

**FEASIBILITY STUDY ON THE  
INTRODUCTION OF FORMAL NON-CUSTODIAL  
OPTIONS INTO THE CRIMINAL JUSTICE SYSTEM  
OF THE KINGDOM OF CAMBODIA**

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## 1. INTRODUCTION

At the request of the Cambodian Ministry of Interior, the Cambodia Office of the United Nations Centre for Human Rights was requested to explore the feasibility of implementing non-custodial options in the criminal justice system, as a way to reduce overcrowding in prison.<sup>1</sup> Subject to what is stated below, this report is presented pursuant to that request.

In terms of the project document, the terms of reference were listed as follows:

- a) to explore viable non-custodial options for both detainees and prisoners
- b) to investigate existing methods of formal and informal criminal sanctions in Cambodia
- c) to develop alternative sentencing legislation which is consistent with the principles of human rights and criminal investigation.

The expected outcome of the study was to provide the Royal Government of Cambodia with:

- a) a report on the ability of establishing formal non-custodial options into the criminal justice process
- b) a model piece of legislation, if necessary
- c) a training package in the case of non-custodial options.

The initial proposal was for a consultant to undertake a study for a period of three months. Following further discussions, it was agreed that the consultancy be divided into two phases — each of six weeks duration. During the first phase, a study would be undertaken to explore the possibility of introducing non-custodial options into the Cambodian criminal justice system and a report on the findings would be prepared. On the basis of the findings contained in the report, a decision would then be made on the need for the second phase of the programme to be undertaken.

The present report therefore deals only with the feasibility of introducing non-custodial measures into the criminal justice system of Cambodia.

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<sup>1</sup> Para 15, Economic and Social Council, Commission on Human Rights, 52nd Session Report by Secretary-General dated 2 February 1996.

## A. BACKGROUND TO CONSULTANCY

A number of surveys and reports have, over the years, highlighted a number of negative features that continue to bedevil the smooth operation of the criminal justice system in Cambodia.

In his report to the Commission on Human Rights dated 24 February 1994,<sup>2</sup> the Special Representative of the Secretary-General for Human Rights in Cambodia reported in paragraph 141 that:

"Article 38 of the Constitution states that the prosecution, arrest and detention of any person shall not be done except in accordance with the law." Some provisions relating to arrest and detention have been laid down in the Transitional Provisions and Code of Criminal Procedure. They recognize, *inter alia*, the right of an arrested person to be brought before a judge within 48 hours. However, it has been admitted by the police themselves, and the judges, that this rule is generally not complied with. The law also states that the accused persons must be tried within six months of their arrest. However, cases of persons in detention for longer periods of time, sometimes for several years, without being brought before a court, have been reported..... There are also cases of persons arrested or detained on criminal charges who are not brought before a judge or other officer authorized by law to exercise judicial power in accordance with Cambodian law."

The Special Representative further noted in para 142 of the same report that:

"According to Cambodian law, arrested persons must be released if they are not tried without delay. The release subject to the guarantee of bail is recognized in the Code of Criminal Procedure. The Cambodia Office of the United Nations Centre for Human Rights knows of several instances in recent months in which persons were granted bail pending trial at a later stage. However, the rules that relate to bail are not uniformly applied in practice. In some cases, persons who had been charged with serious crimes such as murder were released on bail whereas many other persons alleged to have committed similar crimes have not been granted bail, even though they have been in prison for a longer period. If equality before the law is to be guaranteed in this respect, it is essential that the rules relating to bail be evenly applied..."

A survey conducted by LICADHO in 1994 concluded that:

"The very high proportion of detainees imprisoned without trial is certainly the aspect of Cambodia's prisons which is most to be criticized since the detention of people who have not been previously sentenced is a clear denial of basic human rights. As a result, some of the detainees are very likely to be innocent, whereas others can buy their release regardless of their guilt, provided they can afford it."<sup>3</sup>

<sup>2</sup> Economic and Social Council Ref E/CN.4/1994/73 dated 24 February 1994

<sup>3</sup> Prison issues — Report by LICADHO, p. 6

The report further noted that when prisoners are brought to trial after being detained for some time, the Court not infrequently sentences them to the same period of imprisonment that they would have already served.<sup>4</sup>

In a further survey undertaken by the Cambodia Office of the United Nations Centre for Human Rights, the conclusion reached was that:

"A consequent outcome is that if systems of enforcement and adjudication are improved and made more efficient, then there are likely to be more prisoners in Cambodian prisons.... Therefore, any improvement and reform of Cambodia's criminal justice system must be accompanied by complementary reform of its prison system. In other words, the prison system is an integral part of the criminal justice system ....."<sup>5</sup>

On the state of prisons in Cambodia, the report further noted that:

"Cambodia's prisons are in a state of crisis. Penal administration is in disarray. Prison buildings are in many cases literally falling down. Medical care is often non-existent and diseases and malnutrition are rampant."

The report then went on to recommend (a) that pre-trial detention should always be counted as time served and never exceed the maximum sentence for the offence (b) that each day served over the pre-trial period limited by law shall count as three days served (c) that all persons charged with a criminal offence have the right to apply for bail and that such provision be incorporated into relevant legal statutes and (d) that the existing early release programme be replaced with a comprehensive legislated scheme that allows all prisoners to apply for early release at an appropriate time and which is administered by an independent quasi-judicial authority chaired by a judge of the Appeals Court.

A further survey conducted by Mark Plunkett in July 1995 made a number of proposals for a custody diversion project. In particular, the report highlighted the need to boost alternate dispute resolution procedures, alternatives to imprisonment, development of a law and procedure for bail and provision for an early release scheme for prisoners.<sup>6</sup>

## **B. THE CAMBODIAN CONSTITUTION AND LEGISLATION**

On 20 April 1992, the Supreme National Council acceded to the International Convention on Civil and Political Rights and the International Convention on Economic, Social and Cultural Rights.<sup>7</sup> The Constitution of Cambodia became law on 21 September 1993. In Article 31 of the Constitution, the Kingdom of Cambodia recognizes and respects 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. The Constitution further provides, in article 38, that any accused person shall be considered innocent until the Court has

<sup>4</sup> At page 7.

<sup>5</sup> The State of Cambodian Prisons, p. 4

<sup>6</sup> The Legal Aspects of the Development of the Criminal Justice System in Cambodia by Mark Plunkett

<sup>7</sup> Mark Plunkett, (Supra), p. 5



proved him guilty. The Provisions relating to the Judiciary and Criminal Law and Procedure applicable in Cambodia during the Transitional Period provide for a maximum period of detention during the pre-trial stage. The same law further acknowledges that the aim of the correctional system is social rehabilitation and that the treatment of all prisoners must be in conformity with the Standard Minimum Rules for the Treatment of Prisoners. It is necessary to highlight some of these provisions as they have a bearing on the present survey. The penalties imposable in terms of the law are also laid down but in the case of juveniles, provision is made for the reduction by half of the punishments set out.

### C. INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

All major international instruments acknowledge the right of everyone charged with a criminal offence to be presumed innocent until proven guilty.<sup>8</sup> The International Covenant on Civil and Political Rights also provides that a person on a criminal charge shall be entitled to trial within a reasonable time or release pending trial subject to the conditions that may be imposed in accordance with the law. Most important, the Covenant provides, in Article 10, that the purpose and justification of a sentence of imprisonment or a similar measure which deprives liberty is ultimately not only to protect society against crime but also to ensure, so far as that is possible, that upon his return to society the offender is not only willing but able to lead a law abiding and self-supporting life.

The need to keep juveniles out of prison is also highlighted. In general, imprisonment should only be imposed as a last resort. The use of a number of other non-custodial options is to be preferred. The deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response. The need to avoid as far as is possible resort to formal proceedings or trial by the Court is also recommended.<sup>9</sup>

## 2. METHODOLOGY EMPLOYED

In undertaking the present study, it was found to be vital to appreciate the rather complex situation currently obtaining in Cambodia. For this reason, it became necessary to gather as much information on the Cambodian legal system as was possible. Existing United Nations instruments were examined and in particular the "Tokyo" and "Beijing" Rules. Reports prepared during previous surveys were also scrutinised. So too were the relevant pieces of Cambodian legislation. Visits were arranged to courts, prisons, both in Phnom Penh and in some provinces. A number of meetings were held with people from various strata of life involved in the criminal justice system such as provincial, municipal and appeals court judges, prosecutors and police. Further meetings were arranged with senior government officials and non-governmental organizations active in human rights.

<sup>8</sup> See for example Article 11 of the Universal Declaration of Human Rights and Article 14 of the International Convention on Civil and Political Rights.

<sup>9</sup> United Nations Rules for the Protection of Juveniles Deprived of Their Liberty

It was, however, not possible to meet all key government officials as appointments sought with a number of them were not confirmed.

### 3. PRESENT STATE OF CAMBODIAN PRISONS

The conditions in Cambodian prisons generally remain bad although most of the people interviewed acknowledge that considerable progress has been made since UNTAC. Most of the prisons are dilapidated and have not seen any worthwhile maintenance work in decades. Most show evidence of neglect whilst others could literally crumble at any time. Save for Kampot prison, access to all the other prisons visited was not restricted.

Food is generally reported to be bad and largely consists of rice and vegetables given twice daily. Sanitation and clean water are generally lacking. Provisions such as soap, dependent upon funds provided by the government, are lacking. A number of prisoners still suffer from a number of preventable diseases. At a number of prisons, prisoners suffering from diseases such as TB are still not isolated. Largely with the assistance of non-governmental organizations, sporting activities and gardening have been introduced at a number of prisons. At the time of visiting Kandal Prison, some of the prisoners were found outside in the courtyard doing exercises. The situation however was different at Kampong Speu where some prisoners were found milling around near the entrance with virtually nothing to do whilst others were locked up in their cells. At almost all prisons visited, certain sections of the prison are not utilized on account of the dilapidated state of the buildings.

A disturbing feature of the prisons is that often juveniles are still being detained together with adult offenders. This is clearly undesirable and effort must be made to ensure that this practice is stopped. In some cases, it was apparent that no effort had been made to ascertain the age of the accused before his detention. It was observed at some prisons that juveniles are detained in the same section where serious and hardened offenders are also detained.

It was also found that there are a number of cases of juveniles serving in prison. Admittedly some of the juveniles are convicted of serious offences such as murder and their incarceration might be inevitable. However, it was also found that there are juveniles serving relatively small terms of say 12 months or 18 months. There are also a number of cases of adults serving effective prison sentences of 12 months or less — the kind of offender who could be diverted from custody.

It was noted from the statistics provided at the few prisons visited that most of the serving offenders are serving lengthy prison sentences. At Kampong Speu Prison, for example, one third of the 66 convicted prisoners are serving lengthy terms for murder. At Takeo, a large percentage of the 50 serving prisoners were convicted of either murder or robbery. There are a few cases of persons serving small sentences. The point to be stressed is that most of the people in prison do not fall into that category of offender who could benefit from non-custodial sentences. Equally true however is the fact that there are a number of people in prison, though forming a smaller percentage of the overall population, who could benefit from such non-custodial alternatives.

Attempts to get a breakdown of the national prison population proved unsuccessful. As at the time of the survey, there were 2,945 prisoners countrywide. A breakdown was promised but never supplied. It is clear, however, that the prison population is going up slowly but steadily. As of January 1994, there were 1,779 prisoners in Cambodia.<sup>10</sup> As of November 1994, the figure had gone up to 1,900 prisoners.<sup>11</sup> By January 1995, the figure had gone up to 2,299.<sup>12</sup> The figure is now almost 3,000. Whilst the prison population remains an extremely low one by international standards, it is clear that there is a steady rise in the prison population, an observation made previously by the United Nations Centre for Human Rights in its report "The State of Cambodian Prisons" (para 26).

This gradual increase can only exacerbate the conditions in the already overcrowded prisons. The increase can only further strain the financial resources available to the prisons.

A further disturbing feature of the prisons is that there is hardly any security at almost all the prisons visited. At Kampong Speu, the gate was found manned by a single unarmed female prison officer wearing slip-on shoes. All senior officials were absent. The situation was just as bad at Takeo where no one was found manning the gates.

It is clear that a lot more needs to be done to improve the conditions in the prisons. Whilst it is necessary that serious and persistent offenders be incarcerated for the wrongs committed to society, it is clear that there is a sizeable percentage of prisoners who could benefit from non-custodial sentences such as community service. This would be very beneficial to the community as a whole and to the prisons department in particular. This aspect will be commented on shortly.

#### 4. PRE-TRIAL NON-CUSTODIAL MEASURES

##### a) INFORMAL RELEASE OR VERBAL REPRIMANDS BY POLICE

All the people interviewed were agreed that petty offences are rarely referred to Court but are dealt with by the Police who dispose of such cases in a manner they see fit. Thus for example it would be in order for a youthful offender who has stolen an orange to be reprimanded and then allowed to go. There is nothing wrong with this. Others cited cases of petty driving offences as also being eligible e.g. parking in a prohibited area. Again, there is nothing wrong with this provided everything is done properly and impartially. In fact, the United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules) provide in Article 5 for pre-trial dispositions. The Rules provide:

##### "5. Pre-Trial Dispositions

5.1 Where appropriate and compatible with the legal system, the police, the prosecution service or other agencies dealing with criminal cases should be empowered to discharge the offender if they consider

<sup>10</sup> Article 147, Report of the Special Representative of the Secretary-General for Human Rights in Cambodia E/CN.4/1994/73

<sup>11</sup> The State of Cambodian Prisons, p.4

<sup>12</sup> Health Conditions in Cambodia's Prisons — A report by Physicians for Human Rights, p.14



that it is not necessary to proceed with the case for the protection of society, crime prevention or the promotion of respect for the law and the rights of victims. For the purpose of deciding upon the appropriateness of discharge or determination of proceedings, a set of established criteria shall be developed within each legal system. For minor cases, the prosecutor may impose suitable non-custodial measures, as appropriate."

The real difficulty is that there is no set of established criteria for discharge. The result has been that persons facing serious charges have, in some cases, benefited.

At Kandal Court, the judges and prosecutors mentioned cases of juveniles being detained perhaps for a week or so in the prison compound by the police and then being released after a parent undertakes to educate the child.

At Kampong Speu, it was reported that some police officers will release an accused person once he pays compensation to his victim provided he also pays "something" to the police. The judicial mentor attached to the Court confirmed that he has been trying to discourage police from exercising such powers.

At the Youth Rehabilitation Centre, juveniles, some alleged to have committed serious offences, are detained at the instance of the police. They do not undergo any formal trial process and are only eventually released on the recommendation of a disciplinary committee. There is no provision in the law for this practice.

Discussions held with local non-governmental organizations revealed that the informal release system is largely abused by some members of the police. Accused persons are made to pay the police or, in some instances, court officials and then released.

At Takeo, the Chief Prosecutor advised that the police "try to reconcile." He was concerned, and rightly so, that there is no laid down procedure. His experience was that the police were not simply reconciling civil cases e.g. land and boundary disputes but also misdemeanour cases. Prosecutors have, in some cases, directed the police to bring some of these matters to court but such requests have been turned down. The police also not infrequently ask the accused to pay compensation to the victim. They further solicit a bribe from the accused and the matter goes no further. In some cases, once compensation is paid, the police "forget to prosecute the accused for the offence."

Discussions with the police confirmed that once the accused pays compensation to his victim, some serious offences are disposed of in this manner. The difficulty experienced by the police is that "petty offence" is not defined anywhere. The result has been that some persons who have committed serious offences have been released once compensation has been paid. In some cases, the accused is sent for "education" which means manual work at the police station.

Clearly this area is unsatisfactory and needs to be clarified. The law should be amended to clearly stipulate the circumstances in which the police

can release an accused person and a set of established criteria for discharge should be worked out between the judges, prosecutors and the police.

#### b) RELEASE BY THE COURT

The judges at Takeo advised that all cases involving juveniles are handled informally. Indeed, a visit to the prison confirmed that no juveniles had been sentenced to serve prison sentences. The judges would call the parents of the juvenile and a discussion would then take place. The parents would guarantee the proper supervision of the juvenile and the juvenile would then be released to continue with his schooling. All the judges confirmed that this practice had been undertaken because of a realisation that juveniles often commit offences due to peer pressure.

The above approach is laudable in so far as it seeks to divert juveniles from custody. However, it seems to me that the prosecution and perhaps the victim should be involved so that the circumstances surrounding the discharge are made known to them. This practice could lay a solid foundation for a juvenile diversion programme. The form such a programme could take will be discussed in greater detail under the topic "juvenile justice."

#### C. TRADITIONAL METHODS OF CONFLICT RESOLUTION

A study by the Cambodia Office of the Centre for Human Rights found, *inter alia*, that the low prison number is the result of "a combination of factors including the resolution of many criminal matters (and civil disputes) through informal means and reliance upon self-help systems"<sup>13</sup>. Mark Plunkett, in his report<sup>14</sup>, also commented:

"Without idealising the current form of informal dispute resolution.... it does however offer a form of settlement of many quasi-criminal and criminal complaints by one person against another which does not require the intervention of the State except to the extent necessary when directed or mediated by police and village chief.... Consideration should be given to requiring police and other authorities looking to determine whether or not such processes are appropriate in particular cases for non-serious infringements, and to endeavour to affect such settlements as a necessary preliminary step before considering the activation of criminal investigations...."

It does not, of course, lie within the ambit of the present study to ascertain the methods used in the settlement of civil disputes as the primary objective of the study is to ascertain whether additional non-custodial alternatives can be introduced into the criminal justice system. With the exception of the two forms of informal release already commented on above, it has not been possible, within the time available, to get any evidence of the kind of settlement or dispute resolution referred to in Mark Plunkett's report. It is a fact that civil disputes e.g. land disputes are sometimes settled through mediation by the local chief, police or even judge. Some cases might however be subject to both civil and criminal proceedings. Criminal proceedings, it is

<sup>13</sup> State of Cambodia Prisons, para 28, p.13

<sup>14</sup> The Legal Aspects of the Development of the Criminal Justice System in Cambodia, Part 14, p. 49

submitted, should not be the subject of any mediation by a village chief unless the matter is so trifling that perhaps a report or complaint would not have been made to the police in the first instance. The issue of petty offences normally handled by the police has already been commented upon.

In summary, therefore, the following recommendations are made (a) that the law be amended in order to clarify the type of offence and the circumstances under which the police or prosecutor can release an accused person informally and (b) a juvenile diversion programme, possibly including the victim, prosecution and judges, be initiated with clearly laid-down rules of procedure. A diversion programme would benefit juveniles accused of committing non-serious offences.

## 5. THE NEED TO AVOID IMPRISONMENT

The United Nations Standard Minimum Rules for Non-Custodial Measures (the "Tokyo Rules") recommend, in Articles 1.5 and 2.5, the development of non-custodial measures to reduce the use of imprisonment and to deal with the offender in the community. There are a number of good reasons why imprisonment should, as far as possible, be avoided. First, every State is under obligation to ensure minimum standards for all persons detained in prison. This means that proper diet, health facilities, clothing and bedding, etc. must be provided (see the Standard Minimum Rules for the Treatment of Prisoners). This further means that considerable sums of money are spent on maintaining prisoners. In Cambodia, the government spends 30,000 riels per month per prisoner — almost the monthly salary of a junior prison officer. Moreover, the more prisoners there are in detention, the more prison officers must be recruited. Secondly, it is not always in the interests of society for persons who are not of a violent nature or who pose no real threat to society to be incarcerated. Incarcerating such people will result in them becoming hardened and even becoming recidivists. The Chief Judge at the Municipal Court in Phnom Penh cited a case where a non-serious offender, convicted of a petty theft, was set to prison for some time. On his discharge from prison, he committed a robbery. Such a person could easily become a menace to society. It should always be remembered that serving prisoners will eventually come back to society and society would still have to contend with them. It is preferable to deal with such persons in such a way that whilst they do not go to prison, they are nevertheless punished so that they pay reparation for the wrongs committed against society. Whilst no doubt serious offenders have to be sent to prison, it should always be remembered that the purpose and justification of a sentence of imprisonment or a similar measure deprivative of liberty is ultimately to protect society against crime. This end can only be achieved if the period of imprisonment is used to ensure, so far as possible, that upon his return to society, the offender is not only willing but able to lead a law-abiding and self-supportive life.<sup>15</sup>

Sadly, however, such rehabilitation is not possible in Cambodia at the moment. Whilst it is acknowledged that the large percentage of persons serving in prison are persons serving lengthy sentences, it was acknowledged, even by the prisons central administration and by the officers in charge of prisons that prisons generally do not have the material or human resources to prepare prisoners for their eventual release to society. No useful training or rehabilitation takes place in prison. Family contacts are

<sup>15</sup> Body of Principles for the Protection of All Persons Under any Form of Detention, Principle 58.



not maintained. The result is that on their release from prison, most of these prisoners find themselves with no roof over their heads, no friends, no money and consequently may relapse back into crime in order to survive.

The general feeling amongst members of the public in Cambodia appears to be that anyone convicted of a criminal offence should go to prison. This is a view to be found in most countries. The public will therefore need to be educated on the advantages of non-custodial measures particularly in the case of non-serious offenders. This has been achieved in a number of countries and there is no reason why the same cannot, in time, be achieved in Cambodia. There is a need for such measures given the ever-increasing prison population in Cambodia and the consequent budgetary increase for the prisons department. It is anticipated that with the improvement of the systems of enforcement and adjudication, as peace returns to all areas and people become more confident with the criminal justice system, there will be considerable pressure on the prisons department. For example, the Siem Reap Court was reported in 1994 to be hearing approximately sixty criminal cases per year. If this Court improved its efficiency to hear say 100 cases per year, adding a further 30 prisoners to the prison, then the impact on this relatively good but crowded provincial prison would be detrimental.<sup>16</sup> Condemning people to prison via an increasingly efficient process of adjudication to overcrowded and rotting prisons is a reality that Cambodia (and many other countries) must face.

If all these features were to be brought to the attention of the public, most people would no doubt accept that it is not in society's interest nor of the criminal justice system to send a non-serious offender to prison. Imprisonment should be viewed as a serious and rigorous form of punishment to be imposed as a last resort and when no other form of punishment is available.

The point needs to be stressed that non-custodial alternatives are not suitable for persons convicted of murder or other serious felonies. Such alternatives are also not suitable for persons who repeatedly commit criminal offences. The target is the non-serious offender and in particular the youthful offender and first offenders. They need to be given a second chance in life.

The UN Standard Minimum Rules for Non-Custodial Measures recommend disposition of criminal cases by way of verbal sanctions, conditional discharge, fines, confiscation, restitution or compensation, suspended sentences, probation, community service orders, house arrest and referral to an attendance centre. Articles 8 and 12 of the UNTAC Law provide that the treatment of all prisoners must be in conformity with the Standard Minimum Rules.

## 6. BAIL

There are a number of provisions which empower Courts to grant bail.

Article 38 of the Constitution of Cambodia provides that the detention of any person shall only be in accordance with the law and that every accused person shall be presumed to be innocent until proven guilty. Article 14 of the Provisions Relating to the Judiciary and Criminal Law and Procedure applicable in Cambodia during the Transitional Period also provides that a person may only be kept in pre-trial detention if

<sup>16</sup> State of Cambodian Prisons, Para 11, p.4



there is a risk of escape, or non-appearance manifested by the absence of such factors as a job, a family, a home or if there is reason to believe that the accused will influence witnesses or the conduct of the investigation. Article 65 of the Law on Criminal Procedure provides that if the presiding judge thinks that the accused may be temporarily released with or without bail, he shall decide on this issue before dealing with the case on the merits. In terms of Article 66, if the presiding judge is of the view that the case does not constitute a *flagrante delicto* misdemeanour, he will cancel the procedure and send the case back to the Court.

The International Covenant on Civil and Political Rights, ratified by Cambodia in 1992, provides in Article 9.3 for the review of detention orders and for an accused person to be released on bail subject to any conditions as may be imposed.

The problem lies in the fact that the law on bail in Cambodia is largely unclear and consequently cannot be uniformly applied. The criteria upon which bail can be granted is not clearly defined in any law. Some judges do not seem to understand the principles applicable in granting bail or the circumstances under which this should be done. Further the form that bail should take remains unspecified with the result that serious discrepancies result.

A large number of people are still kept in pre-trial detention for a long time. Statistics on the exact number of people awaiting trial and the nature of the offences they face were not made available.

During the current survey, a case of a 13-year old boy who stole a bicycle with two others at Kompong Cham and was not granted bail, despite that fact that his parents were known, was cited.

In practice, judges grant bail in petty and misdemeanour cases e.g. fraud, breach of contract, provided the accused has a fixed abode or is employed. Almost all the judges spoken to advised that under no circumstances should bail be granted in felony or serious misdemeanour cases. Other judges advised that where an offence is committed intentionally, bail cannot be granted. Other judges cited articles 65 and 66 of the Law on Criminal Procedure as authority for the proposition that bail can be granted in *flagrante delicto* cases. However, these articles talk of "the presiding judge" and say nothing about the grant of bail before the accused appears before the presiding judge or whilst investigations are in progress.

In practice, bail is granted in some cases of misdemeanour but not in others. Whilst the seriousness of the offence is always a relevant consideration to be taken into account in determining whether an accused should be granted bail or not, it is clear the real difficulty is that the law says bail can be granted but does not go further to give guidelines. Consequently, the whole matter is left to the entire discretion of the judge. Even persons with a fixed abode and stable background are sometimes denied bail. What amounts to "serious misdemeanours", in respect of which bail cannot be granted according to some judges, remains undefined.

The difficulty with bail does not end there.

Some judges order accused persons to pay bail equivalent to the value of the item stolen or the damage caused. The amount, in the majority of cases, is way beyond the means of the accused and amounts to a denial of bail. It has been confirmed that a number of people to whom bail has been granted remain in custody

after failing to raise the amounts ordered. In some cases, the amount paid as bail is used to offset the damage caused by the offence. It was also revealed that in some cases the bail money is not refunded on completion of the matter but is kept by the judge. Some judges would set bail in US dollars and not Riels. For the majority of the rural people, who struggle to raise Riels, asking them to pay bail in US dollars could amount to a denial of bail.

All the people interviewed were unanimous that the law on bail should be clarified so that judges in particular are clear as to the principles applicable when bail is either granted or denied. All the people interviewed complained that the law is very unclear. There have been cases of persons charged with murder being granted bail whereas others have been denied bail.<sup>17</sup>

Most importantly, the law does not say bail cannot be granted in felony cases. The law is silent on the point although the practice has been for accused persons facing felony cases and certain types of misdemeanours not to be granted bail.

The purpose of granting bail is first and foremost to secure the attendance of the accused person. The possibility of the accused interfering with the evidence or committing further offences are also relevant considerations. Conditions can always be attached to the grant of bail.

It is recommended that the law be amended to clarify the principles which judges need to take into account in considering applications for bail. The following considerations should form part of the draft law:

- a) Type of offence. It is accepted that in view of the existing situation in Cambodia, bail should not be granted in felony cases, except in the most exceptional of cases and where it is clear that the person would not abscond. Additional conditions could be stipulated.
- b) Whether the accused has a fixed abode, is married or employed. In general, persons who have stable family background are not likely to abscond.
- c) The amount of bail to be deposited should be expressed in riels, not US dollars, and should only be high enough to secure the attendance of the accused. In other words, the amount should be within the means of the accused.
- d) Other conditions such as the provision of surety, bonds, surrender of title deeds, reporting conditions, residence at a particular place pending the finalization of the case, should also be included. These conditions could be made part and parcel of any bail granted.
- e) In all misdemeanour cases, consideration should be given to granting bail, unless it is shown that the accused would abscond, or otherwise interfere with the investigations or the evidence or commit further offences.
- f) It should also be made clear that generally bail can be refused where it is shown, on balance, that the accused may commit further offences if

<sup>17</sup> Article 142 of the Report of the Special Representative dated 24/2/94.

released or that he may interfere with the state witnesses or the police investigations.

- g) For juveniles, a court should be able to place the juvenile into the custody of the parents. The parents naturally must have a fixed abode and must assume responsibility for the attendance of the juvenile.

It should be in the most exceptional case that a juvenile should be detained in custody, unless he does not have a fixed abode or is facing a felony.

The above are suggested amendments to the law.

## 7. ALTERNATIVES TO IMPRISONMENT

### a) FINES

The imposition of fines upon conviction is a common penalty. However, some experts in the Ministry of Justice advised that because of a general belief in Cambodia that imprisonment is the most suitable punishment for any offence, a number of judges tend to impose prison terms even in cases where fines would be sufficient. In some cases, the fines imposed by the judges are so high that the fines are not a true option as the accused end up in prison.

It is necessary that the courts make greater use of fines and that in determining the appropriate amount to be paid by way of fine, the means of the accused be taken into account if the option of paying a fine is to remain a true option. Naturally, the seriousness of the offence is always a relevant factor to be taken into account. Imprisonment should never be imposed where a fine will do. It is suggested that this recommendation be incorporated into any proposed amendment to the criminal laws of Cambodia.

### b) SUSPENDED SENTENCES

In terms of Article 10 of the UNTAC Law, prison sentences may be suspended totally or partially, with the exception of felonies. The period of suspension is five years.

At Kompong Speu, the judges confirmed that this option is widely used, particularly in the case of juveniles.

It is not considered necessary that anything further be done as the option appears widely utilized and causes little, if any, problems. It should however be made part of the law that a sentence can be suspended on more than one condition e.g. good behaviour and community service (once legislated).

### c) FORFEITURE AND COMPENSATION ORDERS

These are utilized fairly widely by the judges. However, from discussions with the judges, it transpired that little, if any, weight is accorded to the fact that the accused may have compensated in full. In some cases, accused

persons are nevertheless sent to prison for long periods, almost as if no compensation had been paid. Some judges advised that it is normal procedure for the amount of compensation to be recovered from the sum paid by way of bail. Other judges advised that where an accused person is able to pay compensation but deliberately refuses to do so, he is sent to prison.

It is a practice in a number of countries for the courts to attach considerable weight to the fact that compensation, whether whole or in part, has been paid. Depending on the circumstances, the sentence that would otherwise be imposed is reduced significantly to take this into account. It is also the practice in some countries to suspend a portion of the prison sentence on condition the accused person pays restitution. This can have the desired result as it encourages the accused to repay his ill-gotten gains to ensure his early release from prison.

This is also an area requiring attention. In particular, it is recommended that the law be amended to provide for the suspension of sentences on condition of restitution and in those cases where compensation has already been paid for this factor to be taken into account in assessing an appropriate sentence.

## 8. COMMUNITY SERVICE

This alternative is not provided for under the laws of Cambodia. Everyone spoken to was agreed that such a programme would be very beneficial to Cambodia.

Under a community service programme, a person who would otherwise go to prison is saved the rigours of prison life and is instead made to do work that is beneficial to the society. The work that can be done under such a programmes is varied and to some extent depends on the imagination and common sense of the presiding judge.

Most countries suspend the prison sentence on condition the accused performs a certain number of hours of community service at a given institution. Other countries now have legislation which empowers courts to issue community service orders without the need to suspend the prison sentence. Whatever the approach, the convicted person would know that if he does not perform his community service, he would be sent to prison.

There are a number of advantages of having such a scheme. It has been shown in many countries that community service can have a positive effect on the ever-increasing prison population. It can reduce, but not eliminate, overcrowding. The scheme also ensures that the government saves considerable sums of money that would otherwise be spent in maintaining the convicted person in prison. Most importantly, the scheme can be very beneficial particularly to youthful and first offenders of both sexes. A number of people who commit offences need a second chance to reform as they are not inherently evil-minded or a danger to society. Equally important is the fact that the convicted person continues to fend for his family. Family ties, so necessary if one is not to relapse into crime, are maintained. Indeed, where the convicted person is employed and will not lose his employment as a result of his



conviction, the tendency by the courts is to order that person to perform his community service outside his normal working hours and during weekends.

Once the convicted person has carried out his community service, then that is the end of the matter. The work can entail cleaning public buildings, children's homes, old age homes, schools, churches, market square, etc. It could also involve cleaning the grounds. For persons with particular skills such as painters or electricians, the community service could be ordered in such a way their talents are exploited. Thus, for example, a painter could be made to paint public buildings, an electrician could be made to fix electrical appliances at a children's home, youth centre, old age home, etc.

#### a) SUPPORT OF THE GOVERNMENT, JUDGES AND PUBLIC NECESSARY

All the judges and government officials interviewed were positive about such a scheme in Cambodia. Apparently, there had been a similar scheme operating prior to 1975 but the details on that scheme have not been forthcoming. All persons interviewed expressed the view that this is a scheme which could be used to dispose of certain cases within the criminal justice system, especially those involving women, juveniles and first offenders convicted of non-serious offences. The concern expressed by a number was that it is not the type of a scheme that can be applied on a large scale in Cambodia in view of the fact that there is no system of identification or registration in the country and also the fact that due to the country's history, a number of people do not have a fixed abode. Whilst this is a valid concern, all were agreed that there are a number of people who have a fixed abode who could be diverted from custody by the courts. In particular, most people expressed the view that a programme along the lines of the Zimbabwean community service programme would be very beneficial and that the laws should be amended as soon as possible to make provision for such a scheme and for the procedure and principles to be followed in making such orders to be clearly laid out.

It is clear that whilst some judges had not heard of community service before, it is a programme that all the players in the criminal justice system would wish to see implemented as soon as possible, including the police support the programme. There will be need, as in all countries where such alternatives have been introduced, for public education and if possible, the involvement of the public in the scheme. A number of high-ranking government officials and judges stressed the need for a seminar on community service to be held. It should also be stressed that if the government, public and judges support the scheme, then a viable community service scheme could easily be implemented.

#### b) THE ZIMBABWEAN COMMUNITY SERVICE SCHEME

The scheme was set up by the government after the necessary amendment to the Criminal Procedure and Evidence Act. The scheme is supervised by a National Committee which is chaired by a High Court Judge. The other members of the National Committee comprise senior government officials from key government Ministries and departments such as Justice, Home Affairs, Social Welfare, Police, Prisons, Chief Magistrate, Attorney-General's Office. There are also heads of non-governmental organizations,

the Dean of the Faculty of Law, and other persons who are able to contribute to the deliberations of the Committee.

It was the National Committee which drafted the guidelines to be used by Magistrates and supervisors of the institutions where the convicted persons are referred to perform community service. The National Committee is semi-autonomous but advises government on all developments. The National Committee, in turn, set up provincial and district committees at every court and circuit court. These committees are chaired by the local magistrate and comprises as its members the local public prosecutor, police officer in charge, prison officer in charge, social welfare officer, district administrator, non-governmental organizations and any local civic leaders such as chiefs. These committees are accountable to the National Committee.

Most of the work is done by volunteers. Indeed, most of the members of these committees are persons employed elsewhere but who devote their spare time to the implementation of the scheme.

The National Committee undertook several workshops to educate magistrates, prosecutors and the public on the principles applicable to community service orders. Initially, there was a lot of scepticism about the programme. There were also few placements. In time, however, public confidence in the scheme has grown beyond all expectation and a number of members of the public are playing an active role in the implementation of the programme. The district committees usually meet once a month to discuss any problems and identify suitable institutions for placement. Any serious problems are referred to the National Committee through the National Co-ordinator.

One of the principles stressed to judicial officers is that the option is suitable to persons who would otherwise go to prison for a period of 12 months or less. The person must, as a general rule, be a first offender and must have a fixed abode. If he has a family or is employed, this is even better. It is a requirement that community service is performed as near to the convicted person's place of residence as is possible. A recommended grid of hours of community service was also adopted and circulated.

If the convicted person fails to turn up for his community service, the court is advised and a warrant of arrest is issued. The convicted person is re-arrested and if he does not have a good explanation for his default, then he will be referred to prison to serve the suspended sentence.

A set of guidelines to assist supervisors of institutions was also prepared by the National Committee. It tells the supervisors what to do when confronted with a particular situation. Workshops were also conducted for these supervisors.

The scheme requires very few salaried employees. A consultancy carried out at the request of the European Union and Penal Reform International, who funded the 14 posts that were created to co-ordinate the scheme, recommended this scheme and in particular found that it was

suitable for countries in the Third World, where finances to set up huge probation departments as are to be found in the developed countries, are not available.

It is necessary to add that the scheme was largely successful because of a number of factors. Most importantly, there was political will and secondly the National Committee was allowed a certain degree of autonomy. There was also co-operation of all relevant Ministries at a high level. The involvement of judges of both the High Court and Supreme Court, the willingness of heads of institutions to participate in the supervision of offenders, the involvement of the public and non-governmental organizations are also factors worthy of mention.

The scheme largely operates using the services of volunteers. It is a low-cost scheme but with the potential to produce very good results. The judiciary are in the forefront. The scheme also encourages the participation of members of the public and non-governmental organizations. It is a scheme that is being replicated in a number of developing countries.

c) IS SUCH A SCHEME APPROPRIATE FOR CAMBODIA?

It is true that most of the people serving in Cambodian prisons are serious offenders who cannot benefit from such a scheme. It is also true that a number of people who are convicted do not have a fixed place of abode or proper identification papers. Most of those interviewed were agreed that a number of people with a fixed abode, some married, some employed, are unnecessarily sent to prison. Perusal of the UNTAC laws — in particular from Article 40 to Article 65 — shows that most of the penalties range from a minimum of eight days imprisonment, and even a fine — to a maximum of ten years. Most of these are cases that could properly form the subject of a community service programme. Article 21 of the draft penal code envisages sentences of one year and below for all second and first degree misdemeanours. If the draft penal code is adopted, such sentences could be disposed of by way of community service orders.

The following recommendation is accordingly made:

- I. That a seminar to explain the principles applicable to non-custodial options and to community service orders in particular be held as soon as possible.
- II. Draft legislation be prepared on the principles and procedures applicable to community service orders and for such draft legislation to be forwarded to the relevant government ministries.
- III. That a scheme along the lines of the Zimbabwean community service scheme, which is being replicated in a number of Anglo-phone and Franco-phone African countries because of its unique appeal to developing countries, be considered for possible implementation. Donor funding could be sought to kick-start the scheme.
- IV. Once legislation is promulgated, concerted action be taken to educate the public.

## 9. EARLY RELEASE PROGRAMME

It is necessary to consider this matter under six heads:

### a) RELEASE BY PRISON OFFICIALS

Most of the persons interviewed confirmed that a number of prisons have been releasing convicted prisoners. This is apparently done at the discretion of the officer in charge of the prison.

All the people interviewed including prison officials were agreed that there is no provision in the law which empowers prison officials to implement such a release.

A case was cited at Kompong Chhnang prison and also at Pursat prison where convicted persons sentenced to 10 years imprisonment were released after serving only six years. According to a previous survey, the register at Kompong Chhnang showed a total of 88 prisoners as serving but only 77 were present. The other 11, it appears, had been allowed to go back home and stay with their families. The criteria used could not be determined but it was clear these prisoners had been convicted of serious offences. It was also reported during a previous survey that at Siem Reap prison, prisoners are allowed to go away at night after bribing the prison officials.

Some of the people interviewed during the present survey were more blunt. They advised that there is a lot of corruption involving the prisons and sometimes the courts. They have heard of cases where persons had paid the prison officials and were then released.

It is clear that cases of release by prison officials are not sanctioned under the law and that they are the result of bribery. To put the matter beyond any doubt, the law could be amended to clearly provide that no prison official can *mero motu* release a prisoner, unless this is done by virtue of a warrant signed either by the judge or the King.

### b) CONDITIONAL RELEASE BY THE COURT

Article 71 of the UNTAC Criminal Law provides that convicted persons who have served half of their prison term for a misdemeanour or two-thirds of their term for a crime may be granted conditional release by the court which convicted them, if the court, having received the advice of correctional officials, feels that this release will serve to facilitate rehabilitation.

This article has not been utilized by the courts for a variety of reasons and this difficulty has been highlighted in previous surveys. A case<sup>18</sup> is cited where the director at T5 Prison sent a letter to the Ministry of Justice and to the local court on behalf of 53 inmates in March 1994 inquiring about their release under this article. The request was denied by the court on the grounds that "conditional release" under the UNTAC law has the same meaning as "amnesty" under the Constitution and as such release should

<sup>18</sup> State of Cambodian Prisons, para 80, page 38



only be directed by the Ministry of Justice. Court officials further submitted that conditional release is reserved for sick prisoners under a 1988 government directive.

A number of judges interviewed advised that the primary reason why Article 71 is not utilized is because the courts regard the provision as being inconsistent with the Constitution and therefore null and void. Others said the provision is subject to the Constitution which grants the King the power to grant an amnesty. If an application under Article 71 is received by the court, in practice it is treated as an application for an amnesty by the King. Some judges highlighted the fact that the UNTAC Criminal Law was promulgated in 1993 and the Constitution in 1994. They argue that the article has therefore been overtaken by the Constitution.

There was a diversity of opinion amongst the judges as to the circumstances under which Article 71 could be utilised. A number of judges also pointed out that with the endemic corruption in prison, the people who would benefit would be those people who pay the prison officials. At Kandal Court, the judges advised that Article 71 could be utilized to release a serving prisoner subject to certain conditions e.g., a doctor convicted of an offence arising out of his practice could be barred from private practice although he can continue to work for the Government, or a person convicted of spying can be released on condition he does not operate his garage where he would have access to a telephone. The Appeals Court judges on the other hand advised that the article could be used where a serving prisoner is ill. At Kampot, the judges advised that there are clear instructions from the Ministry of Justice contained in a circular which detail when a convicted person can be released.

The provisions of Article 71 are clear and allow of no ambiguity. Courts have the power to conditionally release persons who have served the stipulated portion of their sentence. Article 71 is in no way inconsistent with the Constitution but is in fact complementary. In practice, however, it is clear this article has caused considerable difficulty and is not being utilized. All the judges say it should be amended in order to make it clear under what circumstances such a release can be granted.

It is considered appropriate that the law be amended in order to make provision for a parole system, to which reference will be made shortly. If this suggestion is acceptable, then Article 71 should be repealed in its entirety and replaced as suggested.

#### c) EARLY RELEASE BY EXECUTIVE DECREE

Heads of Ministries have power to issue proclamations (prakas) and circulars giving instructions (Article 29 of the Law on the Organization and Functioning of the Council of Ministers dated 19 July 1994)<sup>19</sup>. At Kompong Speu, the judges advised that the procedure is for the prison chief to write to the prosecutor. The prosecutor would ask health officials to examine the prisoner to confirm whether he is suffering from a disease. If the report does confirm this, the matter is referred to the Ministry of Justice. The Ministry of

<sup>19</sup> Plunkett, Part 7, page 30

Justice can then authorise the release of the prisoner. The judges advised that this procedure takes a long time as in some cases the prison officials do not initiate the request and health officials are slow. At Kampot, the judges also advised that there are clear instructions from the Ministry on the release of prisoners. The instructions referred to would appear to be Decree 28 of the State of Cambodia. But they advised that if, for example, a convicted person is sentenced to 15 years and he completes five years of that sentence i.e. one third, his case can be raised "for mitigation" i.e. the remaining 10 years could be reduced. If the person has served 10 years of the 15-year sentence (i.e. two-thirds) then full remission can be granted. In either case, the matter would be forwarded through the Ministry of Justice to the King for his approval.

The early release scheme is based upon a decree issued under Decree 28 of the State of Cambodia which allows for a maximum reduction of up to two-thirds of a sentence.<sup>20</sup> Details of how this works in practice are vague but applications are referred through the Ministry of Justice to the King for his approval. If the King approves, the prisoner is released on parole through an order delivered in the name of the King by the Ministry of Justice to the court. It has been noted in a previous survey that the scheme is not uniformly used and some prison officials are not even aware of its existence.

Whilst such a scheme is no doubt beneficial, the difficulty lies in the fact that it is vague and unknown in certain quarters. The processing of the applications takes an unduly long period of time and in some cases the applications are not processed at all. A case of an old, partially blind, man at Kandal Prison who has served seven of his 10-year sentence was cited. Nothing has been heard of his application for release. It seems that these difficulties could be resolved by the creation of a parole board. Such a board could look at all applications and make any necessary recommendations to the Ministry of Justice.

#### d) AMNESTY AND PARDON BY THE KING

Under Article 27 of the Cambodian Constitution, the King has the right to grant partial or complete amnesty. This is a provision which is to be found in the Constitution of most countries. The King can even grant an amnesty to a person who has not yet been prosecuted. It is also the practice in a number of countries for an amnesty to be declared in respect of certain offenders on the happening of a national event e.g. commemoration of independence, election to or assumption of office by a head of state. The decision to grant an amnesty is sometimes taken purely on a political basis.

This is a power that any head of state should enjoy. There is no difficulty with the existence of Article 27. However, if the suggestion for the creation of a parole board is accepted, the law would need to be amended to make it clear that whilst the King has the power to grant a pardon, an amnesty or early release, the parole board would have the power to make recommendations to the King and the Ministry of Justice for the conditional

<sup>20</sup> The State of Cambodian Prisons, para 80, page 38

release of prisoners. These changes would need to be clearly reflected in the law.

e) RECOMMENDATIONS

It is suggested that a Parole Board, chaired by an Appeals Court Judge, be created once the necessary legislation is in place. The body, quasi-judicial in nature, would look at all releases of persons who have served at least two-thirds of their sentences or the release of any person at any time suffering from a fatal and/or communicable disease. The release in the former case would be based on good conduct in prison. The board would effectively take over the functions stipulated in Decree No. 28 dated 20 June 1988 of the State of Cambodia.

Such a body exists in a number of countries. It would be chaired by an Appeals Court judge and comprise members drawn from the prisons department, police department, social welfare, Ministry of Interior, Ministry of Justice, a government psychiatrist or doctor, representatives from one or two NGOs. Such a body would ensure impartiality in the handling of applications for conditional release. One of the fears expressed by judges was that of possible corruption on the part of prison officials. Such a body, if in doubt, would have the power to postpone matters and have additional investigations carried out.

The suggested procedure would be for applications to be forwarded from prisons through the local chief prosecutor and chief judge who should also be required to comment on the application. The application would then be forwarded to the Appeals Court for consideration by the Parole Board. Any recommendations by the Parole Board would be referred through the Ministry of Justice to the King for formal approval.

The creation of such a body is supported by the majority of the judges and senior civil servants interviewed. The general feeling, however, appears to have been that the body should not have the ultimate say in the release of prisoners. Rather the body would make recommendations, substantiated by facts and documents if necessary. The general view was that the final release should be approved by the King. The only difficulty with this suggestion is that there could be delays between the time a recommendation is made by the board to the time the King's approval is communicated to the prison. Nevertheless, if properly and carefully implemented, the scheme should be beneficial.

The law would need to be amended to introduce this scheme. The law should be drafted in such a way that the powers of the parole board vis-à-vis the King and the Ministry of Justice are clear. The procedure to be followed and the forms to be used at the different levels should be prescribed.

The board must be a quasi-judicial body and independent of executive interference. There should be a right of appeal or review against any decision made by the board to the Supreme Court.

The category of offender to benefit must also be specified. The release must be either on account of good behaviour or due to some other good cause e.g. terminal illness. It is noted that Decree 28 provides for persons who have behaved well in prison to be granted an "amnesty" after serving two-thirds of their sentence or, in case of those serving life imprisonment, after serving 15 years. The decree also provides for "mitigation of sentence" where the prisoner has served at least 1/3 of his sentence. Requests for "amnesty" are processed only twice a year and for "mitigation" once a year.

The creation of a parole board is recommended.

If the suggestion for a Parole Board to be established is accepted, convicted persons would have the right to apply for release at any time.

f) AUTOMATIC REMISSION FOR GOOD CONDUCT

A number of countries have introduced legislation which allows for automatic remission for good behaviour in prison. The whole matter is left to the discretion of the officer in charge of the prison. In some countries, remission is for one-third of the total sentence. The objective of such remission is to encourage prisoners to behave properly in prison and to be law-abiding. The programme has worked well in a number of countries and all categories of offender are eligible.

There were mixed feelings on the desirability of such a scheme. The general feeling was that if the release was left entirely to the discretion of prison officials, wrong people would be released after corrupting the prison officials. This fear, it was found, is real given the prevailing situation in Cambodian prisons and cases of improper release of serious offenders that have been witnessed previously.

There was also a suggestion that if such a scheme were to be adopted persons convicted of certain offences such as murder, should not benefit. In practice, it is felt that such a distinction is not necessary, except perhaps where it is shown that a particular offender is a real danger to society. After all people serving lengthy prison sentences have to come back to live in society on their discharge from prison. Within the legal system in Cambodia, no such differentiation has been made. Decree No 28, in fact, provides for an "amnesty" to be granted where a prisoner serving a life sentence (obviously for a felony) has served 15 years imprisonment.

The real concern is corruption amongst prison officials. It is a scheme that would benefit Cambodia in the long term but not in the short term. At this stage, it is not recommended that there should be automatic remission. Rather, all cases should go through the parole board which would then make an appropriate recommendation.



## 10. EXTENT TO WHICH PRE-TRIAL DETENTION SHOULD BE TAKEN INTO ACCOUNT

One of the recommendations made in a previous report by the Cambodia Office of the United Nations Centre for Human Rights<sup>21</sup>, was that pre-trial detention should always count as time served and never exceed the maximum sentence for the offence a detainee is charged with and in particular that each day served over the pre-trial period limited by law (at the moment under the Transitional Criminal Provisions, four months or in some cases, six months) shall count as three days served and be deducted accordingly from any sentence imposed.

The first part of the above recommendation was generally accepted by those judges who were interviewed. In fact, a number of judges pointed out that it is present practice for a convicted person to be released upon conviction if it is found that the period of his detention was equivalent to or longer than the sentence that would otherwise have been imposed. It was generally agreed that such a provision should be incorporated into the law.

The second part of the recommendation, however, did not seem to go down well with those interviewed. One or two judges did not seem to think this would be a good idea. If this recommendation were to be accepted, it would mean that a convicted person detained for say seven months in respect of an offence in respect of which he should not have been detained for longer than six months in terms of the law would be regarded as having been in detention for nine months i.e. six months in respect of the period of detention prescribed by the law and three months in respect of the period of one month detained outside the law.

The rationale for the above recommendation is understandable. This was to ensure that cases came up for trial, at the very latest, within six months. The argument is persuasive that if the period of detention served over the period allowed by the law were not to be treated as three days served, then there would be no real incentive on the authorities to comply with the maximum periods of pre-trial detention.

On the basis of the views expressed by the judges spoken to, it seems desirable that, for the moment, the law should simply provide for the time spent in pre-trial detention to be taken as time served, perhaps with the *proviso* that in cases where a detainee is kept in detention for a considerable period, the judge may treat such period of detention over and above that authorized by the law as three days for each day served. This would, it is recommended, adequately address the concerns raised by the judges.

## 11. JUVENILE JUSTICE

It is felt desirable to deal with this aspect as there is no juvenile justice system in place and juveniles are largely treated in the same way as adults except perhaps for the fact that they get half the prison sentences normally imposed on adults. There is a Youth Rehabilitation Centre created by decree. Some judges have been practising informal but useful methods of dealing with juveniles. These efforts are uncoordinated because there is no juvenile justice system in place. For the criminal justice system of Cambodia to be complete, provision must be made in the law for the manner in which

<sup>21</sup> State of Cambodian Prisons, para 24, page 59

juveniles are treated. There must be a deliberate policy not to incarcerate them unless this is absolutely necessary. The goal should be to ensure that they become law-abiding citizens. As noted in a report submitted to the British Home Office some years ago:

"Most young offenders grow out of crime as they become more mature and responsible. They need encouragement and help to become law-abiding. Even a short period of custody is quite likely to confirm them as criminals particularly as they acquire new criminal skills from more sophisticated offenders. They see themselves labelled as criminals and behave accordingly."<sup>22</sup>

Advocates of juvenile justice argue that children who fall foul of the law are often victims of harsh socio-economic circumstances and of a violent world. The courts everywhere are overloaded with juveniles charged, in the main, with minor offences, including crimes related to being homeless or crimes that are adolescent reactions to difficult socio-economic and family circumstances. The trend is to shift away from punitive and retributive practices towards rehabilitative, educational and restorative options.

There is authority in the UN Human Rights Instruments for such an approach. The United Nations Rules for the Protection of Juveniles Deprived of their Liberty provide in Articles 1 and 2 as follows:

- "1. The juvenile justice system should uphold the rights and safety and promote the physical and mental well-being of juveniles. Imprisonment should be used as a last resort.
- "2. Juveniles should only be deprived of their liberty in accordance with the principles and procedures set forth in these Rules and in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules). Deprivation of the liberty of a juvenile should be a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases."

In those cases where it is necessary to detain juveniles, there must be meaningful activities and programmes which would serve to promote and sustain their health and self-respect to foster their sense of responsibility and encourage those attitudes and skills that will assist them in developing their potential as members of society — Article 12. Detention before trial shall be avoided. All effort should be made to apply alternative measures. When preventive detention is nevertheless used, juvenile courts and investigative bodies shall give the highest priority to the most expeditious processing of such cases to ensure the shortest possible duration of detention — Article 17.

✓ The United Nations Standard Minimum Rules for the Administration of Juvenile Justice "The Beijing Rules," state as follows:

- Member States shall endeavour to develop conditions that will ensure for the juvenile a meaningful life in the community which, during that period when he or she is most susceptible to deviant behaviour, will foster a process of

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<sup>22</sup> Reference to be provided.

personal development and education that is free from crime and delinquency as is possible — Article 1.2

- Juvenile justice shall be conceived as an integral part of the national development process of each country within a comprehensive framework of social justice for all — Article 1.4
- Efforts shall be made to establish, in each national jurisdiction, a set of laws, rules and provisions specifically applicable to juvenile offenders and institutions and bodies entrusted with the functions of the administration of juvenile justice — Article 2.3
- Basic procedural safeguards such as the presumption of innocence ..... the right to confront and cross-examine witnesses.... shall be guaranteed at all stages of proceedings — Article 7.1
- Upon the apprehension of a juvenile, a judge shall without delay consider the issue of release
- Consideration should be given, whenever appropriate, to dealing with juvenile offenders without resorting to formal trial by competent authority (usually referred to as diversion) — Article 11.1
- The police, prosecution and other agencies dealing with juvenile cases should be empowered to dispose of such cases at their discretion without recourse to formal hearings — Article 11.2
- Detention during trial shall be used only as a measure of last resort — Article 13.1
- Whenever possible, detention pending trial shall be replaced by alternative measures such as close supervision, intensive care or placement with a family or in an educational setting or home — Article 13.2
- Deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or if persistence in committing other serious offences and unless there is no other appropriate response — Article 17 (c)
- Disposition measures may include care-guidance and supervision orders, probation, community service orders, financial penalties, compensation and restitution, intermediate treatment, participation in group counselling, orders concerning foster care, living community or other educational settings — Article 18
- The placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period
- The objective of training and treatment of juveniles placed in an institution is to provide care, protection, education and vocational skills, with a view to assisting them to assume socially constructive and productive roles in society — Article 26.1

- Effort should be made to provide semi-institutional arrangements such as half way houses, educational homes, day-home training centre and other appropriate arrangements that may assist juveniles in their proper integration into society.

Articles 37 and 40 of the Convention on the Rights of the Child are also pertinent.

#### a) PRESENT SITUATION IN CAMBODIA

In terms of Article 14(4) of the UNTAC Criminal Law, minors of less than 13 years of age may not be placed in pre-trial detention; minors between 13-18 years may not be detained for a period exceeding one month. The length of such period may be doubled if the juvenile is charged with a felony i.e. a crime.

In terms of Article 68 of the same law, the punishment for any accused person under 18 is half of the punishments set out in the articles.

Thus under Cambodian law, it is quite permissible to detain juveniles in custody pending trial and to sentence them to effective prison sentences. It is respectfully suggested that this approach is untenable and that a more comprehensive juvenile justice system be incorporated into the criminal law, particularly in the light of Article 31 of the Constitution which recognizes and respects human rights as stipulated in the covenants and conventions related to children's rights.

Although Articles 84, 86, 88 and 121 of the draft penal code make provision for a more sympathetic approach to juveniles and for the appointment of a judge to deal with juvenile cases, it is clear these provisions do not go far enough.

#### b) THE YOUTH REHABILITATION CENTRE

Founded by decree in 1994, the Centre is headed by a delegate Minister and two vice-chairmen. It comprises 89 staff personnel and 23 policemen. Built with the assistance of donor funding, the Centre was created to rehabilitate youthful offenders under 18 years of age who commit serious offences throughout the country. This is the only such centre in the country.

Its holding capacity is 100 but at the time of visit, there were 61 juveniles. The centre engages in activities such as poultry keeping, vegetable growing, piggery. It is reasonably well maintained but is almost always short of financial support from the government. At the time of visit, no funds had been disbursed to the centre in almost six months although some funds had been promised. The centre lacks basics such as soap, drinking water. Some inmates have problems with scabies.

Since its inception in July 1995, the centre has received 255 juveniles of whom only nine were convicted by the provincial courts. The



remainder were unconvicted juveniles, mainly from the Phnom Penh area.

All the persons interviewed are agreed that the problem is the law. The centre operates through a disciplinary committee which decides on release. The concern is that almost all the juveniles are not detained by virtue of a warrant issued by a court. They are not convicted. Some could even be innocent. On the basis of the figures provided, just over three percent of the total number of juveniles who have passed through the centre were convicted. Moreover, there is no clear criteria for the admission of juveniles. Others are arrested after committing offences and are then brought to the Centre by the police. Others were brought by their families.

The conclusion is inescapable that the centre is operating outside the laws of Cambodia. Indeed, the Administrator of the centre conceded that there is a legal problem.

Other persons interviewed were of the view that the Centre is not operating effectively. Not all convicted juveniles are accepted into the Centre. The result is that a large number of convicted juveniles remain incarcerated in the provincial prisons. Indeed, the centre is aware that there are juveniles serving in the other provincial prisons. The administrator advised that there is not much that the centre can do as it does not have the capacity to receive dangerous juveniles convicted of serious offences. He advised he has asked that a juvenile court be introduced but the request was turned down on account of lack of human resources. It is a moot point whether the centre has the means to offer meaningful rehabilitation.

#### c) THE NEED FOR A JUVENILE JUSTICE SYSTEM.

There are other features which point to the need for a more comprehensive juvenile court system. A case was cited at Kompong Cham where a 13-year old juvenile was sentenced to 21/2 years for stealing a bicycle in the company of two other juveniles (because he had stolen with two others, the charge preferred was robbery and not theft even though no violence or threats of violence had been utilized). At Kandal Prison, a 16-year old was found serving a two-year sentence for the theft of a motorbike. A woman serving an eight-year sentence was found to have a child in prison. The child is almost six-years old and was born in prison. He will be eight years by the time his mother is discharged. The boy is suffering from TB. It was also reported that the police on occasions detain juveniles in the prison compound for say a week and then release them without charge.

The Chief Judge at Takeo lamented the absence of a proper juvenile court system. He noted that juveniles often commit offences due to peer pressure and that it is not desirable to send them to prison. The result is that at Takeo all the convicted juveniles have not been incarcerated. The parents are invited to court and once they guarantee to keep close supervision on their children, the children are then

released. Indeed, at the time of the visit to the prison, it was confirmed no juvenile has been detained there for quite some time.

All the persons interviewed are agreed that a juvenile court should be established in every province. The senior judge could be assigned to handle juvenile cases say once or twice a week depending on the number of cases coming before the courts. Naturally, there will be need for some training of these judges. Most of the courts visited have between three and five judges. The view expressed by one of those interviewed that the scheme should not be implemented now on account of the shortage of judges does not appear to be entirely correct. It is clear from the visits made to some courts that not all judges are fully utilized.

#### d) RECOMMENDATIONS

The following recommendations are made:

- I. The detention of unconvicted juveniles in the Youth Rehabilitation Centre is clearly against the laws of Cambodia and is indefensible. It is respectfully submitted that only those juveniles who have gone through the criminal justice system should be detained in the centre.
- II. Pre-trial diversion for juveniles be encouraged (see Article 11 of the Beijing Rules). Such a scheme would be appropriate for juveniles who have committed offences other than felonies or crimes. The simple procedure is for the juvenile to acknowledge his wrongdoing in writing. There must be no coercion. The parent must be involved all the way. It is also beneficial to involve the victim especially in property related offences. It is not considered desirable to recommend a complicated diversion programme for Cambodia at this stage.

The purpose of a diversion programme for juveniles is to avoid a criminal record at a young age which could jeopardise their future. This option could in future be extended to cover adults who commit petty offences.

The Chief Judge at Takeo has already taken the lead. Juveniles appearing at the court are not prosecuted once the parents approach the court and undertake to closely supervise the juvenile.

It is important that juveniles who benefit from a diversion programme have a fixed abode. Once the juvenile completes the task or punishment assigned to him, the charges would be withdrawn by the prosecutor. Ideally, the juvenile should be a first offender.

The following diversionary options for juveniles are recommended:

- Pre-trial Community Service under which the juvenile would serve a certain number of hours at a non-profit making or public institution.
- Victim Offender Mediation (usually referred to as VOM) under which communication between the accused and the victim is facilitated. During mediation, facts, feelings and restitution are discussed. The objective is to work out, with the aid of a mediator, an agreement which would consist of an apology, monetary compensation and/or indirect compensation for losses suffered by the victim. The programme is perhaps the most useful as it enhances community understanding.
- Youth-Offender Programme under which juveniles are encouraged to behave within broadly acceptable social norms in order to prevent further involvement in criminal activities and encourages the involvement of parents or guardians in some group sessions.

If this recommendation is accepted, the law would need to be amended to make provision for such a scheme.

- III. Pre-trial detention of juveniles should be discouraged, except in the case of those charged with crimes or those who do not have a fixed abode. It is preferable to remand the juvenile into the custody of his parents (with their consent) or alternatively for bail to be granted. The detention of juveniles for one or two months as presently provided for in the law is undesirable and should be a measure of last resort. Where detention is deemed necessary, prison officials should ensure that the juvenile is kept separate from adult offenders.
- IV. A juvenile court system should be established at every court to deal with juveniles convicted of criminal offences. Depending on the circumstances of each case, the juvenile court could release the juvenile on probation or under the supervision of a particular individual e.g. the headmaster of the school where the juvenile attends. In serious cases, the juvenile court could, after making a comprehensive enquiry, refer the juvenile to the Youth Rehabilitation Centre. The Youth Rehabilitation Centre, as previously suggested, would need to be reorganised and should be run by persons with a social welfare background, not by armed police.

The juvenile court should also be empowered to deal with cases of abandoned children or children in need of care. The case of the six-year old boy at Kandal Prison comes to mind. It would be appropriate, in such cases, for the court to ascertain whether foster care is possible. It should be noted that there are children who have not been involved in any infractions of the law but who, through family circumstances, find themselves destitute. They, too, require the protection of the law.

Comprehensive legislation covering all the aspects dealt with above will be a necessity.

## 12. PREPARING THE OFFENDER FOR HIS RETURN TO SOCIETY

The treatment of persons serving prison sentences should emphasise not their exclusion from the community but rather their continuing to be a part of it — Article 61 of the Body of Principles for the Protection of All Persons under any form of Detention.

Before the completion of a sentence, it is desirable that the necessary steps be taken to ensure for the prisoner a gradual return to life in society. This may be achieved, depending on the case, by a pre-release regime organized in the same institution or in another appropriate institution or by release on trial under some kind of supervision which must not be entrusted to the police but should be combined with effective social aid — Article 60 (2) of the same instrument.

The competent authority should have at its disposal a wide range of post-sentencing alternatives such as halfway houses, work or education programme, various forms of parole, remission, pardon, etc. — Article 9 of the UN Standard Minimum Rules for Non-Custodial Measures.

It was not possible to go into this issue in any great detail as the concept is completely unknown in Cambodia. It cannot be doubted that the programme could be very beneficial. However, a number of people interviewed urged caution in view of the current state of affairs in Cambodia characterised by a general lack of funds on the part of the government and corruption on the part of some prison officials.

One needs to be practical. Central government is struggling to meet the running costs of its various departments. It is very unlikely that a suggestion for work programmes, etc. could be taken seriously. It is simply not a priority and is unlikely to become a priority in the near future. Such a scheme would remain unimplemented for years to come. Moreover, there are no persons trained to run such institutions.

For the moment, it is not considered desirable nor practical to introduce such schemes.

## 13. MENTAL PATIENTS

This is a topic which, strictly speaking, does not arise from the terms of reference but arose purely as a result of a reading of some of the reports previously prepared on the Cambodian prisons. It is a fact that some persons either commit offences whilst labouring under a sickness of the mind to an extent that they are not accountable in law for their actions. Others become mentally sick in prison before their trial. The way such persons are dealt with or disposed of is unclear. The general approach in most countries is not to continue to detain a person who committed an offence whilst suffering from mental illness once that person has been treated and fully recovered from his illness.

An attempt has been made in Article 82 of the draft penal code to deal with this matter but this is superficial.



This is an area which requires further enquiry. It is recommended that further research be undertaken in this context and that any recommendations should be incorporated into appropriate legislation.

## 14 SUMMARY OF RECOMMENDATIONS

The following recommendations are made:

1. **PRE-TRIAL RELEASE BY POLICE AND THE PROSECUTOR:** The law should be amended to make it clear in what circumstances the police or the prosecutor can release an accused person and a set of established criteria for such discharge should be worked out between judges, prosecutors and the police.
2. **BAIL.** The law on bail urgently requires clarification. The criteria to be used in granting bail should be clearly spelt out. Juveniles should only be detained if they face felony allegations or if they do not have a fixed abode or parents into whose custody they could be remanded.
3. **FINES.** The courts should be encouraged to make greater use of fines. The means of the accused should be taken into account. Where appropriate and necessary, time to pay should be given. This requirement should be incorporated into the law.
4. **COMPENSATION.** The law should be amended to empower courts to regard as a mitigating feature partial or full restitution and for such restitution to be taken into account in assessing an appropriate penalty. The law should also provide for the suspension of prison sentences on condition the convicted person pays restitution.
5. **COMMUNITY SERVICE.** A community service programme should be introduced as soon as possible. A seminar should be conducted involving all key players in the criminal justice system so that all may understand the advantages of this option. Draft legislation to introduce a scheme of community service along the lines of the Zimbabwean scheme should also be considered.
6. **EARLY RELEASE BY PRISON OFFICIALS.** It should be made clear in the law that prison officials do not have powers of release except when the convicted person has served his sentence according to law.
7. **EARLY RELEASE BY THE PAROLE BOARD.** It is recommended that the law be amended to introduce a parole board empowered to make recommendations for early release. The body should be chaired by an appeals court judge. Approval for release should be by the King, through the Ministry of Justice.
8. **THE KING'S POWER TO GRANT AMNESTY OR A PARDON.** It is recommended that this should remain.
9. **PRE-TRIAL DETENTION.** It is recommended that the law be amended to provide that any time spent in pre-trial detention be taken as time served,

with the proviso that where the detention over and above the period allowed by the law is considerable, the judge may treat each day served as equivalent to three days served.

10. JUVENILE JUSTICE. It is recommended that a more comprehensive juvenile justice system be introduced into the criminal justice system and the law amended accordingly. The detention of unconvicted juveniles at the Youth Rehabilitation Centre contravenes Cambodian laws and should be stopped. Pre-trial detention of juveniles should be avoided except as a measure of last resort. A pre-trial diversion programme for juveniles should be introduced. Juvenile courts to deal with juvenile cases and possibly abandoned children or children in need of care should also be introduced.
11. MENTAL PATIENTS. It is recommended that further enquiry be carried out into the disposition of such cases.
12. TRAINING WORKSHOP. It is recommended that a training workshop, involving all key players involved in the administration of justice, be conducted to discuss the findings made in this report and in particular the need to introduce new alternatives such as community service.

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