused has, in fact, no notice at all of the charges, trial or judgment. But in practice the remedies for a trial *in absentia* are rarely used and rights to a fair trial are constantly infringed. For example, a recent rape case was heard in the Phnom Penh Municipal Court and the defendant did not appear. It became clear during the proceedings that the accused had fled after allegedly committing the rape and had never been arrested. The incident had occurred in July 2002, but it was not until May 2004 that the case was heard. This may well have been because the accused could not be found. In any event, a lawyer had been ordered by the court to defend the case, but he did not attend the hearing. The accused was found guilty on the testimony of the victim and a written statement from a doctor. He was sentenced to 20 years in prison.[77]

Further, anecdotal evidence from NGO court monitors suggest that it is common for convicted persons to be absent from appeal proceedings. This is because prison officials do not bring the appellants to court. Appeals are heard in the capital city, Phnom Penh, and so appellants in provincial prisons may have a significant trip to attend the hearing. Comments by prosecutors and judges suggest that the prisons do not have enough money to transport appellants.[78] The practical reality is that judges will adjourn the appeal a couple of times if appellants do not appear, but then eventually hear the case, citing the reason as several non-appearances by the appellant.[79] Appeals in Cambodia are full re-hearings on the merits, therefore,

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[75] *Ibid.* at 866, art. 122.

[76] *Ibid.*, art. 123.

[77] Rape Trial before Judge Kongset, 19 May 2004 in Phnom Penh Municipal Court. Information obtained from Centre for Social Development [CSD] CourtWatch Project in Cambodia. The name of the accused was not available. Note that no court records or judgments are available for the public to peruse and therefore court attendance is the only means of obtaining information and statistics. This case can be contrasted to the high profile case of Chhouk Rieng (an ex-Khmer Rouge commander responsible for the deaths of 3 foreigners and 13 Khmers in 1998 after the Khmer Rouge regime was declared unlawful in 1994), where although the accused was not present at his Supreme Court appeal, his lawyer was present and he specifically waived his right to attend the appeal. The authors agree that the Supreme Court did not err in this situation, however, the issue of waiver was not considered by the court, and even if it had been considered, past practice suggests that no distinction would have been made between this sort of absence from trial and any other type of absence.

[78] Interviews conducted by the author with judges and prosecutors at municipal and provincial courts suggested this is often the deciding factor (on file with author). This was supported by anecdotal evidence from court monitors (on file with author).

[79] Raw data records of CSD CourtWatch Project; interview by the author with court monitor on 5 September 2004 (on file with author).

this sort of behavior by prison officials, and tacit acceptance by the prosecutors, judges and government, is totally unacceptable and in breach of the Cambodian government's duty to uphold the right of an accused to attend his own trial.

Clearly, there are other systemic problems with the Cambodian court system that are beyond the scope of this paper; however, a close look at the practical application of current laws is certainly instructive.

D. *International Obligations*

A further issue that can only be touched on here is international obligations binding on Cambodia. The Kingdom of Cambodia signed the *Rome Statute* on 23 October 2000 and ratified the same on 11 April 2002.[80] Since it is unclear whether international conventions are self-executing in Cambodia,[81] the state may now be exposed to the principle of complementarity (set out in the *Rome Statute*). In very basic terms, this means that Cambodia could lose jurisdiction over the prosecution of its own citizens for international crimes unless its criminal procedure complies with international standards.[82] By ratifying the *Rome Statute*, Cambodia impliedly agreed to conform its criminal procedure.

VII. Amending Cambodia's Law: The Draft Criminal Procedure Code[83]

The current form of the *Draft Code* opens with a preamble that asserts the adherence of the *Draft Code* to "the principles designated in the Constitution of the Kingdom of Cambodia adopted on 21 September 1993 and by international conventions which have effect in the territory of the Kingdom of Cambodia."

As at the time of writing, the *Draft Code* has a section entitled "Determination of the Title of Judgments". This concept is important as many rights are dependent on whether a judgment is classified as a "non-default" judgment or a "default judgment". Article 338 states that if the accused does not appear at his or her trial, but there is evidence to prove that they were notified of the hearing, the trial will continue and will be classified as a non-default judgment. Article 339 then states that if there is no evidence that the accused was properly notified of the hearing date, the trial will go ahead in the absence of the accused and his or her representative but it will be classified as a default judgment. There are different time limits for appeal of default judgments, namely that the time runs from the date the accused was actually notified of the judgment. Also, "objections" can be made against default judgments, whereas a non-default judgment must be appealed to a higher court.

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[80] See the *Rome Statute* for details of state's ratification status, online: UN Treaty Collection <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp>.

[81] See *supra* note 55.

[82] *Rome Statute, supra* note 59, art. 17(2)(c) states that the proceedings must be independent and impartial. Therefore, if the ICC receives complaints on the lack of independence and / or impartiality of a domestic trial, this may prompt the ICC Prosecutor to intervene and establish the jurisdiction of the ICC over the case in question.

[83] *Supra* note 1.

These earlier sections are tempered by the chapter entitled "Judgments *in absentia* and Requests for Reconsideration", which states in Article 343 that "[a] convicted person can make a request for reconsideration against a judgment decided in his/her absence."

Article 346 goes on to give the time for submitting a request for reconsideration, stating that:

> A request for reconsideration must be submitted within 15 days from:
> - The date the notice of the judgment in absentia was given if the judgment was given to the convicted person personally, or
> - The date the convicted person actually learned about the judgment if the judgment was not given to the convicted person personally.

The *Draft Code* goes on to allow a retrial, but only if the request for reconsideration is accepted by the court. Article 349 states that "[a]fter having examined the credibility of the request for reconsideration, the court shall decide the case once again." It is not clear what "credibility" means and what happens if the request is not credible. Further, if a retrial is granted and the convicted person does not appear, the original judgment cannot be modified. The judgment has an absolute effect, although normal appeal procedures apply and a convicted person may be successful in an appeal if there was an error of fact or law made in the original judgment.

Therefore, there is no guaranteed retrial for a person convicted *in absentia*. There are 3 possible impediments—firstly, if the convicted person does not make a request for reconsideration within 15 days of finding out about the judgment; second, if the court does not accept the request for reconsideration; and thirdly, if the convicted person does not attend the first day of the retrial (but nevertheless has a very good excuse for not doing so). Further, the fact that a person has been notified of the date of his or her trial and does not appear would not appear to constitute an "unequivocal" waiver of the right to be present.[84]

Even if these problems were overcome, it is argued that this sort of system is (a) against the spirit of international law, (b) unconstitutional or invalid in light of the *Constitution*,[85] and (c) an inappropriate system for a fledgling legal system such as Cambodia's.

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[84] As per the ECHR view, see *supra* note 44.

[85] The 1993 *Constitution* provides that "laws and standard documents in Cambodia that safeguard State properties, rights, freedom and legal private properties and in conformity with the national interests, shall continue to be effective until altered or abrogated by new texts, except those provisions that are contrary to the spirit of this Constitution" (art. 139 of the 1993 and art. 158 of the *Constitution* as amended in 1999). This is not a conceptual provision but a transitional one answering the question of what laws remained in force following the passage of the *Constitution*. Ultimately, it is the Constitutional Council that has the power to rule on constitutionality. For a law to be rendered unconstitutional, the Constitutional Council would have to rule as such. Since its creation, the Constitutional Council has not looked at the constitutionality of trials in absentia, since the offending laws were passed before the Constitutional Council was created. However, the Constitutional Council will have to rule on the constitutionality of the new *Draft Code* (as all new laws pass through a constitutionality check), and we are of the view that the Council should find the relevant provisions are against the spirit of the *Constitution*. If the Council does not, at least it must consider the trials in absentia provisions in detail and give some reasons as to why they do not violate the spirit of the *Constitution*. Note that the Council has never ruled any provision of any law unconstitutional since it began operations.

A. *Against the Spirit of International Law*

Clearly, this sanctioning of trials *in absentia* as set out in the *Draft Code* is against the spirit of the *ICCPR* and the *Rome Statute*. Although the concept of trials *in absentia* is not prohibited at international law, in practice such trials often involve breaches of international law and infringement of human rights (as can be seen from the many cases on this issue brought before regional and international courts). The *Rome Statute* indicates that the international community is turning away from trials *in absentia* and calls on its States Parties to follow suit via the principle of complementarity.[86]

Although the *Draft Code* sets out the possibility of a retrial, such as in the French system, there are no checks and balances in the Cambodian system to ensure its practical implementation. Particularly, the French system is subject to the ECHR, which has already expressed its disapproval of trials *in absentia*, and would guarantee the rights of a person unfairly convicted *in absentia* in France.

B. *Invalidity Pursuant to the Constitution*

As discussed above, the *Constitution* requires that the Kingdom of Cambodia "recognize and respect" international human rights instruments, which undoubtedly include the *ICCPR* and the *Rome Statute*. The passing of a law that will in practical terms be contradictory to the practices and procedures set out in the *ICCPR* and *Rome Statute* is certainly not recognition and respect by the Cambodian government. Since Cambodia's Constitutional Council has not, to our knowledge, found any proposed law inconsistent with the *Constitution* (when in our view many current laws are, such as the recent amendments to the *Constitution* and parts of the *SOC Law*) this council cannot be relied on to provide any protection to rights contained in the *Constitution*. It will be up to the National Assembly to provide proper respect for the *Constitution* and amend the *Draft Code* to comply with it.

C. *Inappropriate System*

The most significant problem with Cambodia embracing a system allowing trials *in absentia* is the practical one. Cambodia is a fledgling democracy with an underdeveloped legal system that has very little respect for the rule of law. Impunity is common; corruption of the judiciary and police is widely reported.[87] Further, Cambodia's courts are inundated with cases, have very limited resources and the judges

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[86] *Rome Statute, supra* note 59, art. 17.

[87] Cambodia's English language newspapers, The Cambodia Daily and The Phnom Penh Post run regular stories on the incompetence and corruption of the judiciary and very recently 4 judges and prosecutors have been charged with taking bribes: see *e.g.*, "Nine Court Officials Face Corruption Charges" *The Cambodia Daily* (29 April 2005) at 1; "Selection of Trial Judges marred by Corruption Charges" *The Phnom Penh Post* (May 6-19 2005) Issue 14/09. Also see Cambodian Human Rights and Development Association, "Human Rights Situation Report 2004" at 18, online: Cambodia Human Rights and Development Association <http://www.bigpond.com.kh/users/adhoc/>. One Cambodian judge, in an interview with the author, admitted that bribes were taken in nearly every criminal case and that the judiciary regularly takes instructions from government officials on how to decide cases: notes on file with the author.

are criticized for allowing defendants to languish in detention for years on end waiting for their cases to be heard.[88] Several arguments can be therefore be made:

(1) The legal system should not be wasting precious time and money prosecuting accused persons *in absentia*, when hundreds of other accused persons are present, living in sub-standard conditions in pre-trial detention and are eagerly awaiting trial.[89]

(2) As Cambodia's judiciary is largely incompetent and many are corrupt and/or take their instructions from the government, the chances of a person convicted *in absentia* being granted a new trial are minimal.[90]

(3) The general public in Cambodia is uneducated as to their rights. If a person was convicted *in absentia*, it is unlikely that they would know about, or know how to assert, their right to a new trial. This is especially so considering most accused do not have a lawyer to advise or represent them.[91]

(4) If a person convicted *in absentia* is granted a new trial (presuming the law is followed), there is no point in having conducted the first trial *in absentia*. The first trial was a waste of time and money, and witnesses would have to be put through the trauma of testifying a second time.

(5) Trials *in absentia* do not bring justice to the victims. The most notable example of this is the trial *in absentia* of the former leader of the Khmer Rouge, "brother number one" Pol Pot in 1979 by a Cambodian/Vietnamese court. He was sentenced to death but was never apprehended.[92] The victims of his extreme policies have complained strongly that justice was never done and, in fact in 1997, Pol Pot was brought before a "people's tribunal" of his own Khmer Rouge colleagues and denounced as a mass murderer of his own people. The people's tribunal found Pol Pot guilty and sentenced him to life under house arrest.[93] Whatever their reasons, the public should not be encouraged to take justice into their own hands in this way, but should be able to rely on the police and judiciary to obtain justice and appropriate punishment for perpetrators of crimes.

(6) Victims cannot enforce orders for compensation against persons tried *in absentia*, as they are unable to be found. This encourages victims to pursue the family or relatives of the perpetrator for money and/or imprisonment.

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[88] By the end of 2004 there was a backlog in Cambodia's courts of more than 10,000 civil cases and 2000 criminal cases: "Justice Ministry to Open District Legal Offices" *The Cambodia Daily* (22 April 2005) at 20.

[89] For example, see Cambodian Human Rights and Development Association, "Human Rights Situation Report 2004", January 2005 at 18. Online: Cambodia Human Rights and Development Association <http://www.bigpond.com.kh/users/adhoc/>.

[90] For evidence of the incompetence, non-independence and corruption of Cambodia's judiciary see the following: Amnesty International "Getting away with murder" 22 December 2004, AI Index: ASA 23/010/2004, online: Amnesty International <http://www.amnesty.org>; Cambodian Human Rights and Development Association, "Human Rights Situation Report 2004", January 2005 at 48-50, online: Cambodia Human Rights and Development Association <http://www.bigpond.com.kh/users/adhoc/>.

[91] Centre for Social Development, *CSD Court Watch Project: The First Twelve Months of Court Monitoring (October 2003–September 2004)* (Phnom Penh: Centre for Social Development, 2004) at 25-26.

[92] David P. Chandler, *Brother Number One: A Political Biography of Pol Pot*, rev. ed. (Chiang Mai: Silkworm Books, 2000) at 160.

[93] *Supra* note 90 at 180-183.

(7) Trials *in absentia* can actually "close the case" on a particular crime; once guilt has been established the police are less likely to pursue the likely perpetrator with all their resources as they then move on to the next crime (as occurred with Pol Pot).[94]
(8) There is no court beyond the national jurisdiction to ensure the rights of persons convicted *in absentia*, unlike in France and other civil law countries in Europe.

For the above reasons, the offending articles should be deleted from the *Draft Code* before it is submitted to the National Assembly and a new clause inserted specifically prohibiting trials *in absentia*. Alternatively, a new clause could be drafted allowing for a trial to continue where the accused had been present in the court for all preliminary stages of the trial and subsequently clearly waived his right to be present.

VIII. Conflict of Procedural Law in Cambodia

In addition to the arguments outlined above, if the *Draft Code* is adopted in its current state by the National Assembly prior to the beginning of trials in the Extraordinary Chambers for the Prosecution of the Khmer Rouge ('Extraordinary Chambers'), there will be a conflict between the criminal procedure law and the *Law on the Extraordinary Chambers*.[95] The Extraordinary Chambers is a special court currently being set up within the Cambodian judicial system. It is tasked to try former Khmer Rouge leaders and those most responsible for atrocities occurring during the period of Democratic Kampuchea (1975-1979). As it results from an agreement between the UN and the Royal Government of Cambodia, it will have approximately half Cambodian judges and staff and half international judges and personnel.

The *Law on the Extraordinary Chambers* has an implied prohibition on trials *in absentia*. The jurisdiction of the court must be carried out in accordance with international standards of justice, fairness and due process of law, as set out in articles 14 and 15 of the *ICCPR*.[96] However, the *Law on the Extraordinary Chambers* also states that Cambodian procedural law will govern proceedings in the Extraordinary Chambers. If Cambodian procedural law allows for trials *in absentia*, there is a conflict between the two positions—arguably a former Khmer Rouge leader could be prosecuted *in absentia* even though the international community (who is funding the trials) never intended that this be allowed.

Further, it is likely that the specific procedural rules governing the Extraordinary Chambers will ban trials *in absentia* explicitly pursuant to international standards. If this occurs, there will be one law for former Khmer Rouge leaders, and a different law for everyone else. Obviously, this would be very unsatisfactory.

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[94] *Supra* notes 5 and 13.

[95] The full name of the law is the *Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea*. Unofficial translation by the Council of Jurists and the Secretariat of the Taskforce, revised 23 November 2004, online: <http://www.cambodia.gov.kh/krt>.

[96] United Nations General Assembly, *Report of the Secretary General on Khmer Rouge Trials*, 31 March 2003, Doc No. A/57/769, online: Official Documents System of the UN <http://ods-dds-ny.un.org/doc/UNDOC/GEN/N03/303/58/IMG/N0330358.pdf>.

IX. Conclusion

The *Draft Code* stands to become the criminal procedure law in Cambodia. If it does in its current form, the permission of trials *in absentia* will deny the accused the right to be present, to defend him or her self, to confront witnesses, and to present exculpating or mitigating circumstances to the court.

In its legislative reform, it may be advisable for Cambodia to follow the example of other states that are going through transition in their criminal law. One of these examples is Russia which, as discussed above, adopted multiple amendments to its criminal procedure law, in particular, quashing the article that used to allow trials *in absentia.*

Should Cambodia pass the *Draft Code* in its current form, it is likely that arguments challenging the constitutionality of the articles will be raised. Cambodia will also be flouting the international trend against trials *in absentia* and will likely incur strong criticism from the international community and its core donors.

In any event, the drafting of a new *Criminal Procedure Code* is a unique opportunity for the Cambodian government to think carefully about this issue, modernize its laws and align them with its constitution. It is an opportunity that should not be wasted.