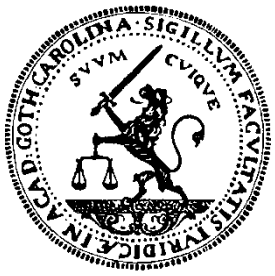

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Pre-Trial Detention and Its Alternatives in Cambodia: A Critical Study of National Practice, Criminal Procedure Code, and Its Adherence to International Human Rights Standards

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Table of Contents

Executive Summary 1

Preface 4

Abbreviation 6

Terms Used in This Thesis 8

Chapter 1: Introduction 9

1.1 Background 9

1.2 Purpose and Research Questions 13

1.3 Research Materials and Methods 14

1.3.1. Research materials 14

1.3.2. Interviews 16

1.4 Delimitations 17

1.5 Theory 18

1.6 Structure of the Thesis 21

Chapter 2: International Human Rights Standards 23

2.1 Grounds of Police Custody 26

2.2 Length of Police Custody 28

2.3 Grounds of Pre-Trial Detention 30

2.3.1The Risk of Absconding 31

2.3.2 The Risk of Obstructing the Investigation 32

2.3.3 The Need to Prevent Repetition of the Crime 32

2.3.4 The Need to Preserve the Public Order 33

2.4 Length of Pre-Trial Detention 33

Chapter 3: Legal Instruments in Cambodia 36

3.1 The Description of the Procedure for Filing Criminal Actions to the Court of First Instance in Cambodia 36

3.1.1 Preliminary Investigation by the Police and Prosecutor 37

3.1.2 Judicial Investigation by the Investigating Judge 38

3.1.3 Trial 38

3.2 Grounds of Police Custody 39

3.3 Length of Police Custody under Cambodian law 40

3.3.1 Length of Police Custody for Adults 40
3.3.2 Length of Police Custody for Minors 41
3.4 Grounds of Pre-Trial Detention under Cambodian Law 42
3.5 Length of Pre-Trial Detention under Cambodian Law 42
3.5.1 Length of Pre-Trial Detention for Felony 43
3.5.2 Length of Pre-Trial Detention for Misdemeanor 43
Chapter 4: Practice and Analysis of Pre-Trial Detention in Cambodia 45
4.1 Analysis of the Legal Context 46
4.2 Analysis of Implementation of Pre-Trial Detention in Cambodia 48
4.2.1 Pre-Trial Detention Is a Common Practice for Flagrante Delicto Cases 48
4.2.2 Cambodia's Anti-Drug Campaign 52
4.2.3 Length of Pre-Trial Detention in Practice 54
4.2.4 Court Order Form Which the Investigating Judges Have Used for the Decision of Pre-Trial Detention 56
Chapter 5: Existing Alternatives to Pre-Trial Detention in Cambodia and Recommended Alternatives 60
5.1 Existing Alternatives to Pre-Trial Detention in Cambodia and Its Application 62
5.2 Recommended Alternatives 64
5.2.1 Mexico's Precautionary Measure Unit 64
5.2.2 Electronic Monitoring Bracelet (EMB) 67
5.3 Concluding Remarks 71
Bibliography 74
Appendix I 83
Appendix II 84
Appendix III 87

Executive Summary

The unnecessary and disproportionate use of pre-trial detention is a global issue that affects developed and developing countries alike.[1] According to World Prison Brief, Cambodia has ranked 12th (among 217 countries) making it become a country with one of the highest percentages of pre-trial detainees: 71.8 percent to be exact.[2] The excessive and unnecessary use of pre-trial detention in the Kingdom of Cambodia continues to be one of the major concerns in Cambodian judiciary system. Such excessive and inappropriate use of pre-trial detention has resulted in many consequences including chaotic, overcrowded and often times violent detention centers and the breakdown of family ties[3] often leaving the accused and their dependents in poverty.

Since there is a very high rate of pre-trial detainees in Cambodia, this paper is designed to examine and review the current practice of Cambodian courts and its regulations concerning pre-trial detention in order to understand when and why such detentions take place. This paper, in addition, will scrutinize whether Cambodian courts' practice and its relevant regulations on pre-trial detention are compatible with the standards of relevant international human rights instruments which Cambodia has ratified. Last but not least, this paper further explores and examine how the existing alternatives to pre-trial detention in Cambodia are implemented.

The author found that the provisions governing the pre-trial detention and police custody in Criminal Procedural Code of Cambodia (CPCC) almost fully conforms with the international human rights standards except provisions on the determination of the length of the police custody and pre-trial detention. In this paper, the key finding indicates that the primary problem with the pre-trial detention

[1] Open Society Foundations and University of Bristol, "Pretrial Detention and Torture: Why Pretrial Detainees Face the Greatest Risk" 2011, Page 11

[2] World Prison Brief, "Highest to Lowest-Pre-trial detainees/remand prisoners", accessed on 13 March 2021 via https://www.prisonstudies.org/highest-to-lowest/pre-trial-detainees?field_region_taxonomy_tid=All

[3] Open Society Foundations, "The Socioeconomic Impact of Pre-trial Detention", 2011, Page 20

in Cambodia does not lie with the laws but the practice and the application of the laws.

In practice, the court in Cambodia has focused almost entirely on imprisonment of the accused person and the decision to place the accused person in pre-trial detention tends to be automatic in *flagrante delicto* case with less consideration on personal circumstances and other surrounding factors. Since pre-trial detention is a common practice in Cambodia, any deviation from the practice may require justification from the judges before many actors (prosecutor, president of the court or even the police) and might be allegedly perceived that such decision is involved with corruption. As any deviation from the practice could adversely impact on judge, it is more convenient for him/her to just place the accused in pre-trial detention as requested by the prosecutor despite the availability of non-custodial measures. Apart from this, the author found that there are some judges in Cambodia who merely tick off boxes in the Court Order Form for the decision of pre-trial detention without providing substantial grounds to justify their decision in the Order.

This current practice suggests that some judges in Cambodia might not have factual nor concrete evidence to justify their decision and customarily utilizes pre-trial detention as the general rule and routine rather than a measure of last resort. Such practices are not compatible with the International Covenant on Civil and Political Rights (ICCPR) to which Cambodia is a party.

Regarding the existing alternatives to pre-trial detention in Cambodia, the author found that the existing alternatives are not effectively implemented due to the lack of mechanisms for overseeing and monitoring the compliance of the accused with the imposed obligations, as well as the lack of cooperation with the local authorities involved. In this paper, the author has also suggested two new suitable alternatives from Mexico and Belgium and discuss the possibility of integrating these alternatives into Cambodian law.

Finally, the author is of the opinion that Cambodia should pay more attention to ensure that the use of alternatives is effectively implemented in judicial process and

the pre-trial detention is used as the last resort. Once effective use of alternatives and the use of pre-trial detention as the measure of last resort are well implemented, the arbitrary detentions and the rate of pre-trial detention in Cambodia will be reduced accordingly.

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Key Words:

Pre-trial detention, Police custody, Duration of pre-trial detention, Duration of police custody, Grounds for pre-trial detention, Grounds for police custody, Alternatives to pre-trial detention, Cambodia, Practice, International Human Rights Standards, Criminal Procedure Code of Cambodia, ICCPR, Electronic Monitoring Bracelet, Non-custodial measures, Petty offense, Misdemeanor, Felony.

Preface

First of all, I would like to take this opportunity to express my gratitude to the Raoul Wallenberg Institute of Human Rights and Humanitarian Law (RWI) for providing me with this precious opportunity to study Master of Laws in International Human Rights Law at Lund University. I am so thankful to all its staffs for their endless support during my academic journey in Sweden. It has been an amazing journey, full of new experiences, knowledge, and friendships.

I would like to extend my gratefulness to my supervisor, the remarkable scholar, Dr. Karol Nowak for his inspiration, support and advice during the process of this thesis writing. This thesis would not have come into existence smoothly without him. Thank you for always finding time to talk to me whenever I need to. Though we could not meet in person due to the Covid 19 situation, it was a pleasure for me to discuss the topic and find new solutions via Zoom with you.

I am also grateful to the legal practitioners for taking their precious time to participate in the interviews and for providing me with great inputs regarding the practice of pre-trial detention in Cambodia. Many great thanks to all of my dearest friends, who took their valuable time to proofread my paper and provide insightful feedback and comments.

My greatest thank is extended to my brother and sisters, whom I am deeply indebted to, for their relentless support, encouragement and advice. You are all amazing.

Last but not least, I would like to express my utmost gratitude and profound thank to my parents who work restlessly for the family. I have been very blessed to have you both as my parents. I really appreciate your effort, care and hard work for raising me to be who I am today. Your relentless support, love and belief are the greatest motivation for me to work hard and to accomplish all of my academic achievements. All these accomplishments would not be possible without you. Your contribution in my life is tremendous. I promise I will work harder to make you proud as always.

អារម្ភកថា

ជាបឋម ខ្ញុំសូមឆ្លៀតឱកាសនេះដើម្បីថ្លែងអំណរគុណដល់វិទ្យាស្ថាន Raoul Wallenberg (RWI) នៃសិទ្ធិមនុស្សនិងនីតិមនុស្សធម៌ ដែលបានផ្តល់ឱ្យខ្ញុំនូវឱកាសដ៏មានតម្លៃនេះដើម្បីបន្តការសិក្សា អនុបណ្ឌិតច្បាប់ស្តីពីសិទ្ធិមនុស្សអន្តរជាតិ នៅសាកលវិទ្យាល័យលុន (Lund University) ។ ខ្ញុំសូមថ្លែងអំណរគុណដល់បុគ្គលិកទាំងអស់នៅក្នុងស្ថាប័ន ដែលបានគាំទ្រនិងជួយជ្រោមជ្រែងឥតឈប់ឈរ ក្នុងដំណើរសិក្សារបស់ខ្ញុំនៅប្រទេសស៊ុយអែត។ វាជាដំណើរដ៏អស្ចារ្យមួយ ដែលពោរ-ពេញទៅដោយបទពិសោធន៍ ចំណេះដឹង និងមិត្តភាព។

ខ្ញុំសូមថ្លែងអំណរគុណដល់សាស្ត្រាចារ្យណែនាំរបស់ខ្ញុំ លោកបណ្ឌិត Karol Nowak សម្រាប់ការលើកទឹកចិត្ត ការគាំទ្រនិងជំនួយរបស់លោកក្នុងអំឡុងពេលនៃការសរសេរនិក្ខេបបទនេះ ។ ដោយសារតែគាត់ ទើបដំណើរការនៃការសរសេរនិក្ខេបបទនេះ ប្រព្រឹត្តទៅដោយរលូន ។ អរគុណដែលតែងតែចំណាយពេលវេលាដើម្បីផ្តល់អនុសាសន៍ឲ្យខ្ញុំ គ្រប់ពេលវេលាដែលខ្ញុំបានស្នើរសុំ។ ទោះបីជាពួកយើង មិនអាចជួបដោយផ្ទាល់ ដោយសារតែស្ថានភាព Covid 19 ក៏ដោយ តែខ្ញុំមានសេចក្តីរីករាយណាស់ ដែលខ្ញុំនៅតែអាចពិភាក្សាពីនិក្ខេបបទនេះ និងស្វែងរកដំណោះស្រាយថ្មីៗតាមរយៈ Zoom ជាមួយលោក។

ខ្ញុំក៏សូមថ្លែងអំណរគុណដល់អ្នកអនុវត្តច្បាប់ទាំងអស់ ដែលបានចំណាយពេលវេលាដ៏មានតម្លៃដើម្បីចូលរួមក្នុងកិច្ច-សម្ភាសន៍ និងផ្តល់ឱ្យខ្ញុំនូវចំណេះដឹងដ៏ធំធេង ទាក់ទងនឹងការអនុវត្តជាក់ស្តែងនៃការឃុំខ្លួនបណ្តោះអាសន្ននៅប្រទេសកម្ពុជា។ សូមថ្លែងអំណរគុណយ៉ាងជ្រាលជ្រៅចំពោះមិត្តភក្តិជាទីស្រឡាញ់របស់ខ្ញុំទាំងអស់ ដែលបានចំណាយពេលវេលាដ៏មានតម្លៃ ក្នុងការផ្តល់យោបល់ល្អៗ មកលើកិច្ចការរបស់ខ្ញុំ ។

ខ្ញុំសូមថ្លែងអំណរគុណយ៉ាងជ្រាលជ្រៅចំពោះបងប្រុសបងស្រីរបស់ខ្ញុំ ចំពោះការគាំទ្រ ការលើកទឹកចិត្ត និងការផ្តល់យោបល់ជាច្រើនរបស់លោក។

ជាចុងក្រោយខ្ញុំសូមថ្លែងអំណរគុណយ៉ាងជ្រាលជ្រៅបំផុត ចំពោះឪពុកម្តាយរបស់ខ្ញុំ ដែលបានខិតខំប្រឹងប្រែង ដើម្បីគ្រួសារ។ ខ្ញុំមានសំណាងណាស់ ដែលមានអ្នកទាំងពីរជាឪពុកម្តាយរបស់ខ្ញុំ។ ខ្ញុំពិតជាមានមោទនភាពចំពោះការប្រឹងប្រែង ការយកចិត្តទុកដាក់ និងការខិតខំបីបាច់ថែរក្សាចិញ្ចឹមខ្ញុំ ឱ្យមានសម្ភាពដូចសព្វថ្ងៃនេះ។ ការគាំទ្រឥតឈប់ឈរ សេចក្តីស្រឡាញ់ និងជំនឿចិត្តរបស់លោក គឺជាកម្លាំងចិត្តដ៏ធំធេងបំផុតសម្រាប់ខ្ញុំ ក្នុងការខិតខំដើម្បីសម្រេចនូវរាល់សមិទ្ធិផល នៃការសិក្សារបស់ខ្ញុំ។ គ្រប់សមិទ្ធិផលទាំងអស់នេះមិនអាចបានជោគជ័យទេ បើគ្មានលោក។ ការចូលរួមចំណែករបស់លោកទាំងពីរនៅក្នុងជីវិតរបស់ខ្ញុំ គឺធំធេងខ្លាំងណាស់។ ខ្ញុំសន្យាថា ខ្ញុំនឹងខិតខំបន្ថែមទៀត ដើម្បីឱ្យលោកទាំងពីមានមោទនភាពលើសពីនេះ។

Abbreviation

CCC	Criminal Code of Cambodia
CPCC	Criminal Procedural Code of Cambodia
EMB	Electronic Monitoring Bracelet
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
GPS	Global Positioning System
The Committee	United Nations Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
MoJ	Ministry of Justice
RF	Radio Frequency
RGC	Royal Government of Cambodia
OHCHR	The Office of the United Nations High Commissioner for Human Rights
Nelson Mandela Rules	United Nations Standard Minimum Rules for the Treatment of Prisoners
NGO	Non-Governmental Organization
UN	United Nations
UNODC	United Nations Office on Drugs and Crime
The Tokyo Rules	United Nations Standard Minimum Rules for Non-Custodial Measures

UDHR	Universal Declaration of Human Rights
WGAD	Working Group on Arbitrary Detention of the United Nations
WPB	World Prison Brief

Terms Used in This Thesis

The terms defined here based mainly on Cambodian laws and context

Accused person refers to the individual who is accused of an offence and sent to the investigating or trial judge by the Prosecutor.

Arrest refers to the short-term restriction of an individual's liberty which may last up to 48 or 72 hours, imposed by the prosecutors at their discretion.

Felony refers to the offence carrying a sentence of life imprisonment or imprisonment for more than five years but less than or equal to thirty years.[4]

Misdemeanor refers to the offence carrying a sentence of imprisonment for more than six days and less than or equal to five years.[5]

Non-custodial measure, in this paper, refers to the decision made by the investigating judge to submit the accused of an offence to certain obligations and conditions that do not include imprisonment.[6] This term is used interchangeably with "**alternative to pre-trial detention**."

Petty offence refers to the offence carrying a penalty of a fine or imprisonment for a period of six days or less.[7]

Pre-trial detention refers to the detention of an accused person in a criminal case before the trial takes place.

Pre-trial detainee refers to the accused who is placed in pre-trial detention by the investigating judge.

[4] Criminal Code of Cambodia 2009, Article 46
[5] Ibid, Article 47
[6] Human Rights in the Administration of Justic: "A manual on Human Rights for Judges, Prosecutors and Lawyers: Chapter 9 The Use of Non-custodial Measures in the Administration of Justice", Page 374
Criminal Code of Cambodia 2009, Article 48

Chapter 1: Introduction

1.1 Background

Despite the fact that there is a global commitment to using the pre-trial detention as a measure of the last resort as stipulated in UN Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules), the rate of pre-trial detention has dramatically increased in both developing and developed countries alike. On any given day, there are around three million people in pre-trial imprisonment worldwide.[8] Asia's total pre-trial detainees have increased by over 34% since the year of 2000, where it: doubled in the Philippines, tripled in Indonesia and increased by a six-fold in Cambodia.[9] Such tremendous rise in the number of pre-trial detainees are attributable mainly to an unnecessary and excessive use of pre-trial detention, which results in many consequences for individuals: losing their freedom, suffering physical and mental damages, being asked to pay the bribe to secure their release or better condition of their detention, losing their jobs and income, and separating them from their family and community ties.[10]

The excessive use and prolongation of pre-trial detention are caused by many factors including but not limited to: the lack of judges and prosecutors, too few alternatives to pre-trial detention, inadequate legal aid funding and lack of advanced technology to expedite investigation.[11] In addition, another cause of this excessive use of pre-trial detention is the judicial culture and practice, which the judges were perceived as being too ready to make assumptions about the risks of releasing the accused without having substantial evidence, too quick to take the prosecutors' side, unwilling to listen to defense arguments about the weak evidence or ways to

[8] Institute for Crime & Justice Policy Research (Birkbeck, University of London), Catherine Heard and Helen Fair, "Pre-Trial Detention and Its Over-Use (Evidence form Ten Countries)", November 2019, page 2
[9] Ibid
[10] Open Society Foundations, "The Socioeconomic Impact of Pre-trial Detention", 2011, Page 5
[11] Institute for Crime & Justice Policy Research (Birkbeck, University of London), Catherine Heard and Helen Fair, "Pre-Trial Detention and Its Over-Use (Evidence form Ten Countries)", November 2019, Page VIII

mitigate the risks, and reluctant to give concrete and evidence-based reasons for their decision to place the accused in pre-trial detention.[12]

A very common argument against pre-trial detention is that it conflicts with the right to liberty and the principle of presumption of innocence.[13] An individual who has merely been accused of the alleged crimes not yet found guilty but has already been detained and suffered from severe personal pressure for weeks, months and even years. Pre-trial detention is a severe measure with serious negative consequences for the individual, thus, the court must have strong grounds prescribed by law to justify the need for such detention before imposing the detention on the accused. Vague grounds and excessive uses of pre-trial detention undermine the right of accused to liberty and presumption of innocence.

Pre-trial detainees are particularly at risk of being tortured during the investigating stage as it is perceived that the form of torture or other ill-treatments is the easiest and fastest way to acquire the confession or information from detainees.[14] The practice of torture during the investigation is particularly caused by many reasons including: lack of access to legal aid, and poorly trained and paid law enforcement officials who are unable to access the modern criminal investigation tools.[15]

The unnecessary and disproportionate use of pre-trial detention is one of the global issues that affects developed and developing countries alike.[16] The average pre-trial detention duration and the percentage of all pre-trial detainees are relatively low in the developed countries while they are relatively high in the developing countries.[17] The following are countries with some of the highest rates of detainees awaiting trial: Libya (where 90 percent of all prisoners are awaiting trial), Bangladesh (81.3

[12]Institute for Crime & Justice Policy Research (Birkbeck, University of London), Catherine Heard and Helen Fair, "Pre-Trial Detention and Its Over-Use (Evidence form Ten Countries)", November 2019, Page VII

[13] Oxford University Press, Richard L. Lippke "Taming the Presumption of Innocence" 2016, Page 166

[14] Open Society Foundations and University of Bristol, "Pretrial Detention and Torture: Why Pretrial Detainees Face the Greatest Risk" 2011, Page 11

[15] Ibid

[16] Ibid

[17] Ibid

percent), Benin (75.8 percent), Haiti (75 percent), Nigeria (73.8 percent), Congo (73 percent) and Cambodia (71.9 percent).[18]

Cambodia is a party to many international human rights instruments including International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR). The Constitution of Cambodia 1993 also recognizes and respects human rights as stated in the UN Charter, the Universal Declaration of Human Rights (UDHR) and all treaties and conventions related to human rights, women's rights and children's right.[19] Therefore, Cambodia has obligation to ensure that the right to liberty and presumption of innocence as stipulated in all these international human rights instruments are properly respected.

Over the last 2 decades, the Royal Government of Cambodia (RGC) has put tremendous effort to improve criminal justice in the country. There are many positive developments seen in both substantive and procedural rules.[20] The remarkable development in respect of criminal justice in Cambodia is the adoption of the new Criminal Procedural Code of Cambodia (CPCC), which came into force in 2007.[21] This CPCC is regarded as the most detailed criminal procedure in the history of Cambodia, which stipulates many important areas including the rights of the accused person, the detail of interrogation and investigating stage, a complaint challenging the composition of trial judges, the role and power of judicial police, the detail of court structure and how the court works.[22]

In spite of the government's effort to improve the criminal justice system in the country, the rate of pre-trial detention in Cambodia is still very high, with 71.8% of

[18] World Prison Brief, "Highest to Lowest-Pre-trial detainees/remand prisoners", accessed on 26 January 2021 via https://www.prisonstudies.org/highest-to-lowest/pre-trial-detainees?field_region_taxonomy_tid=All
[19] The Constitution of Cambodia 1993, Article 31
[20] Konrad Adenauer Stiftung, Hor Peng, Kong Phallack, and Jorg Menzel, "Introduction to Cambodian Law", 2012, Page 230
[21] Criminal Procedural Code of Cambodia (CPCC) 2007, Article 612 and page 190 in Original Khmer Version
[22] Konrad Adenauer Stiftung, Hor Peng, Kong Phallack, and Jorg Menzel, "Introduction to Cambodian Law", 2012, Page 230

detainees still awaiting trial.[23] The increase in the number of inmates, the severe overcrowding, disproportionate and unjust detention and extensive detention of accused persons in Cambodia is partly due to the systemic failures of implementation of pre-trial detention.[24] In early 2017, the RGC initiated the six months campaign against drugs, which at least 55,770 people were arrested on suspicion of using or selling drugs between January 2017 and March 2020.[25] The data of RGC indicates that, as of April 2020, 56.9% of all prisoners in Cambodian prisons are held on drug-related charges.[26] The number of prisoners in Cambodia has dramatically increased since the campaign started, from 21,900 at the end of 2016 to over 38,990 in March 2020 and the majority of whom are awaiting trial.[27]

In every country including Cambodia, people can be arrested and detained on suspicion that they have committed a crime and sometimes these people are imprisoned for weeks, months and years before the judgements on their cases are passed.[28] Unfortunately, in some cases in Cambodia, by the time the detainee's judgements have been passed and the sentences are finally handed down, the charged persons have already been detained for longer than the sentencing period of the crime they were charged with.[29]

This paper, therefore, is designed to examine and review the current practice of Cambodian courts and its regulations concerning pre-trial detention in order to understand when and why the detention takes place. This paper, in addition, will scrutinize whether Cambodian courts' practice and its relevant regulations on pre-trial detention are compatible with the standards of relevant international human

[23] World Prison Brief, "Cambodia", accessed on 26 January 2021 via https://www.prisonstudies.org/country/cambodia
[24] Licadho, Cambodian League for the Promotion and Defense of Human Rights, "Time for Bail: Ending Needless Mass Detention", October 2018, Page 1
[25] AMNESTY INTERNATIONAL and LICADHO, "Arbitrary Detention Related To Drug Policies In Cambodia: Joint Submission By Amnesty International And The Cambodian League For The Promotion And Defense Of Human Rights (LICADHO)", June 2020, Page 5
[26] Ibid
[27] Ibid
[28] United Nation, Center for Human Rights, "Human Rights and Pre-trial Detention (A Handbook of International Standards relating to Pre-trial Detention", 1994, Page III
[29] Licadho, Cambodian League for the Promotion and Defense of Human Rights, "Time for Bail: Ending Needless Mass Detention", October 2018, Page 1

rights instruments which Cambodia has ratified. Last but not least, this paper also has an objective to discover and examine whether the existing alternatives to pre-trial detention in Cambodia are well implemented. If not, the author will propose new alternatives that may suit best the Cambodian context.

1.2 Purpose and Research Questions

The excessive and unnecessary use of pre-trial detention in the Kingdom of Cambodia continues to be one of the major concerns in the Cambodian judiciary system. Such excessive and inappropriate use of pre-trial detention has resulted in many consequences including chaotic, overcrowded and violent environments for detainees and family breakdown in a society[30] where the majority of Cambodian population live in poverty and depend on family ties. This has also undermined the right of the accused to liberty and to be presumed innocence, guaranteed by both international and domestic laws.

As a party to ICCPR and many other core human rights instruments, Cambodia has the obligation to ensure that the right to liberty and presumption of innocence are fully respected. Failures to implement alternatives to pre-trial detention and the inconsistency of the use of pre-trial detention remarkably affect individuals' right to liberty and presumption of innocence. This paper, therefore, aims to answer the following questions:

1). whether Cambodian practice and regulations of pre-trial detention are compatible with international human rights standards;

2). whether the existing alternatives to pre-trial detention in Cambodia are effectively implemented, and

3). whether there are other alternatives to pre-trial detention from other countries which can be incorporated into Cambodian laws to suit Cambodian context.

[30] Open Society Foundations, "The Socioeconomic Impact of Pre-trial Detention", 2011, Page 20

To answer these questions, the author has examined the international human rights standards, the Cambodian regulations and its practice on pre-trial detention in order to provide an insight on flaws of implementation. With the information at hand, the author is going to analyze and scrutinize whether or not the existing alternatives to pre-trial detention in Cambodia are frequently used by investigating judges. The author also aims to provide an overview of the implementation of the pre-trial detention in the court of first instance in Cambodia and to discover preferable alternatives to pre-trial detention from other countries in order to recommend them to be incorporated in Cambodian law.

1.3 Research Materials and Methods

1.3.1. Research materials

The author has used two methods (the legal dogmatic and qualitative research methods) to answer the aforementioned research questions since these methods provide the author more flexibility, deeper insight and better analysis of the materials on the international human rights standards, Cambodian regulations and its application of pre-trial detention so that the author could acquire the full picture concerning the pre-trial detention to reflect whether or not Cambodian regulations and its practice in this respect are compatible with the international human rights standards. The "legal dogmatic method" refers to the study of the normative legal materials and the interpretation of laws such as legislation, case law, and legal doctrine[31] while the "qualitative research method" refers to the use of qualitative data such as interviews, respondent observation and documents in order to understand the "how" and "why" a particular social phenomenon operates as it does in the particular context.[32]

In the second chapter of this paper, the author has explored the concepts of the existing international legal standards concerning pre-trial detention and focus on the international legal instruments governing pre-trial detention including

[31] South Ural State University, Alexander and Alexey, "Formal-Dogmatic Approach in Legal Science in Present Condition", 2018, Page 968

[32] MPRA, Mohajan, Haradhan "Qualitative Research Methodology in Social Science and Related Subject", December 2018, Page 2

reasonable length of police custody and pre-trial detention, and legal grounds of pre-trial detention and police custody. The author, therefore, has examined these international standards through a wide range of sources including treaties, conventions, case law from the European Court of Human Rights (ECtHR), Commentaries on these relevant conventions, Academic Journals, Articles, General Comments of the UN, documents from the international human rights body, and other documents from the credible authors in this field. The author has reviewed and used different sources in order to create a compact picture of the international standards on the pre-trial detention. Some of them do not impact Cambodia directly but it is fair to say that they have some kinds of indirect impact since they are the international consensus or main views of the standards. Most of the literature used in this chapter have been collected from the RWI library based in Lund and various internet sources.

The author, in the third chapter, has provided the existing Cambodian laws governing pre-trial detention in Cambodia which include police custody, existing alternatives to pre-trial detention, grounds and length of pre-trial detention applying to minors and adults. To acquire insight into Cambodian laws, the author has examined a wide range of national legal instruments, including, but not limited to, the Constitution of Cambodia, CPCC, Criminal Code of Cambodia (CCC), annotated Cambodian Code of Criminal Procedure, Prakas (Circular or Ministry-level decree) and other related laws. All these legislative documents are mainly collected from internet sources.

The fourth chapter is designed to provide the insight into the implementation of pre-trial detention including the challenges that the courts of the first instance are facing. The author has also figured out whether the legislations and practice on pre-trial detention in Cambodia are in conformity with the international human rights standards. To achieve this, the author has reviewed the reports from national and international NGOs, news articles and independent media regarding the use of the pre-trial detention in Cambodia. In furtherance of the objectives of this paper, the author has also interviewed 8 legal practitioners including judges and lawyers, who

have extensive experience in this field, to attain the full picture of the practical use of pre-trial detention in Cambodia.

1.3.2. Interviews

The author has designed several questions (attached in **Appendix I)** as a commencement of the interview; however, these prepared questions are not sent to the interviewees in advance. The designed questions are asked spontaneously to ensure that the respondents answer openheartedly, truthfully and willingly rather than giving the prepared answers which may not reflect the reality. Before the interview starts, the respondents have been informed beforehand about the purpose of the interview, which is to seek deep insight into the practice of pre-trial detention in Cambodia.

As amidst pandemic of Covid-19 at the time of writing and because the respondents are in Cambodia while the author is in Sweden, the interviews were conducted via online calls, so the author was not able to fully observe the gesture, tone and the body languages of the respondents. The interview with each respondent took at least 30 minutes and was conducted in Cambodian language (Khmer).

The respondents have been selected based on the willingness, possibility of participation and experiences with regard to implementation of the pre-trial detention in Cambodia. They all are professional legal practitioners (6 judges and 2 lawyers) from different courts based on different geographical locations, who have practiced in their respective fields for many years. Since the provided information is quite sensitive, the author decided not to reveal their real names and addresses them herein as “the respondents” instead. Upon receiving the information from the respondents via the interviews, the author has presented and analyzed this obtained information thereafter. Further, the author also analyzed various reports from national and international NGO on this particular topic in order to provide the conclusion on whether the practice and Cambodian legal instruments on pre-trial detention are compatible with the international human rights standards.

1.4 Delimitations

This paper is designed to answer whether Cambodian legal instruments and practice of pre-trial detention are in conformity with international human rights standards, hence, this study concentrates on Cambodian legal instruments, its practice and standards of pre-trial detention in the international human rights instruments to which Cambodia is a party. The author, therefore, introduces these standards, touches upon the existing domestic legal instruments related to pre-trial detention and makes a focused analysis solely of the context of Cambodia. As pre-trial detention is related to many rights, the author limits to work on rights to liberty and presumption of innocence (hereinafter "the related rights to pre-trial detention") under the scope of pre-trial detention only (detention upon final conviction is not covered under this paper).

Since the treatment, application, conditions and requirements of pre-trial detention apply differently to minors and adults, the author discusses mainly on the application in the case of adults. Under CPCC, the pre-trial detention in Cambodia is done during the investigation stage under the sole authority of the investigating judge. Therefore, the author does not focus much on the arrest (herein referred to detention made by the police and prosecutor) during police custody which is under the authority of the police and prosecutor. However, an overview of this stage is briefly given.

Cambodia is the member of ASEAN and the party to ICCPR and many other international human rights instruments, thus, the author is delimited to give closer look at the standards of the related rights to pre-trial detention as set in those ratified conventions. The author does not touch upon the ASEAN Human Rights Declaration since this instrument merely reaffirms its commitment to international human rights instruments to which Cambodia is a party. For the merit of interpretation, the author, due to the lack of commentaries of the related rights to pre-trial detention, uses the case laws from European Court of Human Rights (ECtHR) as the foundation to understand and elaborate the concept of these related rights.

In addition, this paper also explores other suitable alternatives to pre-trial detention in many countries including in Belgium and in Mexico that are unavailable in Cambodia, and discuss whether these alternatives are suitable in the context of Cambodia. The author does not go into detail on the exact mechanisms needed to incorporate the suggested alternatives in Cambodia and does not touch upon the expenses and the cost of the suggested alternatives. The author does only discuss why these alternatives should be incorporated in Cambodia.

As the majority of detainees in Cambodia are held in pre-trial detention (71.8 percent)[33], this study is also designed to explore why this high alarming rate of pre-trial detention in Cambodia comes into existence. This study is set to analyze only root causes of this high rate of pre-trial detention prior to the trial of the court of first instance, thus, the detention after the imposed conviction is not included in this paper.

Owing to the limitation of time and the availability of research resources, this paper is intended to serve academic purposes only. It aims to highlight the structural problems regarding the implementation of the use of pre-trial detention in Cambodia and to discover if there are any incompatibilities between Cambodian laws, practice and international human rights standards in respect of pre-trial detention. This paper is neither a specialized report that provides complete illustration of the issues nor a paper that aims to set out the solutions to the issues found in comprehensive detail.

1.5 Theory

Soon after its establishment, the United Nations (UN) began to establish international norms for the protection of the accused persons. Two of the foundational international instruments on human rights are known as Universal Declaration of Human Rights (UDHR) and ICCPR, which guarantee persons' right to be free from arbitrary arrest, right to a fair trial and the presumption of innocence

[33] World Prison Brief, "Highest to Lowest-Pre-trial detainees/remand prisoners", accessed on 26 January 2021 via https://www.prisonstudies.org/highest-to-lowest/pre-trial-detainees?field_region_taxonomy_tid=All

for any criminal charges brought against them.[34] The ICCPR provides that *"Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."*[35]

The right to be presumed innocent has also been guaranteed by the UDHR.[36] The presumption of innocence guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt and that ensures the accused person has the benefit of doubt, therefore, he/she shall be treated according to this principle.[37] It is a duty of all public authorities to avoid prejudging the outcome of the trial, e.g. by abstaining from issuing public statements affirming the guilt of the accused person.[38] This includes a duty to ensure that the media is discouraged from undermining the right to presumption of innocence of the accused person.[39]

The accused person who has yet to be convicted of the crime, which he/she has been accused of, is guaranteed the right to "separate treatment appropriate to his/her status as an unconvicted person."[40] The investigating authorities may place the accused persons in pre-trial detention only to ensure their appearance at trial, prevent their interference with the evidence, prevent further offences, protect the security of the public and the detainee and etc.[41] Unlike the accused persons, the convicted persons are detained because they are found guilty of the crime they committed.

Therefore, it is important to distinguish between pre-trial detainees and convicted persons, as according to the principle, the pre-trial detainee is always presumed

[34] United Nations, "Human Rights and Pre-trial Detention (A Handbook of International Standards relating to Pre-Trial Detention", 1994, Page 1
[35] ICCPR 1976, Article 14 (2)
[36] UDHR 1948, Article 11 (1)
[37] Open Society for Justice Initiative, "International Standards on Criminal Defence Rights: UN Human Rights Committee Decisions", April 2013, Page 7
[38] Ibid
[39] United Nations, ICCPR, "General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial", July 2007, Para 30
[40] ICCPR 1976, Article 10 (2)
[41] United Nation, Center for Human Rights, "Human Rights and Pre-trial Detention: A Handbook of International Standards relating to Pre-trial Detention", 1994, Page 8

"innocent" until he/she is convicted. Pursuant to the Rule 115 of the Nelson Mandela Rules:

"*An untried prisoner shall be allowed to wear his or her own clothing if it is clean and suitable. If he or she wears prison dress, it shall be different from that supplied to convicted prisoners.*[42]"

The right to liberty and security of person has been enshrined both in Article 9 of ICCPR and in Article 3 of UDHR which provides that no one shall be subjected to arbitrary arrest or detention, and no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.[43] Liberty of persons herein refers to the freedom from confinement of the body, not a general freedom of action.[44]

This right to liberty of person is not absolute, and Article 9 of ICCPR does recognize that sometimes deprivation of liberty is justified, for example, in the enforcement of the criminal laws.[45] Examples of deprivation of liberty include police custody, pre-trial detention, imprisonment after conviction, house arrest, administrative detention, etc.[46]

The arrest or detention shall be authorized by the domestic law, otherwise, it is arbitrary. According to UN Human Rights Committee (the Committee), the concept of "arbitrariness" is not equivalent to "against the law", however, it shall be interpreted more broadly to include other elements of inappropriateness, injustice, lack of predictability and due process of law.[47] This reflects that pre-trial detention shall not only be lawful but also reasonable and necessary in all circumstances, for example, to prevent flight, interference with evidence, and

[42] United Nations Office on Drugs and Crime, "The United Nations Standard Minimum Rules for the Treatment of Prisoners", Rule 115
[43] ICCPR 1976, Article 9 (1)
[44] United Nation, ICCPR, "General Comment No.35: Article 9 (Liberty and Security of Person)", 2014, Para 3
[45] ICCPR 1976, Article 9 (1)
[46] United Nation, ICCPR, "General Comment No.35: Article 9 (Liberty and Security of Person)", 2014, Para 5
[47]Human Rights Committee, Fongum Gorji-Dinka vs Cameroon, "Communication No. 1134/2002", 17 March 2005, Para 5.1

recurrence of the crime, and to protect the security of the detainees, witnesses and victims.[48]

The burden of proof lies on the investigating authorities to show that the detainee, if released, poses such a threat and that cannot be addressed by alternative measures.[49] The investigating authorities should only use such detention as a measure of last resort and shall carefully evaluate all circumstances of the case at hand before detaining the accused person to protect the future dangers.[50]

1.6 Structure of the Thesis

This thesis is divided into five chapters, wherein the first chapter introduces the brief background of pre-trial detention around the world with an exclusive focus on the context of Cambodia, purpose and research questions, methodology and materials to be employed, delimitation of this paper, and last but not least, brief introductions to theories on principle of presumption of innocence and right to liberty of individual.

The second chapter discusses international human rights standards on pre-trial detention. In the first part of this chapter, the author highlights the principle of legality and the concept of arbitrariness as required to employ the pre-trial detention. In addition, the author emphasizes the international human rights standards which include grounds for arrest, grounds for pre-trial detention, permitted length of police custody and pre-trial detention.

The third chapter provides an overview of general procedure of criminal action in Cambodia and discusses the section in CPCC governing pre-trial detention and arrest in Cambodia. This chapter introduces the grounds of police custody, pre-trial detention and its permitted length stipulated in CPCC.

The fourth chapter provides an insight into the practice of pre-trial detention in Cambodia. The author, in this chapter, analyzes the acquired information from the

[48] Ibid
[49] United Nation, ICCPR, "General Comment No.35: Article 9 (Liberty and Security of Person)", 2014, Para 15
[50] Ibid, Para 21

interviewees and the NGOs' reports in order to conclude whether the legal instruments and the practice of pre-trial detention in Cambodia are compatible with the international human rights standards.

The last chapter introduces the existing alternatives to pre-trial detention in Cambodia and explore if there are suitable alternatives from other countries that are suitable to be integrated in Cambodian law. Thereafter, the author recommends the alternatives which suit best in the Cambodian context and discusses the possibility of integrating these alternatives into Cambodian laws.

Chapter 2: International Human Rights Standards

In this section, the author has illustrated the relevant international human rights standards that govern the grounds and length of the police custody and pre-trial detention. Until now, there has been no comprehensive set of international legal standard on these matters. Although there is no single set of international standards, the protection of persons in pre-trial detention are found in an extensive array of international legal instruments namely UDHR, treaties which Cambodia has ratified (e.g. ICCPR), and other documents originating from the UN which have become customary international laws. By its nature, pre-trial detention refers to the detention of individuals who have not yet been convicted of criminal conducts while arrest refers to the act of apprehending a person for the alleged commission of an offence[51] which covers the period up to the point where the individual is brought to the competent authority who has the power to decide on pre-trial detention.[52]

Under international human rights law, the arrests or detentions can be lawful if it is carried out in accordance with both national, and international law, and free from arbitrariness, in that laws and their application shall be just, predictable/foreseeable, appropriate and comply with due process of law.[53] Liberty of individuals concerns freedom from confinement of the body, not a general freedom of action while security of individuals concerns freedom from injury to the mind, body and mental and bodily integrity.[54]

[51] UN, General Assembly Resolution 43/173, "Body of Principle for the Protection of All Persons Under Any of Detention or Imprisonment", 9 December 1988

[52] Manfred Nowak, "U.N. Covenant on Civil and Political Rights CCPR Commentary", 2nd revised edition, 2005, Page 221

[53] UN, Human Rights Committee, "General Comment No. 35 (Article 9: Liberty and Security of person", 16 December 2014, Para 12

[54] Ibid, Para 3

The deprivation of liberty may include remand detention, police custody, house arrest[55], pre-trial detention, imprisonment after conviction and administrative detention. Pursuant to international standards, pre-trial detentions shall be the exception not the rule, and should only be used as a mean of last resort mandating the minimum period of detention necessary.[56] The prohibition of arbitrary deprivation of liberty has been stipulated in many key international and regional legal instruments for the protection and promotion of the human rights, which include Article 9 of UDHR and ICCPR, Article 5 of the European Convention of Human Rights (ECHR), Article 7 of American Convention on Human Rights, Article 6 of the African Charter of Human and Peoples' Right and Article 14 of the Arab Charter on Human Rights.

Whether the arrest or detention is permissible in a given case shall be assessed against the principle of legality and the prohibition of arbitrariness.[57] Under Article 9 of ICCPR, the arrest and detention may be authorized by domestic law, thus must in all cases be carried out in accordance with the law (**principle of legality**). The Committee views that Article 9 of ICCPR is violated if an individual is arrested or detained on grounds which are not clearly established by law, in other words, the grounds for arrest or detention shall be established by domestic law.[58] This established domestic law shall meet the standard of "lawfulness" requiring it to be sufficiently accessible, precise to allow citizen-if need be, with appropriate advice, to foresee the consequences which his action may entail.[59] The lawfulness under Article 9 of ICCPR relates to both national and international legal standards.[60]

[55] UN Human Right Committee, Fongum Gorji- Dinka v. Cameroon, Communication No. 1134/2002, 17 March 2005, Para 5.4
[56] ICCPR, Article 9
[57] Manfred Nowak, "U.N. Covenant on Civil and Political Rights CCPR Commentary", 2nd revised edition, 2005, Page 222
[58] UN Human Right Committee, Clifford McLawrence v. Jamaica, Communication No. 702/1996, 26 April 1996, Para 5.5
[59] ECtHR, Steel and Others v. the United Kingdom, Application no. 67/1997/851/1058, 23 September 1998, Para 54
[60] Report of the Working Group on Arbitrary Detention, "UN Doc.E/CN/4/2005/6/Add.4", 2004, Para 54

Another requirement under Article 9 (1) of ICCPR is that the arrest or detention shall not be "**arbitrary**". This means that even if the arrest or detention meets the formal requirements of domestic law, it still may be considered as contrary to the purpose of Article 9 of ICCPR if it was arbitrary. The idea of "**arbitrary**" is not equated with "against the law", however, shall be interpreted more broadly to include many elements such as inappropriateness, lack of predictability, injustice, and due process of law, as well as elements of proportionality, necessity and reasonableness.[61]

This means that the arrest or detention of individuals must not only be lawful but reasonable and necessary in all circumstances.[62] The "reasonableness" and "necessary" on this matter shall be assessed in the light of all circumstances of the particular case such as the gravity of the offences, the risk of influencing the witnesses and the risk of absconding. It is essential to note that the "reasonableness" of the suspicion on which the arrest or detention shall be made is significant to the determination of arbitrariness. The ECtHR has interpreted the "reasonable suspicion" as the existence of the fact or information available at hand that would satisfy an objective observer which the person concerned may have committed the crime.[63] This simply means that it can be only regarded as "reasonable" once the fact or information objectively links the person suspected to the supposed offence.

Therefore, there should be no deprivation of liberty that relies on instincts, feeling, or prejudice (whether religious, ethnic or any other) as an indicator of someone's involvement in the commission of the crime.[64] The ECtHR has emphasized in the case of *Fox, Campbell and Hartley v. UK* that the mere fact that an individual has committed some crimes-even if similar- in the past will not be a sufficient basis for reasonable suspicion of the crime.[65] In that case, the applicants had previously been

[61] UN Human Right Committee, Fongum Gorji- Dinka v. Cameroon, Communication No. 1134/2002, 17 March 2005, Para 5.1
[62] Ibid
[63] ECtHR, Stepuleac v. Moldova, Application no. 8207/06, 06 November 2007, Para 68
[64] Monica Macovei, "Human Rights Handbooks, No.5 (A guide to the implementation of Article 5 of the European Convention on Human Rights)", 2002, Page 26
[65] ECtHR, Fox, Campbell and Hartley v. The United Kingdom, Application no. 12244/86; 12245/86; 12383/86, 30 August 1990, Para 35

convicted for act of terrorism. Although the court accepted that it could reinforce a suspicion linking them to the commission of the terrorist-type crimes, it appears that this was the only basis on which they had been deprived of their liberty, thus, the court viewed that this cannot justify their arrest.[66]

2.1 Grounds of Police Custody

Police custody herein refers to the situation where the arrestee has been placed in the police station waiting to be sent to the court. A person may be arrested based on the court order (arrest warrant) or due to the action taken directly by the police.[67] An arrest warrant by the court, generally, is required to make the arrest "lawful" and not arbitrary with a very limited exception.[68] Such exception includes an arrest which has been carried out once the police identifies that a suspect is committing a crime (in *flagrante delicto* case) or the arrest carried out during the state of emergency.[69]

The ground for arrest without court warrant that usually remains uncontested arises where a suspect is arrested in *flagrante delicto*, which simply means the suspect is in the act of committing a crime.[70] In case an individual has been arrested without the court warrant, the Working Group on Arbitrary Detention of the UN (WGAD) usually examines whether that arrest by the state is carried out in *flagrante delicto* as such an arrest under the international human rights standards is permissible even without the court warrant.[71]

Although the arrest without court warrant is allowed in *flagrante delicto* under the international standards, the WGAD has tried to ensure that this exception is not applied and interpreted in an overbroad manner. The WGAD emphasized that the notion of arrest in *flagrante delicto* is limited to instance where a suspect is caught

[66] Ibid
[67] Manfred Nowak, "U.N. Covenant on Civil and Political Rights CCPR Commentary", 2nd revised edition, 2005, Page 230
[68] Jared Genser, Cambridge University Press, "The UN Working Group on Arbitrary Detention: Commentary and Guide to Practice", 2020, Page 229
[69] Ibid, Page 230
[70] Ibid, Page 237
[71] Ernest Bennett, et al. v. Haiti, "WGAD Opinion No. 23/2000", 14 September 2000, Para 41

actually committing a crime.[72] In its report on the visit to Mexico, the WGAD noted that the domestic law of Mexico has extended the concept of *flagrante delicto* to cover the arrest of a person found in 72 hours of the commission of the alleged offence as long as there are signs and shreds of evidence which indicate that the person's involvement with the alleged crime.[73] The WGAD, in that report, concludes that this overbroad interpretation of arresting a person in the act based on the alleged evidence or signs shall not fall in the exception due to the fact that it is materially different, violate the principle of presumption of innocence and carries a great risk of possible arbitrary arrest.[74] Pursuant to the ICCPR, the arrestee shall enjoy the right to "*be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him."*[75]

In principle, after the initial arrest, the suspect is brought to the police station or placed in police custody until a suspect is brought before a court – in the police custody is under the jurisdiction of the police or gendarmerie.[76] The police custody, under the international norm, is authorized for two main reasons: 1). to question the person whom there is reasonable suspicion about the alleged crime they may have committed and/or hold them while the evidence or exhibits are being collected that may substantiate a charge against them, and 2). to ensure that they appear before the court in the next day.[77] The person who is in police custody shall enjoy the right to be brought "promptly" before the court for a determination of the legality of his

[72] Jared Genser, Cambridge University Press, "The UN Working Group on Arbitrary Detention: Commentary and Guide to Practice", 2020, Page 238
[73] Commission on Human Rights, "Report of WGAD on its visit to Mexico: E/CN.4/2003/8/Add.3", 17 December 2002, Para 39
[74] Ibid
[75] ICCPR, Article 9 (2), See also: UN, General Assembly "Resolution 43/173: Body of Principles for the Protection of all persons under Any Form of Detention or Imprisonment", 9 December 1998, Principle 10, 13 and 14
[76] Association for the Prevention of Torture (APT), "Monitoring Police Custody: A Practical Guide", 2013, Page 13
[77] Ibid, Page 10

detention.[78] How long a person can be remanded in police custody according to international standard is illustrated in the next section.

2.2 Length of Police Custody

Regardless of whether a person has been arrested on the basis of a court warrant or in the case of *flagrante delicto*, he/she shall enjoy the right to be "promptly" brought before the court.[79] While the term "promptly" has been left open and may vary depending on objective circumstances — on a case by case basis, the delay should not exceed a few days counting from the commencement of arrest.[80] The Committee emphasized that the period for evaluating the "promptness" starts at the time of the arrest and not at the time once the arrestee arrives at the place of detention.[81]

The Committee is of the opinion that the period of police custody shall not exceed 48 hours due to the fact that this length of time is typically adequate to transport the arrestee and prepare for the judicial hearing.[82] Any delay longer than 48 hours shall require special justification to be compatible with article 9 (3) of ICCPR.[83] The domestic laws of most state parties to the ICCPR fix the precise time limits for police custody, sometimes even shorter than 48 hours and in case of juveniles, they apply a very strict standard of promptness, such as 24 hours.[84] The author herein would like to introduce some cases where the Committee found violation of article 9 (3) of ICCPR.

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[78] ICCPR, Article 9 (3), See also: UN, General Assembly "Resolution 43/173: Body of Principles for the Protection of all persons under Any Form of Detention or Imprisonment", 9 December 1998, Principle 11

[79] Ibid

[80] UN Human Rights Committee, Clifford Mclawrence v. Jamaica, Communication No. 702/1996, 18 July 1997, Para 5.6; see also: UN Human Rights Committee, Lyubov Kovaleva and Tatyana Kozyar v. Belarus, Communication No. 2120/2011, 27 November 2012, Para 11.3

[81] UN Human Rights Committee, Zhanna Kovsh v. Belarus, Communication No. 1787/2008, 27 March 2013, Para 7.3

[82] Ibid, Para 7.3-7.5

[83] UN Human Rights Committee, Borisenko v. Hungary, Communication No. 862/1999, 14 October 2002, Para 7.4

[84] UN Human Rights Committee, "General Comment No. 35 (Article 9: Liberty and Security of person", 16 December 2014, Para 33

In *Fillastre and Bizouarn v. Bolivia*, the applicants had been held in police custody for ten days before being brought before the court and without being informed of the charges against them — the Committee, thus, found that this was a violation of Article 9 (3) of the ICCPR.[85] In *McLawrence v. Jamaica*, the Committee held that the term "promptly" shall be decided on the case by case basis and conclude that a delay of one week in a capital case is not compatible with the meaning of Article 9(3) of ICCPR, thus, in that case the Committee concluded that there is a violation if a suspect has been held in police custody for one week.[86] In another case, *Kurbanov v. Tajikistan*, the Committee emphasized that the detention for one week without an arrest warrant and without the applicant being brought before a judicial body was a violation of Article 9(3) of ICCPR.[87]

The requirement that "*an arrestee shall be brought promptly before a judge or other officer authorized by law to exercise judicial power"*[88] corresponds literally to Article 5(3) of ECHR, making it justifiable to draw upon the criteria developed by the ECtHR for the sake of interpretation of this provision. In *Schiesser* case, the ECtHR is of the view that the judicial official, to whom the accused is brought, shall be independent from the executive branch[89] and be empowered to decide on the pre-trial detention or to release the arrested person.

The Committee has confirmed this notion in *Kulomin v. Hungary* which concerns the authorization and the renewal of pre-trial detention by the prosecutor. The Committee views that the judicial power shall be exercised by an authority who is impartial, objective and independent in respect of the case at hand.[90] In this case, *"the Committee is not satisfied that the public prosecutor could be regarded as*

[85]UN Human Rights Committee, Fillastre v. Bolivia, Communication No. 336/1988, 05 November 1991, Para 6.4
[86] UN Human Rights Committee, McLawrence v. Jamaica, Communication No. 702/1996, 18 July 1997, Para 5.6
[87] UN Human Rights Committee, Kurbanova v. Tajikistan, Communication No. 1096/2002, 06 November 2003, Para 7.2
[88] ICCPR, Article 9(3)
[89] ECtHR, Schiesser v. Switzerland, "Application No. 7710/76", 4 December 1979, Para 29
[90] UN Human Rights Committee, Vladimir Kulomin v. Hungary, Communication No. 521/1992, Para 11.3

having the institutional objectivity and impartiality necessary to be considered an "officer authorized to exercise judicial power" within the meaning of article 9(3).'"[91]

Therefore, though there is no fixed length of police custody, it can be concluded that, in conformity with the international norms, general comments of the Committee and case law of ECtHR, the length of police custody shall end within a few days resulting in either the release of the arrestee or remand to pre-trial detention.

2.3 Grounds of Pre-Trial Detention

States shall use the pre-trial detention as a mean of last resort in criminal proceedings, with due regard for the investigation of the alleged crime and for the protection of society and the victim.[92] Paragraph 3 of Article 9 of ICCPR requires that the detention of a person who is awaiting trial shall be the exception rather than the rule. The Committee is of the opinion that paragraph 3 applies to the person who is awaiting trial on criminal charges, meaning after the person has already been accused by the prosecutor.[93]

According to General Comment 35 of the Committee, pre-trial detention should not be compulsory for all persons accused of particular crimes without assessment of their individual circumstances.[94] It shall be necessary and based upon the determination of each case taking into account all circumstances, for example, to prevent flight, interference with the evidence or exhibit, or the recurrence of the crime.[95] Thus, the Committee indicates that the pre-trial detention can be only

[91] Ibid
[92] United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules), "General Assembly Resolution 45/110 ", 14 December 1990, Para 6.1
[93] UN, Human Rights Committee, Rafael Marques De Morais v. Angola, Communication No. 1128/2002, 29 March 2005, Para 6.4
[94] United Nation, ICCPR, "General Comment No.35: Article 9 (Liberty and Security of Person)", 2014, Para 38
[95] UN, Human Rights Committee, Marinich v. Belarus, Communication No. 1502/2006, 16 July 2010, Para 10.5

justified under Article 9 to prevent flight by the detainee, interference with the evidence or exhibit or further occurrence of the crime.[96]

These permissible grounds correspond literally to the opinion of the ECtHR which recognizes grounds to make pre-trial detention justifiable such as the risk of absconding, the risk of obstructing the investigation of the case, the need to prevent the repetition of crime, the need to protect the detainee and the need to preserve public order.[97] With regard to these grounds, the author also uses the case law of the ECtHR for the interest of interpretation of all these permissible grounds.

2.3.1The Risk of Absconding

The court may place the accused person in pre-trial detention if there are potential risks that the person, if released, will escape from his residence or country and avoid prosecution. The existence of the risk of absconding cannot be gauged solely on the basis of the severity of the sentence faced.[98] The court shall assess many other relevant factors that may either indicate the existence of a risk of absconding or make it appear so slight that it cannot justify the pre-trial detention.[99] These relevant factors for the assessment include the character of the person involved, his home, his occupation, his assets, his family ties and all types of links with the countries in which the accused is being prosecuted.[100]

Once the only remaining reason for pre-trial detention is the fear which the accused will flee and avoid appearing for the upcoming trial, he/she shall be released from that detention if there is a possibility to obtain the guarantee that will ensure his/her appearance before the trial.[101] A decision that is based on a stereotyped form of word without providing a precise explanation as to why the risk of absconding exists is never deemed appropriate and acceptable by the Committee and the

[96] UN, Human Rights Committee, Kulov v Kyrgyzstan, Communication No. 1369/2005, 26 July 2010, Para 8.3
[97] ECtHR, Buzadji v. The Republic of Moldova, "Application No. 23755/07", 5 July 2016, Para 88
[98] ECtHR, Panchenko vs Russia, "Application no. 45100/98", 8 February 2005, Para 106
[99] Ibid
[100] ECtHR, Neumeister vs Austria, "Application No. 1936/63", 27 June 1968, Para 10; see also: ECtHR, Becciev v. Moldova, "Application No. 9190/03", 4 October 2005, Para 58
[101] ECtHR, Merabishvili v. Georgia, "Application No. 72508/13", 28 November 2017, Para 223

ECtHR. Therefore, this ground requires the court to establish a well-founded concern that the accused will abscond his residence and try to avoid the trial if he/she is released.

2.3.2 The Risk of Obstructing the Investigation

The court may place an accused in pre-trial detention once the accused could use the opportunity of his release to undermine the proceeding against him or by pressuring on the witnesses, tipping off others who are also under investigation or destroying documents, exhibits or other forms of evidence that may disrupt the investigation of the case.[102] The danger of the accused hindering the proper conduct of the proceeding (destroying the evidence or threatening the witnesses) cannot be relied upon *in abstracto;* it shall be supported by factual evidence.[103]

The implication is that the court may base on this ground only when he has a concrete factual evidence that if released, the accused will hinder or obstruct the investigation by either destroying the evidence or threatening persons who may have information about the allegation of the committed crime. This reflects that the right to liberty of the accused will be violated if the courts present the potential risk, "obstructing the investigation caused by the accused" in an abstract form without substantiating such allegation by facts and evidence, namely, by solely stating that "if released, the accused would get rid of the evidence." This simply means that to be able to use this ground the court shall prove the casual link between the accused person's release and the potential risk of destruction of the evidence.

2.3.3 The Need to Prevent Repetition of the Crime

The court may place an accused in pre-trial detention based on the fear that the accused, if released, will commit further crime. Before relying on this ground, the court shall evaluate all potential risks including the likelihood whether the accused person will continue his criminal activities, the previous offences that has been committed by the accused person, and the nature of the crime. The risk of

[102]Monica Macovei, "Human Rights Handbooks, No.5 (A guide to the implementation of Article 5 of the European Convention on Human Rights)", 2002, Page 31

[103] ECtHR, Trzaska v. Poland, "Application No. 25792/94", 11 July 2000, Para 65

committing further crime shall be assessed on the basis of the facts of the case and be a reasonable one, in the light of the circumstances of the case, thus, the court shall take into account of the personality of the accused and his/her past history.[104] Previous conviction of the accused could be a ground for a reasonable fear that the accused might repeat the crime or commit a new crime.[105] However, the detention in this case can be unlawful and arbitrary if the court refers to the danger of committing further crime in an abstract manner without providing factual concrete support to justify their decision.

2.3.4 The Need to Preserve the Public Order

The court may place an accused in pre-trial detention based on the fear that the accused, if released, will cause public disorder and social disturbance. Certain crimes, due to their gravity and public reaction to them, may give rise to a public disorder and social disturbance which are capable of justification for pre-trial detention at least for a period of time.[106] Such ground is deemed relevant and sufficient only on the basis that the court is capable of showing that the release of the accused would actually cause public disorder or social disturbance.[107]

In the light of an example, the possibility of a reaction to a serious crime such as murder may be justified for the pre-trial detention if the court has before them factual evidence to believe that if released, the accused would be revenged by the victim's relative or the public. The detention continues to be legitimate unless the public order or social disturbance remains threatened by the crime.[108] Otherwise, the right to liberty of the accused would be violated.

2.4 Length of Pre-Trial Detention

Under the international human rights law, there is no precise maximum length of pre-trial detention, however, Article 9(3) of the ICCPR indicates that anyone detained on a criminal charge shall be entitled to a trial within a "reasonable time".

[104] ECtHR, Clooth v. Belgium, "Application No. 12718/87", 12 February 1987, Para 40
[105] ECtHR, Matznetter v. Austria, "Application No. 2178/64", 10 November 1969, Para 9
[106] ECtHR, Letellier vs France, "Application no. 12369/86", 26 June 1991, Para 51
[107] Ibid
[108] Ibid

Since Article 9(3) corresponds to Article 5(3) of ECHR, the author will also include case law of the ECtHR for serving the interest of interpretation. The Committee and the ECtHR are of the opinion that what constitutes "reasonable time" shall be assessed on a case-by-case basis, taking into consideration on the complexity of the case, the accused's behavior during the proceeding and the manner that the case is dealt with by the judicial and executive authorities.[109]

Thus, each case must be assessed on its own particular merits. In determining the length of pre-trial detention, the period to be taken into account begins with the point at which the detention is imposed and it ends on the date of which the judgement of the court of first instance is made.[110] In this respect, the Committee and the ECtHR have never endorsed the notion that there is an exact maximum pre-trial detention period, which should never be exceeded.

However, continued detention can be acceptable in a particular case unless the specific indication of permissible grounds for pre-trial detention is still justified such as, the risk of obstructing the completion of an investigation or the need to prevent the repetition of the crime.[111] According to the ECtHR, the arguments for and against the release of the accused shall not be "general and abstract"[112], but shall contain references to the fact and the accused's personal circumstances which justify his/her detention.[113] The justification of any period, regardless of how short, shall be persuasively demonstrated by the court.[114]

In *Bolanos v. Ecuador*, the Committee decided that, without proof of special circumstances such as the impediments to investigation caused by the accused, the

[109] United Nation, ICCPR, "General Comment No.35: Article 9 (Liberty and Security of Person)", 2014, Para 37; See also: UN, Human Rights Committee, Kon v. Senegal, Communication No. 386/1989, 21 October 1994, Para 8.6; and ECtHR, "Guide on Article 5 of ECHR: Right to Liberty and Security, 2020, Para 195

[110] United Nation, ICCPR, "General Comment No.35: Article 9 (Liberty and Security of Person)", 2014, Para 37

[111] UN, Human Rights Committee, Clement Boodoo v. Trinidad and Tobago, Communication No. 721/1996, 5 April 2002, Para 6.2; see also: ECtHR, "Guide on Article 5 of ECHR: Right to Liberty and Security, 2020, Para 195

[112] ECtHR, Boicenco v. Moldova, "Application No. 41088/05", 11 July 2006, 142

[113] ECtHR, Aleksanyan v. Russia, "Application No. 46468/06", 05 June 2009, Para 179

[114] ECtHR, Idalov v. Russia, "Application No.5826/03", 22 May 2012, Para 140

pre-trial detention lasting four years and four months was a violation of Article 9(3) of ICCPR.[115] This determination is similarly made by the ECtHR which indicated that the periods of pre-trial detention without proper justification lasting from two and a half years to nearly five years is excessive.[116]

The Committee and ECtHR even considered that shorter periods of time may still be excessive, depending on the particular circumstance of the nature of detention. In *Lewis v. Jamaica*, the Committee considered the detention of 23 months as violation of Article 9(3) of ICCPR since the state provided an unreasonable and unsatisfactory explanation with regard to this detention.[117] In *Shishkov v. Bulgaria*, the ECtHR held that the overall pre-trial detention of seven months and three weeks was unjustified since the domestic court relied solely on a statutory presumption of detention based on the gravity of the crime rather than examine the hypothetical risk of absconding, repetition of the crime or collusion.[118] In this case, the ECtHR noted that the domestic court failed to examine the individual circumstance of the accused.

Therefore, though there is no precise maximum length of pre-trial detention under international standards, according to the cases mentioned earlier, the Committee and the ECtHR seem to agree any continued detention shall be justified based on the nature of each case's circumstances.

[115] UN, Human Rights Committee, Bolanos v. Ecuador, Communication No. 238/1987, 26 July 1989, Para. 2.1, 8.3, and 9

[116] Oxford University, Jacobs, White & Ovey,"The European Convention on Human Rights (sixth edition)", 2014, Page 228

[117] UN, Human Rights Committee, Neville Lewis v. Jamaica, Communication No. 708/1996, 1 August 1997, Para 8.1

[118] ECtHR, Shishkov v. Bulgaria, "Application No. 38822/97", 9 January 2003, Para 64 & 66

Chapter 3: Legal Instruments in Cambodia

The most notable development on criminal justice in Cambodia is the adoption of the new Criminal Procedural Code of Cambodia (CPCC), which came into force in 2007.[119] This CPCC is regarded as the most detailed criminal procedure in the history of Cambodia, which addresses many important areas including rights of the accused person, the detail of interrogation and investigating stage, complaint and challenging procedure on the composition of trial judges, the role and power of judicial police, the detail of court structure and how the court works.[120] Furthermore, the grounds and length of police custody and pre-trial detention are also found in the CPCC. In this chapter, the author has provided an overview of the procedure of the criminal action to the court of first instance in Cambodia and thereafter, provided the grounds and length of police custody and pre-trial detention stipulated in the CPCC.

3.1 The Description of the Procedure for Filing Criminal Actions to the Court of First Instance in Cambodia

This part aims to provide an overview of the procedure of criminal complaint to the court of the first instance in Cambodia. The author has provided an overview of where the complaint should be brought to once there is an alleged offence. The procedure for *flagrante delicto* offences is not discussed under this paper.

Under CPCC, *"Criminal actions are brought by Prosecutors for the general interests of the society. Prosecutors initiate criminal proceedings and request the application of the law by investigating and trial judges.*"[121] The victim of the crime may file a complaint to either the Judicial Police (the Police) or the Prosecutor, whose power includes conducting the preliminary investigation.[122] The criminal procedure before the court of first instance is divided into two categories: General

[119] Criminal Procedural Code of Cambodia (CPCC) 2007, Article 612 and page 190 in Original Khmer Version

[120] Konrad Adenauer Stiftung, Hor Peng, Kong Phallack, and Jorg Menzel, "Introduction to Cambodian Law", 2012, Page 230

[121] Criminal Procedural Code of Cambodia (CPCC) 2007, in Original Khmer Version, Article 4

[122] Ibid, Article 40

Procedure and Summary Procedure. The use of these two procedures varies depending on the seriousness of the offences and the sentence that it carries.

The General Procedure refers to the procedure that shall pass through three stages 1). preliminary investigation, 2). judicial investigation and 3). trial. This procedure applies to felonies and complicated misdemeanors.[123] However, the Summary Procedure refers to the procedure that goes through only two stages: 1). preliminary investigation and 2). trial. This procedure applies only to the petty offense or uncomplicated misdemeanor.[124] Though the law divides the procedure depending on the type of offences, in practice the court has generally used the General Procedure in all types of offences, thus, the author provides an overview of the General Procedure only.

3.1.1 Preliminary Investigation by the Police and Prosecutor

A victim of the offence may file a complaint to either the Police or the Prosecutor, whose duties include conducting the preliminary enquiry. Upon having knowledge of an act which may constitute the offence, the Police may conduct the preliminary enquiry at their discretion or upon the request of the Prosecutor. The Police have the power to summon persons for interrogation during this preliminary inquiry if they are suspected of committing an offence or have relevant information about the offense. In case of refusal to appear as summoned, the Police shall notify the Prosecutor who may issue an Order to appear, which gives the Police power to bring that person to the police station.[125]

After collecting the evidence, interrogating the suspect and examining the nature of offence, the Prosecutor may decide to either hold the case file without processing or to conduct further proceedings against the offender(s).[126] If the Prosecutor decides to proceed with the case, he/she may issue an Introductory Submission and

[123] Ibid, Article 122
[124] Ibid, Article 45-49
[125] Ibid, Article 114
[126] Ibid, Article 40

send the case file to the Investigating Judge.[127] The judicial investigation is commenced soon after the issuance of the Introductory Submission.

3.1.2 Judicial Investigation by the Investigating Judge

The judicial investigation is a court-based investigation, which is presided over by the investigating judge. He/she has an obligation to gather both inculpatory and exculpatory evidence related to the case, thus, he/she may perform all investigations including interrogation of accused person and witnesses, site visits, and asking the Police to perform certain investigative activities, that he/she deems useful to ascertaining the truth.[128]

Under CPCC, only investigating judges can place accused persons in pre-trial detention.[129] The investigating judge who orders the pre-trial detention of the accused person shall issue an Order containing reasons as stipulated under Article 205 of CPCC. When the investigating judge considers that the judicial investigation is concluded, he/she shall notify the prosecutor, the accused person, the civil parties and the lawyers.[130]

The investigating judge concludes the judicial investigation by issuing a Closing Order, which can be an indictment or a non-suit order.[131] The non-suit order is issued once the investigating judge deems that the facts do not establish an offence. In contrast, if the investigating judge considers that the facts indicate that there was an offence, he/she shall issue an indictment for the accused person to go before the trial court.[132] Soon after the issuance of the indictment by the investigating judge, the accused person shall be called the "charged person".

3.1.3 Trial

There must be a bench of three judges if it is the felony case, however, if it is misdemeanor or petty offense case, only a single judge shall preside over the trial.

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[127] Ibid, Article 124
[128] Ibid, Article 127, 130, and 131
[129] Ibid, Article 206
[130] Ibid, Article 246
[131] Ibid, Article 247
[132] Ibid

The presiding judge shall inform the charged person of the charges that he/she is charged of.[133] Then, the presiding judge shall ask questions which he/she believes to be conducive to ascertaining the truth (both inculpatory and exculpatory questions).[134] After the presiding judge's questions, the prosecutor, lawyers, and all parties, with the authorization of the judge, may ask questions to the charged person, however, except for questions asked by prosecutor and lawyers, all questions shall be asked through the presiding judge.[135] At the conclusion of the hearing , parties may give their closing statements one after another.[136]

The judgement can be issued at the hearing date or in a subsequent session. In the latter case, the judge shall inform the parties of the announcement date.[137] The parties have 30 days for an appeal, calculated from the day the non-default judgement was pronounced.[138]

3.2 Grounds of Police Custody

Under CCPC, the arrest without court warrant made by the Police varies depending on the time for which they perform their duty under the scope of investigation of *flagrante delicto* cases or under the scope of primary investigation.[139] Therefore, it is important to understand what conditions constitute the *flagrante delicto* cases under Cambodian law.

The *flagrante delicto* felonies or misdemeanors refer to the 1). offenses that are being committed, 2). offenses that have just been committed, and 3). if shortly after a felony or misdemeanor has been committed: a). a suspect is being in a hot pursuit by the public; b). a person is found to have an object, or a scar, mark or any other evidence from which it can be concluded that he committed or participated in the commission of an offence.[140]

[133] Ibid, Article 325
[134] Ibid
[135] Ibid
[136] Ibid, Article 335
[137] Ibid, Article 347
[138] Ibid, Article 382
[139] Criminal Procedural Code of Cambodia (CPCC) 2007, Article 84
[140] Ibid, Article 86

In the *flagrante felony or misdemeanor case*, the Police may order to appear or bring any person suspected of committing an offense to their office and the law also authorizes every person to arrest the offender and bring him to the nearest Police.[141] However, if it is not the *flagrante delicto* case, the Police are authorized only to summon and hear the answer of the suspect. In case of refusal to appear as summonsed, the Police shall inform the Prosecutor who may issue an order to appear.[142]

The situation where a person detained at the police station by the Police or the order of the Prosecutor is called "Police Custody". In the investigation of the *flagrante delicto* case, the Police may remand anyone in custody based on two grounds. Firstly, the Police may remand a person in custody who is suspected of participating in the commission of the crime and the Police shall immediately report and provide all relevant evidence required to the Prosecutor.[143] Secondly, the Police may also remand any person in custody who may provide them with relevant facts if these two conditions are fulfilled: a). a person who may provide information refuses to do so and, b). a written authorization from the Prosecutor for such detention.[144] The next section, the author aims to explore how long a person can be remanded in police custody under the CPCC.

3.3 Length of Police Custody under Cambodian law

The length of police custody varies depending on the age of the person in custody and applies differently whether he/she is an adult or a minor. The adult, under Cambodian law, refers to a person who is 18 or beyond 18 years old whereas the minor refers to a person who is below 18 years old.

3.3.1 Length of Police Custody for Adults

The maximum length of police custody for persons who reaches or is beyond the age of majority (18 years old) is 48 (forty-eight) hours and that duration shall

[141] Ibid, Article 87 and 93
[142] Ibid, 114
[143] Ibid, Article 96
[144] Ibid

commence from the time when that person arrives at the police or military police office.[145]

In case of a felony, when there is evidence proving that that person is guilty and it is necessary to detain such person, the Police may extend the duration of the Police Custody for a period nolonger than 24 (twenty-four) hours, excluding the time necessary for the transportation of that person. Such extension shall be authorized in writing beforehand by the Prosecutor who has to examine whether the factual and legal conditions are fulfilled.[146] Such extension shall not be applied to the minor.

3.3.2 Length of Police Custody for Minors

Minors whose ages are between 14 years old and less than 16 years old, in case of felony, shall not be placed in police custody for more than 36 hours but in case of misdemeanor, shall not be more than 24 hours.[147] For those who are between 16 years old and less than 18 years old, in case of felony, shall not be placed in police custody for more than 48 hours but in case of misdemeanor, shall not be more than 36 hours.[148] Those whose ages are less than 14 years old shall not be placed in police custody.[149]

The summary of length of police custody for minors is illustrated below

Type of offences	**Age**	**Duration**
Felony	Between 14 to less than 16 years old	36 hours
Misdemeanor	Between 14 to less than 16 years old	24 hours
Felony	Between 16 to less than 18 years old	48 hours
Misdemeanor	Between 16 to less than 18 years old	36 hours

[145] Ibid
[146] Ibid
[147]Ibid
[148] Ibid
[149] Ibid

3.4 Grounds of Pre-Trial Detention under Cambodian Law

According to section 5 of the CPCC, pre-trial detention can be applied only in the case of a felony or misdemeanor that involves a punishment of imprisonment of one year or more.[150] The application of pre-trial detention shall be imposed only by the investigating judge and based on one of the six grounds stipulated under Article 205 of CPCC:1). to stop the offense or prevent the offense from happening again, 2). to prevent any interferences with witnesses or victims or prevent any collusion between the charged person and accomplices, 3). to maintain the evidence or exhibits, 4). to ensure the presence of the accused person during the proceedings against him/her, 5). to protect the security of the accused person, or 6). to maintain public order from any trouble caused by the offense.[151]

The investigating judge who orders the pre-trial detention of an accused person shall issue an order containing the reasons and the reasons in that order shall be based on aforementioned grounds of Article 205.[152] In principle, the accused person shall remain at liberty except under the conditions listed in Article 205.

3.5 Length of Pre-Trial Detention under Cambodian Law

The length of pre-trial detention varies depending on the ages of the accused person and type of offences he/she has been accused of whether it is felony or misdemeanor. A minor under 14 years old cannot be put in pre-trial detention.[153] Under article 398 of CPCC, whatever judgement the court of first instance makes either acquit or sentence the accused, shall not be executed until the expiration of the time limit for appeal.[154] In case the prosecutor makes an appeal against the judgment of the court of first instance, the accused shall remain in prison until the appeal court makes its decision.[155] However, if the prosecutor agrees to release the

[150]Ibid, Article 204
[151] Ibid, Article 205
[152] Ibid, Article 206
[153] Ibid, Article 212
[154] Ibid, article 398
[155] Ibid

accused, he/she can be released before the expiration of the time limit for the appeal.[156]

3.5.1 Length of Pre-Trial Detention for Felony

For an adult accused of a felony, the pre-trial detention shall not exceed 6 months, however, when this time period ends, the investigating judge may extend the detention for another 6 months, by an order with a clear and well-motivated order.[157] Such extension can only be made twice.[158]

For a minor whose age is between 14 to less than 16 years old, the pre-trial detention cannot exceed 4 months, however, for a minor whose age is between 16 to less than 18 years old, the pre-trial detention cannot exceed 6 months.[159]

3.5.2 Length of Pre-Trial Detention for Misdemeanor

For an adult accused of a misdemeanor, the pre-trial detention shall not exceed 4 months, however, when this time period ends, the investigating judge may, only once, extend the detention for another 2 months, by an order with a clear and well-reasoned order. The duration of the above detention cannot exceed half of the minimum sentence set by law for the accused misdemeanor.[160]

For a minor whose age is between 14 to less than 16 years old, the pre-trial detention cannot exceed 2 months, however, for a minor whose age is between 16 to less than 18 years old, the pre-trial detention cannot exceed 4 months.[161] The duration of this detention cannot exceed half of the minimum sentence set by law for the minor.[162]

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[156] Ibid
[157] Ibid, Article 208
[158] Ibid
[159] Ibid, Article 213
[160] Ibid, Article 209
[161] Ibid, Article 214
[162] Ibid

The summary of length of pre-trial detention is illustrated below

Type of offences	Age	Duration	Duration that can be extended
Felony	From 18 years old and above	6 months	6 months + 6 months
Misdemeanor	From 18 years old and above	4 months or half of the minimum sentence set by law for the charged misdemeanor	2 months
Felony	From 16 years old to less than 18 years old	6 months	No extension
Misdemeanor	From 16 years old to less than 18 years old	4 months or half of the minimum period of sentence set by law for the minor	No extension
Felony	From 14 years old to less than 16 years old	4 months	No extension
Misdemeanor	From 14 years old to less than 16 years old	2 months or half of the minimum period of sentence set by law for the minor	No extension

Chapter 4: Practice and Analysis of Pre-Trial Detention in Cambodia

In spite of the fact that the government of Cambodia has been working hard to ensure the improvement of criminal justice system especially the legal and implementation of pre-trial detention to be compatible with the international human rights standards, there are many challenges and flaws which hinder the effectiveness of the implementation of related rights to pre-trial detention in Cambodia. The realization of the right to liberty and presumption of innocence relies not only on the existence of strong legal frameworks but also on the enforcement and implementation of these existing laws. This reflects that the relevant stakeholders, who play the major roles to implement the laws including judges, prosecutors, lawyers, and judicial police, are the key actors who can ensure whether or not Cambodia has complied with the international human rights standards on an individual's rights regarding pre-trial detention.

In this section, the author discusses the practice of pre-trial detention in Cambodia and analyzes the challenges and flaws in order to provide proper solutions to tackle the barriers to the realization of the accused's related rights to pre-trial detention guaranteed by ICCPR, to which Cambodia is a party. At the same time, section 5 of CPCC governing the pre-trial detention and its implementation have been scrutinized if they are compatible with the international legal standards.

Thereafter, the author has highlighted the provisions of CPCC on pre-trial detention which are not in compliance with the standards and suggest the amendment accordingly. In addition, in the second part of this chapter, the implementation of pre-trial detention has been examined through the legal practitioners' interviews and the domestic and international NGOs' reports. The author discusses the root causes of the high and alarming rate of pre-trial detention why it comes into existence in Cambodia. Afterward, the author provides some solutions to tackle the highlighted causes and consequences.

4.1 Analysis of the Legal Context

As seen from the international human rights standards and Cambodian domestic law discussed earlier, it is perceived that the CPCC governing police custody and pre-trial detention are almost fully compatible with international human rights standards. In consideration of its grounds to its length of police custody and pre-trial detention, there are only a few minor incompatibilities found, which will be discussed in the following paragraphs. These incompatibilities are the determination of the length of the arrest and pre-trial detention.

According to the Committee, a person who is in police custody or arrested shall enjoy the right to be brought "promptly" before the court for a determination of the legality of his/her detention.[163] While the term "promptly" has been left open and may vary depending on objective circumstances —, the delay should not exceed a few days counting from the commencement of the arrest.[164] The Committee emphasized that the period for evaluating the "promptness" starts at the time of arrest and not at the time once the arrestee arrives at the place of police custody.[165]

However, under CPCC, duration of the police custody shall commence from the time when that person arrives at the police or military police office[166] where the police may decide to whether or not place the arrestee in police custody. This indicates that the length of police custody under Cambodian law excludes the duration of the initial commencement of arrest and starts counting from the time of the arrestee arrives at the police office, which does not correspond to the international standards where the duration of police custody commences from the time of the arrest.

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[163] ICCPR, Article 9 (3), See also: UN, General Assembly "Resolution 43/173: Body of Principles for the Protection of all persons under Any Form of Detention or Imprisonment", 9 December 1998, Principle 11

[164] UN Human Rights Committee, Clifford Mclawrence v. Jamaica, Communication No. 702/1996, 18 July 1997, Para 5.6; see also: UN Human Rights Committee, Lyubov Kovaleva and Tatyana Kozyar v. Belarus, Communication No. 2120/2011, 27 November 2012, Para 11.3

[165] UN Human Rights Committee, Zhanna Kovsh v. Belarus, Communication No. 1787/2008, 27 March 2013, Para 7.3

[166] Criminal Procedural Code of Cambodia (CPCC) 2007, Article 96

Therefore, to comply fully with the international human rights standards regarding police custody, this minor incompatibility in the CPCC should be amended to "the duration of police custody shall be commenced from the time of the arrest", not the time the arrestee arrives at the police office."

The second incompatibility that the author found is the determination of the length of pre-trial detention. Under the international human rights standards, in determining the length of pre-trial detention, the period to be taken into account begins with the point at which the detention is imposed and it ends at the time of the judgement of the court of first instance is made.[167]

However, under Article 398 of CPCC, whatever judgement the court of first instance makes either acquitting or sentencing the charged person, shall not be executed until the expiration of time limit for appeal. In case the prosecutor makes an appeal against the judgment of the court of first instance, the charged person shall remain in prison until the appeal court makes its decision.

This illustrates that the length of the pre-trial detention under Cambodian law does not end even if the court of first instance passes its judgement to acquit the accused person, which contradicts the international standards requiring the length of pre-trial detention to end after the judgement of the court of first instance has passed. Thus, according to the international standards, the accused shall be released if he or she is not found guilty by the court of first instance.

The stipulation in this respect in CPCC, which contradicts the standards, has caused many pre-trial detainees to wait months for the appeal by the prosecutor and remain trapped in the prison despite receiving a judgement of acquittal. Beyond this, those detainees, unfortunately, do not have any legal recourse against the prolonged detention during the prosecutor's appeal because the CPCC does not set the timeframe in which the appeal to the appeal court shall be heard. The CPCC

[167] United Nation, ICCPR, "General Comment No.35: Article 9 (Liberty and Security of Person)", 2014, Para 37

specifies only that the court of appeal should decide within the reasonable time.[168] How to determine "reasonable time" is not stipulated in the CPCC at all.

Therefore, to comply fully with the international human rights standards on pre-trial detention, Article 398 of CPCC should be amended to "the charged person shall be released immediately if he/she is not found guilty by the court of the first instance." In addition, the time period for the appeal hearing should be stated clearly in the CPCC for example in at most 4 months, the appeal court shall open the trial.

4.2 Analysis of Implementation of Pre-Trial Detention in Cambodia

There have been traditionally some differences between what is said in the law and what is being done in practice. To examine the implementation of pre-trial detention in Cambodia, the author has relied not only on NGO' reports but also a number of interviews with 8 legal practitioners, who have wide experience on pre-trial detention. Since the provided information is quite sensitive, the author decides not to reveal their identity, and the author herein addresses them as "the respondents" instead. The interview with each respondent took at least 30 minutes and had been conducted in Cambodian language (Khmer) via online call. The questions that the author asked the respondents are attached in the **Appendix I**.

In this section, the author aims to analyze how the high and alarming rate of pre-trial detention comes into existence in Cambodia and whether or not the current practice of the court with regard to pre-trial detention has complied with the international human rights standards. Thereafter, the author also suggests solutions to tackle the challenges found.

4.2.1 Pre-Trial Detention Is a Common Practice for Flagrante Delicto Cases

In practice, the courts in Cambodia have focused almost entirely on imprisonment of the accused person and the decision to place the accused person in pre-trial detention tends to be automatic in *flagrante delicto* cases with less consideration on

[168]Criminal Procedural Code of Cambodia (CPCC) 2007, Article 387

personal circumstances and other surrounding factors.[169] It is perceived that the practice to use the detention requires no additional resources: no need to look for the accused, no need to assess/monitor whether the accused has complied with any imposed restrictive measures, no need to worry about absconding of the accused, and no need to making efforts to rearrest the accused. In *flagrante delicto* cases[170], the prosecutor regularly requests the investigating judge to detain the accused person because he/she believes that the detention is a "convenient" and "easy" measure to ensure the participation of the accused before the trial judge(s).

Within the criminal justice in Cambodia, pre-trial detention has been traditionally the measure of first rather than the last resort. All legal practitioners, whom the author interviewed, shared similar responses that the accused persons, in most cases (more than 90%), have been placed in pre-trial detention in the case of *flagrante delicto*, where they have been arrested and brought immediately to the court by the judicial police. The grounds for pre-trial detention as stipulated in Article 205 of CPCC where the judges have used frequently are 1). to stop or prevent the offense from happening again, 2). to protect witnesses or victims or the collusion between the accused person with the accomplice, and 3). to ensure the presence of the accused person during the proceedings against him.

In the *flagrante delicto* cases, the investigating judges rarely release the accused person due to three main reasons: firstly, in most cases, the investigating judges perceive that "releasing the accused" is considered to be "against the request from the prosecutor" to detain the accused person, secondly, they have sufficient amount of evidence to indicate that the accused person has involved/committed the crime, and thirdly, the accused person has already been caught and brought to the court, so if the investigating judges release the accused person, it may have an impact on their future working relationship between the judicial police, prosecutor and investigating judges.

[169]LICADHO, Cambodian League for the Promotion and Defense of Human Rights "Rights at a Price: Life inside Cambodia's Prisons", January 2015, Page 24

[170] In practice, this term is commonly understood that the accused has already been arrested and brought before the investigating judge

This reflects that instead of basing their decision mainly on evidence and justification as required by law, the decision of the judges tend to be based more on external factors. The common quote that some respondents have used is "The police put much effort to catch/arrest the accused whereas the judges keep releasing him/her." This common quote is further explained below.

The working relationship greatly influences the decision of the investigating judge not to release the accused person since the investigating judge does not want to discredit or waste the effort of the police and prosecutor and to ruin their prospective working relationship. In Cambodia, the prosecutor and the police are the ones who implement the order of the court, and it is perceived that the executive branch is more powerful than the judicial branch.

Hence, if the investigating judge decides to release the accused person against the request of the prosecutor in this *flagrante delicto* case, where the accused is already caught and brought to the court, and later order to re-arrest the released accused, the prosecutor and the police have a tendency of being reluctant to effectively implement that court order because they think that "the investigating judge should have detained the released accused in the first place."

To avoid such a scenario and to maintain their good working relationship, the investigating judge is greatly influenced to detain the accused person based upon the request from the prosecutor and this practice has been customary in Cambodia. Furthermore, this practice can be viewed as a violation of the principle of impartiality guaranteed by the UN Basic Principles on the Independence of the Judiciary, which requires the judges to act impartially and examine the request from the prosecutor in detail before making the decision to either detain or release the accused person.

In addition, since pre-trial detention is a common practice in Cambodia, any deviation from the practice might risk the decision being allegedly perceived to be involved with corruption. For example, if the prosecutor requests the investigating judge to use non-custodial measure instead of placing the accused in pre-trial detention, the judge might perceive that the prosecutor has received the bribe from

the accused. In the same way, if the judges use the alternative measures instead of placing the accused in pre-trial detention, the judge may be viewed that he/she has accepted a bribe from the accused or his/her relatives. This common practice of pre-trial detention in Cambodia has been one of the greatest obstacles for the application of available non-custodial measures.

Last but not least, the investigating judge is influenced by the president of the court, and it almost becomes a custom among the new judges to seek consultation or approval from the president of the court for the decision especially the sensitive cases they handle (the cases involving high ranking officials and well-off persons for example). In an ideal legal system, each judge shall be independent and shall apply the law as stated in the law without any interferences from external factors. As discussed earlier, since the pre-trial detention is a common practice in *flagrante delicto* cases, any deviation from the practice may require the justification from the judges before many actors such as the prosecutor, the president of the court and even the judicial police.

To avoid the confrontation between them, it is more convenient for the investigating judge to just place the accused in pre-trial detention as requested by the prosecutor. The implication of this practice is that the investigating judge in most cases fails to make the decision on pre-trial detention in an independent manner or rarely accept the motion to release the accused raised by his defense lawyer due to the influence from the common practice and fear of deterioration of the working relationship with other actors such as the prosecutor or the president of the court. This current practice reflects that the court in Cambodia seems to use the pre-trial detention as the general rule and routine rather than a measure of last resort as required by ICCPR.

Thus, such practice is not compatible with the ICCPR where requires the pre-trial detention to be a mean of the last resort only with the minimum necessary period.[171] This inordinate pre-trial detention not only appears to be an indication of the failure

[171] ICCPR, Article 9

to comply with the international human rights standards but also has resulted in thousands of detainees awaiting their trial and dramatically increase of Cambodia's prison population. This overuse of pre-trial detention also leads to the existence of many arbitrary detentions in Cambodia.

4.2.2 Cambodia's Anti-Drug Campaign

Another reason why the distressing rate of pre-trial detention developed in Cambodia is the launch of anti-drug campaign by the government. The criminal justice system of Cambodia has been full of drug-related cases since the establishment of this campaign in 2017[172] while there are limited numbers of prosecutors and judges in Cambodia, thus, each prosecutor and judge handle overloaded cases, which result in the slower court procedures.

Due to the large number of cases assigned for the investigation, the investigating judges are unable to sufficiently assess and consider each case's circumstances properly as they simply do not have enough time. The failure to properly assess the case results in many arbitrary detentions once they order for pre-trial detention. In furtherance, such practice of improper and excessive use of pre-trial detention has led to an overcrowded prison population. Currently, the number of prisoners in Cambodia has increased by 78% since the start of anti-drug campaign, from 21,900 at the end of 2016 to over 38,990 by mid-2020[173] and as indicated by World Prison Brief (WPB) 71.8% of the overall prison population are pre-trial detainees.[174] Up to mid-2020, 57% of all prisoners in Cambodia are held on drug related charges.[175]

All respondents, whom the author interviewed, provided the same response that most of the pre-trial detainees are charged with drug-related cases. It is rare for drug related cases, especially in *flagrante delicto cases*, for detainees to be released

[172] Amnesty International, "Substance Abuses: The Human Cost of Cambodia's Anti-Drug Campaign", 2020, Page 13
[173] Amnesty International & LICADHO "Arbitrary Detention Related to Drug Policy in Cambodia", June 2020, Page 5
[174] World Prison Brief, "Highest to Lowest-Pre-trial detainees/remand prisoners", accessed on 26 January 2021 via https://www.prisonstudies.org/highest-to-lowest/pre-trial-detainees?field_region_taxonomy_tid=All
[175] Amnesty International & LICADHO "Arbitrary Detention Related to Drug Policy in Cambodia", June 2020, Page 6

because the court believes that the drug related crime is the systematic crime, so if the accused happens to be released, there is a high risk that he/she colludes with his/her peers, who are also under investigation, therefore, placing him/her in pre-trial detention is the most effective way to stop the collusion and to ensure his/her appearance before trial.

The commonly used grounds in the drug related cases are 1). to stop or prevent the offense from happening again, and 2). to protect witnesses or victims or the collusion between the accused person with the accomplice. Once talking about the ground "to stop or prevent the offence from happening again", the respondents emphasized that before ordering the pre-trial detention, they also consider many other relevant factors such as the accused's permanent residence, occupation, previous conviction, social status and the gravity of the crime.

Some of the respondents added that pre-trial detention is very common because the existing alternatives to pre-trial detention in Cambodia are still limited, thus placing the accused person in pre-trial detention is the most practically effective and necessary way to ensure the appearance of the accused before the trial. Otherwise, he/she would run away if he/she happens to be released. The policy of the anti-drug campaign imposed by the government together with the common practice of pre-trial detention by the court have shown no sign of reduction of the current rate of pre-trial detainees in Cambodia. WPB discloses that Cambodia has been ranked 12 out of 217 countries, from highest to lowest, once it comes to the percentage of the number of pre-trial detainees.[176]

Through earlier illustration, it can be concluded that the excessive use of pre-trial detention in Cambodia are attributable to many factors including but not limited to the launch of anti-drug campaign by the government, the judicial culture and practice, in which judges were perceived as being too ready to use the pre-trial detention, too swift to take the prosecutors' side and too reluctant to find ways to

[176] World Prison Brief, "Highest to Lowest-Pre-trial detainees/remand prisoners", accessed on 13 March 2021 via https://www.prisonstudies.org/highest-to-lowest/pre-trial-detainees?field_region_taxonomy_tid=All

alleviate the risk of releasing the accused. In addition, the failure to use the alternatives is also the main factor contributing to the excessive use of pre-trial detention in Cambodia.

Therefore, judges in Cambodia should consider and use more alternatives, rather than, take the pre-trial detention as a measure of the first resort. Since the alternatives to pre-trial detention can be one of the mechanisms to reduce the rate of pre-trial detention in Cambodia, the author, in the next chapter, dives into the existing alternatives available in Cambodia and discuss about good alternatives from other countries that can be practically used in the context of Cambodia.

4.2.3 Length of Pre-Trial Detention in Practice

Regarding the actual length of pre-trial detention in practice, all respondents provided the same response that, throughout their experiences, the accused person who is placed in pre-trial detention has never been detained for longer than the permitted time. They added that, in Cambodia, there is no common implementation or specific method where the judges can use to track duration of the pre-trial detention. Each judge has his/her own method in tracking the duration of the detention. Some judges note the date of the detention and expiration date of detention on the board in their office, some judges use the Microsoft Excel to notify them about the expiration date of detention, and other judges have their pre-trial detention book where they can note and check it every morning. All these methods are used to ensure that no detainee held in pre-trial detention exceeds its permitted time.

For the time being, there is no existing law or particular policy requiring the investigating judges to review the length of pre-trial detention at certain time, however, in practice, upon the completion of their investigation on the cases, the investigating judges generally issue Orders to send the detainee to trial judge(s). If the investigation has not yet been completed by the expiration date of detention, the investigating judges commonly issue Orders to extend the pre-trial detention (how long the extension can be depends on which type of crime the accused was charged with).

Some of respondents noted that it is rare that the detention is extended, however, in case of the extension of detention, they generally provide reasons to substantiate their decision where such practice is aligned with the international human rights standards that require the court to provide reasons of the permissible grounds for any continued detention such as the risk of obstructing the completion of the investigation.[177] Therefore, such good practice should remain in place so that Cambodia may ensure that no pre-trial detainees are held longer than the permitted time. This continued practice suggests that Cambodia has legally and practically satisfied the international human rights standards in term of duration of pre-trial detention.

However, some NGO' reports have provided contrasting information revealing that there are some cases where the accused persons are held in pre-trial detention for period longer than those allowed by the law simply because, in Cambodia, the investigating judges are on rotation every four years, and are not able to clear the backlog of cases in the provinces they are rotating through.[178] In addition, the absence of policy that requires the judges to check/review duration of accused's detention is another factor causing the existence of the exceedance of permitted time for pre-trial detention.

Therefore, to reduce and avoid any possible/future exceedance of permitted time for pre-trial detention, the author believes that the policy at the court that requires judges to review the detention of the accused at certain time is really important since the existence of this policy not only ensures that the permitted time of detention is carefully checked and reviewed but also requires the judges to reassess the grounds or necessities of detention whether or not the imposed grounds are extinguished. This regular review on the grounds of detention may also reduce the rate of arbitrary detention in Cambodia as the court can release the detainees early

[177] UN, Human Rights Committee, Clement Boodoo v. Trinidad and Tobago, Communication No. 721/1996, 5 April 2002, Para 6.2; see also: ECtHR, "Guide on Article 5 of ECHR: Right to Liberty and Security, 2020, Para 195

[178] Cambodian Human Rights Action Committee, "Joint NGO Submission to The United Nations Huan Rights Committee on the List of Issues Prior to Reporting for the Second Periodic Report of Cambodian on ICCPR", April 2014, Page 10

once its grounds of detention are extinguished. Therefore, the author suggests that this mechanism should be incorporated in the courts' policy.

4.2.4 Court Order Form Which the Investigating Judges Have Used for the Decision of Pre-Trial Detention

As discussed earlier, most of the accused persons in *flagrante delicto* cases are placed in pre-trial detention to ensure that they appear before the trial. This leads the pre-trial detention in Cambodia to be a common practice, rather than the exception. According to the international human rights standards and Cambodian law, pre-trial detention can be only made once one of the permissible grounds is justified such as the risk of absconding, the risk of obstructing the investigation of the case, the need to prevent the repetition of crime, the need to protect the detainee and the need to preserve the public order.[179]

One of the main reasons resulting in the arbitrary detention is the failure to provide the justification in the Order for the use of pre-trial detention. The investigating judge shall provide substantial factual evidence to substantiate the decision in its Order, thus, before making decision to detain the accused person, the court shall assess many relevant factors include the character of the person involved, his home, his occupation, his assets, his family ties and all types of links with the countries which the accused in is being prosecuted.[180] In this section, the author will discuss what type of Court Order Form is used in the present day, thereafter, discuss whether or not the court has properly provided concrete reasons in its order before detaining the accused.

Before 2014, the Court Order Form involving box ticking was used nationwide to place an accused in pre-trial detention without providing any legal and factual reasoning for the detention in the order.[181] Therefore, the accused person back then

[179] ECtHR, Buzadji v. The Republic of Moldova, "Application No. 23755/07", 5 July 2016, Para 88
[180] ECtHR, Neumeister vs Austria, "Application No. 1936/63", 27 June 1968, Para 10; see also: ECtHR, Becciev v. Moldova, "Application No. 9190/03", 4 October 2005, Para 58
[181] United Nations Human Rights, Office of The High Commissioner, "Reforming the Pre-Trial Detention Process to Prevent Arbitrary Detention", March 2014, Page 1

did not understand the reasons for the detention, which such cases resulted in many arbitrary detentions.[182]

In early 2012, the Office of the United Nations High Commissioner for Human Rights (OHCHR) in Cambodia paid close attention to the practice of pre-trial detention in Cambodia and recommended to amend the Court Order Form for pre-trial detention used by the judge. Upon OHCHR's advice, the Ministry of Justice (MoJ) drafted the new Court Order Form for pre-trial detention, which instructs the judges to provide the concrete reasons in the Order for the detention.[183] Such instruction to provide reason not only reduces the arbitrary detention but also increase the accountability and transparency in Cambodian judicial system. Cambodia had taken a big step towards reform where the new Court Order Form for pre-trial detention was approved in 2014 by the MoJ and was circulated to all courts of first instance in the country.[184] The new Court Order Form is attached in **Appendix II**.

However, some judges, in practice, are still using the old Form involving the box ticking (as attached in **Appendix III**) instead of the new Form introduced by the MoJ, resulting in some pre-trial detentions being imposed without giving the accused person a reasoned decision in the Order.[185] Such practice by some judges in Cambodia is not compatible with the international human rights standards which require the judges to provide reasons to substantiate their decision for the detention, and that reason cannot be relied upon *in abstracto;* but shall be supported by factual evidence.[186]

Clear and grounded justification in the Court Order is a very crucial method to reduce/eradicate the perception of arbitrariness and bias in the judicial system, however, if judges simply tick one or two of the grounds for detention as stipulated

[182] Ibid
[183] Ibid
[184] Ibid, Page 2
[185] Cambodian Human Rights Action Committee, "Joint NGO Submission to The United Nations Huan Rights Committee on the List of Issues Prior to Reporting for the Second Periodic Report of Cambodian on ICCPR", April 2014, Page 10
[186] ECtHR, Trzaska v. Poland, "Application No. 25792/94", 11 July 2000, Para 65

in CPCC, it reflects that the judges fail to provide in-depth explanation/justification for their decision and fail to provide clear grounds for the non-use of available alternatives to pre-trial detention.

Such practice is a reflection that the judges fail to provide substantial evidence to justify the legitimacy of their decision, which may undermine the court's integrity as a whole. In addition, such continued practice not only violates the domestic law, but is also a sign of continued incompatibility with the international human rights standards, that requires the judges to provide proper factual justification for their decision to place the accused person in pre-trial detention.

An inference can be drawn that, through such practice, the right to liberty of the accused in Cambodia is not properly respected since the judges tend to assume in abstract form that the accused may evade the trial or reoffend, if not held in pre-trial detention, without providing justification in the Order. Additionally, the right to liberty of the accused is still not properly respected if the judges merely state in the Order that "if released, the accused would get rid of the evidence or would repeat the crime" without clear justification.

This basically means that, to be able to place an accused in pre-trial detention according to the international human rights standards, the judges shall prove the casual link between the accused person's release and the potential risk of the permitted grounds for detention in the Court Order.

The author is of the view that the new Court Order Form introduced by MoJ is a good sample as it instructs the judges to provide the justification for their decision. However, this Form has not yet become compulsory for the judges since it is merely an instruction, not the law. Therefore, it depends on the judges' discretion to use it. That is why there is no consistent use of Court Order Form for pre-trial detention in Cambodia. Some courts of first instance in Cambodia have used the new form while other courts continue using the old Form that involve only the box ticking.

In the author's opinion, to obligate all courts to consistently use the new Form for pre-trial detention, an instruction from the MoJ is not enough since it is not binding,

therefore, the requirement to use this new Form should be incorporated in the law. The requirement should indicate how the decision should be made and substantiated. Once this new Form becomes compulsory, all judges shall not only succinctly state the grounds for pre-trial detention, but also clearly explain the need for such detention and the factual circumstances why other alternatives to pre-trial detention are not suitable.

Chapter 5: Existing Alternatives to Pre-Trial Detention in Cambodia and Recommended Alternatives

In the previous chapter, the author has highlighted that the excessive use of pre-trial detention in Cambodia is one of the main concerns in the Cambodian judicial justice system. Pursuant to the international and Cambodian law, the accused has the right to be presumed innocent until proven guilty.[187] The detention of the accused, who is entitled to be presumed innocent, without substantial justification is a severe infringement of their right to liberty. The international standards require that pre-trial detention shall be used as an exceptional measure of last resort, where it is permissible unless there are reasonable grounds to believe that the person concerned is involved in the commission of the crime and there is a potential risk that the person concerned will abscond from his residence, obstruct the investigation of the case, commit further crime, or cause public disorder.[188]

The court should resort to pre-trial detention only when non-custodial measure cannot address the concerns that justify the use of such detention.[189] The implication of these international standards is that the accused should be given the opportunity to avoid the pre-trial detention through using the non-custodial measures. The obligation to consider the alternative to pre-trial detention comes from the rule that the deprivation of the accused's liberty can only be applied if it is proportionate and necessary to the purpose sought by the imposed measure, thus, when the judge assesses the proportionality and necessity of the detention, the alternatives shall always be considered.[190] Otherwise, if the alternative is ignored

[187] ICCPR, Article 14 (2); and Cambodian Constitution, Article 38
[188] ECtHR, Buzadji v. The Republic of Moldova, "Application No. 23755/07", 5 July 2016, Para 88
[189] United Nations Office on Drugs and Crime, "Handbook of basic principles and promising practices on Alternative to Imprisonment", 2007, Page 18
[190] UNHCR, The UN Refugee Agency, "Alternatives to Detention: Factsheet on International and Regional law and practice related to states' obligation with respect to alternatives to detention", Page 2

and the detention of the accused is applied when it is not proportionate and necessary, such detention would become "arbitrary".[191]

The Tokyo Rules emphasizes that the need of non-custodial measure to pre-trial detention shall be employed at as early as possible.[192] The measures include releasing the accused and requiring the released accused to do one or more of the following conditions: to remain at a specific address; to surrender the identification papers (passport or ID card); to pledge financial or other forms of property as the security to assure that he/she appears at trial, to refrain from engaging in particular conduct, to appear in court on a specified day; or to report on a daily or periodic basis to the court or the police.[193] Imposing the pre-trial detention is not a default practice; however, its alternative should be the first resort, and the detention should be imposed only once it is strictly necessary.[194]

According to the international human rights standards, using the alternatives to pre-trial detention also restricts the right to liberty of the accused to certain extent, and this burden increases when the investigating judges impose multiple alternatives at the same time.[195] Therefore, the investigating judges must carefully assess the pros and cons of alternative to find the most appropriate and least restrictive form in order to serve as the effective alternative to pre-trial detention.[196]

It is hard to provide the specific countries with good practice in respect of pre-trial detention; however, good practice can be evaluated by some factors including the availability of the effective non-custodial measures, the immediate access to legal

[191] Ibid
[192] United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules), "General Assembly Resolution 45/110 ", 14 December 1990, Para 6.2
[193] United Nations Office on Drug and Crime Vienna, "Custodial and Non-Custodial Measures: Alternative to Incarceration" Page 8
[194] European Union Agency for Fundamental Rights, "Criminal Detention and Alternative: Fundamental Rights Aspects in EU Cross-Border Transfers" 2016, Page 62
[195] United Nations Office on Drug and Crime Vienna, "Custodial and Non-Custodial Measures: Alternative to Incarceration" Page 20
[196] Ibid

aid of the accused person, effective legal appeal against the decision for pre-trial detention, and a speedy trial.[197]

In this chapter, the author aims to provide an overview of existing alternatives to pre-trial detention in Cambodia and offer some recommendations on the current application of these alternatives. In addition, the author aims to explore some new alternatives from other countries that are unavailable in Cambodia and recommend them to be integrated into the CPCC, so that it can increase the use of alternatives in the courts of first instance in Cambodia.

5.1 Existing Alternatives to Pre-Trial Detention in Cambodia and Its Application

As discussed earlier, the use of pre-trial detention in Cambodia is a custom rather than a measure of last resort, and such practice, according to the respondents, is partly attributable to the lack of effective non-custodial measures and the absence of authority to effectively monitor the compliance of the accused with the non-custodial measures. The rampant overuse of pre-trial detention in Cambodia has resulted in severe overcrowded prison population where almost 75% of detainees are awaiting their trial.[198] Such growing prison population in Cambodia is partly contributed by the systemic failure to apply the existing alternatives to pre-trial detention.

In Cambodia, there are a range of alternatives to pre-trial detention available to ensure the appearance of the accused before the trial without depriving the absolute liberty of the accused. Article 223 of CPCC authorizes the judges to place an accused person under the judicial supervision if the accused is being investigated of the offence punishable by imprisonment.

[197] Council of Europe, "Reducing use of custodial sentences in line with European Standards Project in Armenia", 2013, Page 16

[198] Amnesty International and LICADHO, Joint Statement "Cambodian Authorities Must Follow Through With Release of Prisoners Amid Covid-19", 2020, Page 2

With that judicial supervision, the accused is released and required to do one or more of the following obligations[199]:

1. *Not to go outside the boundary determined by the investigating judge;*
2. *Not to change the address of the residence without the permission from the investigating judge;*
3. *Not to go to certain places determined by the investigating judge;*
4. *Shall appear at the police office or military office set by the investigating judge;*
5. *Shall response to the summon from any person appointed by the investigating judge;*
6. *Hand over all identity documents to the clerk's office;*
7. *Not to drive any vehicle;*
8. *Not to receive or meet certain persons specified by the investigating judge;*
9. *To deposit some amount of money and for the duration of payment determined by the investigating judge based on the financial circumstances of the accused;*
10. *Not to possess or bring with the weapons and shall return all those weapons to the clerk's office;*
11. *To undergo the medical examination or treatment under the medical supervision in the hospital;*
12. *To avoid certain specified professional activities.*

In Cambodia, the court does not have strong and effective mechanisms to implement all these alternatives to pre-trial detention. According to the respondents, if the accused persons are released during the investigation, they are, in most cases, placed under judicial supervision attached with several obligations as listed above.

Once asked if the imposed obligations on the released accused are effective to ensure the appearance of him before the trial court, all respondents shared similar

[199] Criminal Procedural Code of Cambodia (CPCC) 2007, Article 223

response that the imposed obligations seem not to be an effective measure due to the lack of mechanisms for overseeing and monitoring the compliance with the imposed obligations, as well as the lack of cooperation with the local authorities involved.

In the light of an example, if the investigating judge releases the accused person and places him under the judicial supervision with the obligation "not to go outside the designated boundary", the court will not know whether or not the accused breaches or fulfils that obligation since there is no mechanism to overseeing or monitoring the compliance of the accused. Due to the absence of this overseeing mechanism, there is a high possibility that the accused would abscond from his residence if released. Some of the respondents emphasized that, practically, if the accused persons are released in *flagrante delicto cases*, they will not appear before the trial. The court, therefore, is reluctant to use non-custodial measures since the imposed measures are not able to ensure the appearance of the accused before the trial court.

5.2 Recommended Alternatives

Alternatives are very crucial and should be the primary consideration for judges to avoid over-reliance on pre-trial detention. In this section, the author aims to provide suitable alternatives from other countries that can be incorporated and implemented in Cambodia this day and age or in the very near future, so that the court can use a variety of alternatives to fit each circumstance of the accused. These alternatives are strongly recommended to be integrated into the current CPCC.

5.2.1 Mexico's Precautionary Measure Unit

In respect of the supervising non-custodial measures, an effective mechanism can be learnt from the Mexico's precautionary measure unit (the Unit) which provides the training based on human rights and empathy to the released accused.[200] Such an approach is seen to be effective because the Unit designs the strategy based on the

[200] Inter-American Commission on Human Rights, "Practical Guide to Reduce Pre-Trial Detention", 2017, Page 26

released accused's circumstances.[201] Once the court imposes the obligations to the released accused, the Unit explains what will happen in the upcoming trial, what the imposed obligations mean, how the supervision is to take place, and importantly, the consequences of the failure to comply with the imposed obligations.[202]

Such communication between the Unit and the released accused is one of the keys for the supervision. Additionally, the contact with the released accused person is regularly conducted by the Unit so that he or she feels accompanied in his or her case.[203] As indicated, this approach has something to do more with psychology of the accused, and it is effective since the released accused fully understands of the consequences that he/she will face if he/she fails to comply with the imposed obligations. The consequences can be another criminal punishment if the accused fails to fulfill the obligations imposed by the court. This approach, according to the Unit, results in 90% of the released accused persons appearing before the trial court.[204] This high percentage of compliance reflects that this supervising approach is a highly effective model, which can be used to ensure the appearance of the accused before the trial court without placing him/her in pre-trial detention.

In the context of Cambodia, there is no such supervising model to provide the training to the released accused and conduct regular contact with him/her. Since the Mexican supervising model is highly effective in ensuring the appearance of the accused before the trial, Cambodia should consider establishing similar model in order to improve the effectiveness of the implementation in the use of alternative to pre-trial detention. However, establishing such model will not be easy as the state shall allocate human and financial resources in order to operate as effectively as Mexico's model. Considering the current situation in Cambodia, the author understands that Cambodia is lacking financial and human resources and there are

[201] Ibid
[202] Ibid
[203] Ibid
[204] Ibid

many prioritized fields on which the government is focusing. Thus, the government might hesitate to establish this model at the present moment.

Alternatively, although this supervising model might not be capable of being implemented immediately, the author believes that Cambodia may still learn from Mexico's experience. As indicated earlier, the Unit's main tasks are to explain the accused what will happen in the upcoming trial, what the imposed obligations mean, how the supervision is to take place, and importantly, the consequences of the failure to comply with the imposed obligations.

The author believes that these explanations can simply be done by the judges. In the context of Cambodia, the accused, who is placed under the judicial supervision, should be verbally explained by the judges in respect of the consequences of the failure to comply with the imposed obligations, so that the released accused fully understands what happens if he/she fails to fulfil the imposed obligations.

Some of the respondents elaborated that, in some cases, they have explained the accused verbally, who is placed under the judicial supervision that if he/she fails to comply with the imposed obligations, he/she will be charged of another crime regarding "the failure to respect the judicial supervision measures". The punishment for this violation can be one- or two-years imprisonment as stipulated by Criminal Code of Cambodia.[205] They added that most accused persons, who were told about the consequence of failure to fulfill the obligations, appear before the trial court. This practice at least enhances the compliance of the accused with the imposed obligations since he/she fears another punishment if he/she breaches the obligations. With success in Mexico, it is feasible that this model is effective in ensuring the appearance of the released accused before trial. Therefore, the author is of the opinion that this practice should be consistently and cooperatively upheld by all judges in Cambodia.

[205] Criminal Code of Cambodia 2009, Chapter 4: "Breach of Certain Judicial Decisions" Article 576-585

However, this approach is not suitable for the drug addicted and violent accused because this type of accused, if released, will most likely commit another crime even though they have known the consequences they will face. According to the U.S Department of Justice, 76.9% of drug addicted offenders commit another crime within 5 years of their release.[206] The implication of this statistic is that there is a high possibility that the drug addicted accused commits another crime if he/she was to be released even in the investigating stage.

In the author's opinion, instead of placing him/her in pre-trial detention or immediately releasing him/her, the accused charged with drug addiction should be sent to rehabilitation center to receive proper treatment such as psychological care and anti-violence training before releasing him/her. After receiving successful treatment, he/she can be reintegrated into the society without being placed in pre-trial detention. This method not only reduces the number of per-trial detainees but also helps to reduce the number of drug addicted persons in Cambodia.

5.2.2 Electronic Monitoring Bracelet (EMB)

Electronic monitoring bracelet (EMB) refers to the non-custodial measure that utilizes Radio Frequency (FR) and Global Positioning System (GPS) to closely track the position of the offender.[207] EMB has been seen as a good alternative to pre-trial detention not only because of the cost reduction of the expense on imprisonment but also because it allows the offender to refrain from being contaminated by the prison environment and losing social, family and work tie.[208]

In the pursuit of modernization of the criminal justice system, many policy makers in countries across the globe have adopted the use of EMB as one of the alternatives

[206] U.S. Department of Justice, Office of Justice Programs, *Bureau of Justice Statistics,* "Special Report: Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010", April 2014, Page 1

[207] City University of New York (CUNY), John Jay College of Criminal Justice, "Alternatives to Pretrial Detention: Global Best Practice Catalog", 2017, Page 4

[208] The Howard League for Penal Reform, Eric Maes and Benjamin Mine, "Some Reflection on the Possible Introduction of Electronic Monitoring as an Alternative to Pre-Trial Detention in Belgium", 2013, Page 144

to pre-trial detention.[209] EMB has become very popular and used by numerous countries such as Canada, the United Kingdom, United States, Singapore, New Zealand, South Africa, Holland, and Sweden.[210] One of the main purposes of using the EMB is to reduce the prison population and tackle the prison overcrowding.[211] Apart from this, using EMB could avoid a number of negative effects of imprisonment including but not limited to job loss, and loss of income.[212] In addition, it also serves the judicial objectives where the principle of presumption of innocence is guaranteed and the use of pre-trial detention in exceptional cases is upheld.[213]

In respect of the technologies used in the EMB, there are two main technical options: 1). RF and 2). GPS, which are used in different context and for various purpose.[214] RF control is very useful to determine whether the accused is obeying the order of the court to stay at specific address.[215] Using this RF control is more economical than other types of technology and it is frequently used to enhance the enforcement of house arrest.[216] However, the EMB equipped with the GPS systems deemed as the most appropriate non-custodial measure for monitoring the real time position of the accused;[217] thus, the accused goes wherever can be tracked by this system.

In the context of Cambodia, the court is reluctant to release the accused person due to the absence of ineffective alternatives to ensure the appearance of the accused before the trial court. Therefore, the bracelet equipped with the GPS is strongly

[209] United Nations Office on Drugs and Crime, Regional Office for Central America and the Caribbean, "The Use of Electronic Monitoring Bracelets as an Alternative Measure to Imprisonment in Panama", 2013, Page 2
[210] John Howard Society of Alberta, "Electronic Monitoring", 2000, Page 3
[211] The Howard League for Penal Reform, Eric Maes and Benjamin Mine, "Some Reflection on the Possible Introduction of Electronic Monitoring as an Alternative to Pre-Trial Detention in Belgium", 2013, Page 149
[212] Ibid
[213] Ibid
[214] United Nations Office on Drugs and Crime, Regional Office for Central America and the Caribbean, "The Use of Electronic Monitoring Bracelets as an Alternative Measure to Imprisonment in Panama", 2013, Page 3
[215] Ibid
[216] Ibid
[217] Ibid

recommended since it is capable of tracking the actual position of the released accused. In case the accused does not appear before the trial court as summoned, the judicial police could easily identify his position and bring him to the court. In addition, the author recommends the bracelet equipped with GPS rather than RF control because the court in Cambodia rarely places an accused in house arrest, therefore, using the EMB equipped with RF is not suitable form for the application of Electronic monitoring in Cambodia since RF, according to international experience, is almost exclusively used with respect to home curfews – which means that if the accused leaves their home at a prohibited time, the RF will alert the supervisors that the curfew is violated.[218]

To effectively implement EMB equipped with GPS, there shall be sufficient material and human resources available. There is a need for sufficient control mechanisms (the GPS-systems and the bracelet), sufficient staff to monitor this operation and sufficient budget for the operation of this platform.[219] The United Nations Office on Drugs and Crime (UNODC) is of the opinion that the state willing to initiate this EMB should first analyze the cost versus benefits relations, comparing the expenses of the life of the accused in prison and the cost of the use of EMB.[220]

At a first glance, it seems very challenging for Cambodia to incorporate this platform at this stage since financial and human resources in Cambodia are still limited and there are many other prioritized fields that the government is focusing on for the time being. However, according to international experiences, the expenses related to the use of EMB is really less expensive than the expense of the

[218] District of Columbia Crime Policy Institute, John, Akiva, Samuel, and Mitchell, "The Costs and Benefits of Electronic Monitoring for Washington, D.C.", 2012, Page 4
[219] The Howard League for Penal Reform, Eric Maes and Benjamin Mine, "Some Reflection on the Possible Introduction of Electronic Monitoring as an Alternative to Pre-Trial Detention in Belgium", 2013, Page 153
[220] United Nations Office on Drugs and Crime, Regional Office for Central America and the Caribbean, "The Use of Electronic Monitoring Bracelets as an Alternative Measure to Imprisonment in Panama", 2013, Page 17

incarceration.[221] Incarceration is very expensive since the government needs to spend resources on building and administering prisons as well as housing, training, feeding and caring for the pre-trial detainees.[222] Apart from this, there are also other indirect consequences where the imprisonment could affect the wider community and society in various negative ways: for instance, prison are known for being incubators of diseases such as the AIDS, Covid 19, and tuberculosis, so when these pre-trial detainees are released, they may contribute to further spread of these diseases into the community.[223]

In addition, using the EMB could allow the accused persons with limited financial resource to return to their home to meet their family, return to their workplace and earn money to continue supporting their dependents, rather than spend months in pre-trial detention. Therefore, if Cambodia wishes to spend less financial budget while reforming the use of alternatives to pre-trial detention, EMB equipped with GPS is strongly recommended.

Under Cambodian law, the duration of the pre-trial detention shall be deducted from the sentence decided by the court.[224] Therefore, if Cambodia happens to incorporate this EMB equipped with the GPS as one of the alternatives to pre-trial detention, Cambodia may learn from Belgium experience that one day of wearing the EMB is equated to one day of pre-trial detention spent by the accused.[225] Thus, the total duration of wearing the EMB shall be subtracted from the final prison sentence.

According to the above analysis, the author recommends that Cambodia should start thinking of incorporating this model of alternatives into the current CPCC so that the investigating judges could choose freely among various existing alternatives and apply them in a more flexible way to suit the accused's

[221] District of Columbia Crime Policy Institute, John, Akiva, Samuel, and Mitchell, "The Costs and Benefits of Electronic Monitoring for Washington, D.C.", 2012, Page 4
[222] United Nations Office on Drugs and Crime, "Handbook of Basic Principles and Promising Practices on Alternatives to Imprisonment", 2007, Page 4
[223] Ibid
[224] Criminal Procedural Code of Cambodia (CPCC) 2007, Article 503
[225] The Howard League for Penal Reform, Eric Maes and Benjamin Mine, "Some Reflection on the Possible Introduction of Electronic Monitoring as an Alternative to Pre-Trial Detention in Belgium", 2013, Page 152

circumstances. If Cambodia does not start and take a step to reform the excessive and unnecessary use of pre-trial detention now, then when?

5.3 Concluding Remarks

The primary problems with the use of pre-trial detention in Cambodia found in this paper does not pertain to the law but the implementation of the law: no substantial legal amendments are required. This paper has examined the root causes of high alarming rate of pre-trial detention in Cambodia and analyze whether or not the legal instruments and the practice governing the pre-trial detention are compatible with the international human rights standards.

As discussed earlier, the primary causes of the excessive use of pre-trial detention in Cambodia are attributable to two main factors: the launch of the anti-drug campaign by the government and the judicial practice where the use of pre-trial detention in *flagrante delicto* cases is a common practice, which the judges fail to make the decision on pre-trial detention in an independent manner or rarely accept the motion to release the accused raised by the defense lawyer due to the influence from the common practice and the fear of deterioration of their working relationship.

The implication is that any deviation from the common practice may result in deterioration of the working relationship with other actors (prosecutor or judicial police) and being perceived of involving with corruption. Since any deviation from the practice could adversely impact on judges, it is more convenient for him/her to just place the accused in pre-trial detention as requested by the prosecutor despite the availability of non-custodial measures.

In Cambodia, the excessive use of pre-trial detention does not lie with the law but the practice and the application of the law. The law requires the judges to provide concrete evidence to justify the need and necessity for pre-trial detention yet the practice raises some concerns since the court, practically, takes a very relaxed approach in ordering the use of the pre-trial detention.

As analyzed earlier, in Cambodia, the provisions governing the pre-trial detention and police custody in CPCC almost fully comply with the international human rights standards except the determination of the length of the police custody and pre-trial detention. Therefore, to conform fully to the international human rights standards, the author recommends article 398 and 96 of CPCC should be amended so as to reflect the following:

Article 398: "*the accused shall be released immediately if he/she is not found guilty by the court of the first instance."*

Article 96: "*the duration of police custody shall be commenced from the time of the arrest, not the time the arrestee arrives at the police office."*

Regarding the practice of pre-trial detention in Cambodia, a big step towards reform is required. The current judicial culture and practice, which results in judges being perceived as being too eager to make assumptions about the jeopardy of releasing the accused, too swift to take the prosecutor's side, and too reluctant to find way to alleviate the risks of releasing the accused, should be eradicated.

Under the international human rights standards, the pre-trial detention can be unlawful and arbitrary if the court merely relies on the permissible grounds as stipulated in the law in an abstract manner without substantial factual concrete to justify their decision to place the accused in pre-trial detention. As discussed earlier, there are some judges in Cambodia still using the box ticking Court Order Form for pre-trial detention without providing the substantial grounds to justify their decision in the order. Such practices are incompatible with the international human rights standards.

Therefore, the new Court Order Form for pre-trial detention, as introduced by the MoJ should be incorporated into law so that it becomes compulsory for all judges to set out clearly the necessity for the detention and to provide the factual circumstances why other alternatives to pre-trial detention are not suitable.

Last but not least, Cambodia should pay more attention to ensure that alternatives are being effectively utilized in the judicial process and pre-trial detention is used

as a measure of last resort. Once alternatives are effectively implemented and the use of pre-trial detention as the measure of last resort becomes a norm, the arbitrary detentions and the rate of pre-trial detention in Cambodia will reduce accordingly.

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Appendix I

Questions for the Interview

1. In practice, which ground(s) for pre-trial detention have the investigating judges used frequently?
2. What does the court order form for pre-trial detention look like? Upon the order for pre-trial detention being issued, do judges provide substantial grounds for their decision?
3. Is pre-trial detention used frequently? Why? Which offenses are they mostly used on?
4. Have the investigating judges commonly used the alternatives to pre-trial detention in Cambodia? Are they effective?
5. In your experience, has accused person been placed in pre-trial detention beyond the permitted time?
6. In case the accused has been placed beyond the permitted period, does the state provide any compensation?
7. In your opinion, what should be done to improve the pre-trial detention situation in Cambodia?

Appendix II
New Court Order Form for Pre-Trial Detention

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

សាលាដំបូងខេត្ត-រាជធានី

សំណុំរឿងព្រហ្មទណ្ឌលេខ.....

ចុះថ្ងៃទី.....

សំណុំរឿងស៊ើបសួរលេខ.....

ចុះថ្ងៃទី.....

លេខ[1].....

ដីកាសម្រេចឃុំខ្លួនបណ្តោះអាសន្ន

យើង.....ចៅក្រមស៊ើបសួរនៃសាលាដំបូង.....អមដោយ លោក/លោកស្រី.....ជាក្រឡាបញ្ជី។

- បានឃើញមាត្រា២០៣ ដល់មាត្រា២០៦ និងមាត្រាផ្សេងៗទៀត នៃក្រមនីតិវិធីព្រហ្មទណ្ឌ ដែលទាក់ទងនឹងការឃុំខ្លួនបណ្តោះអាសន្ន

- បានឃើញដីកាសន្និដ្ឋានបញ្ជូនរឿងឲ្យស៊ើបសួរលេខ.....ចុះថ្ងៃទី.....ខែ.....ឆ្នាំ..... ដែលបានបើកការស៊ើបសួរលើ

ឈ្មោះ.....ឈ្មោះហៅក្រៅ.....ភេទ.....ថ្ងៃខែឆ្នាំកំណើត.....
សញ្ជាតិ.....មុខរបរ.....មានអត្តសញ្ញាណប័ណ្ណ/លិខិតឆ្លងដែនលេខ.....
កំរិតវប្បធម៌.....ទីកន្លែងកំណើតនៅភូមិ.....ឃុំ/សង្កាត់.....
ស្រុក/ខណ្ឌ.....ខេត្ត/រាជធានី.....។
ទីលំនៅថ្នាក់លេខ.....ផ្លូវលេខ.....ភូមិ.....ឃុំ/សង្កាត់.....
ស្រុក/ខណ្ឌ.....រាជធានី/ខេត្ត.....។
ឪពុកឈ្មោះ.....រ☐ ស☐ ម្តាយឈ្មោះ.....រ☐ ស☐
ប្តី/ប្រពន្ធឈ្មោះ.....រ☐ ស☐ មានកូន.....នាក់ ឬនៅលីវ☐ នីតិជន☐ អនីតិជន☐។
មុខរបរ.....

[1] លេខរបស់ដីកាសម្រេច

ប្រវត្តិនៃការផ្តន្ទាទោសដោយតុលាការ.....។

ជននេះត្រូវបានដាក់នៅក្រោមការពិនិត្យពីបទ.....តាមមាត្រា.....

នៃក្រមព្រហ្មទណ្ឌ/ច្បាប់.....។

ប្រព្រឹត្តនៅផ្ទះលេខ.....ផ្លូវលេខ.....ភូមិ.....ឃុំ/សង្កាត់.....

ស្រុក/ខណ្ឌ.....ខេត្ត/រាជធានី.....

កាលពីថ្ងៃទី.....ខែ.....ឆ្នាំ.....។

បានឃើញកំណត់ហេតុស្តីពីការបង្ហាញខ្លួនលើកដំបូង

បានឃើញកំណត់ហេតុស្តីពីការពិភាក្សាដេញដោល និងការគេគំសម្គាល់របស់ភាគី

I. ស្ថានភាពអង្គហេតុ និងអង្គច្បាប់

១ ក្នុងករណីបច្ចុប្បន្ន ជនត្រូវចោទឈ្មោះ .....ត្រូវចោទពីបទ.....

(បញ្ចូលបទល្មើសដែលមានកំណត់នៅក្នុងដីកាបញ្ជូនរឿងឲ្យស៊ើបសួរ.....)

២. ប្រព្រឹត្តិនៅ.....

(សង្ខេបអង្គហេតុនៃរឿង)

៣. តំណាងអយ្យការ បានស្នើឲ្យឃុំខ្លួន☐ មិនឲ្យឃុំខ្លួន☐ បណ្តោះអាសន្នលើជនត្រូវចោទ

ឈ្មោះ.....ផ្អែកលើសំអាងហេតុដូចតទៅ.....

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៤. ជនត្រូវចោទឈ្មោះ .....ឬមេធាវីការពារ ស្នើសុំ(កូនក្តីឲ្យ)នៅក្រៅឃុំ

បណ្តោះអាសន្ន☐ ដាក់ក្រោមការត្រួតពិនិត្យតាមផ្លូវតុលាការ☐ ដោយសំអាងហេតុផលថា

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II. សំអាងហេតុនៃសេចក្តីសម្រេច

៥. ជនត្រូវចោទឈ្មោះ.....ត្រូវចោទពីបទឧក្រិដ្ឋ/មជ្ឈឹម ដែលច្បាប់កំណត់ដាក់

ពន្ធនាគារស្មើ ឬលើសពី ១(មួយ)ឆ្នាំ (មាត្រា២០៤ នៃក្រមនីតិវិធីព្រហ្មទណ្ឌ)។

៦. (បញ្ជូលនូវការយល់ឃើញឆ្លើយតបទៅនឹងសំអាងហេតុនានា ដែលលើកឡើងដោយភាគីមានដូចជា តំណាងអយ្យការ និងជនត្រូវចោទ ឬមេធាវីការពារជនត្រូវចោទ ដោយពន្យល់សំអាងហេតុគាំទ្រទៅនឹងមូលហេតុនៃការឃុំខ្លួន ចំនួនមួយ ឬច្រើន ដែលមានចែងក្នុងមាត្រា២០៥ នៃក្រមនីតិវិធីព្រហ្មទណ្ឌ).....

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(ហេតុផលជាមូលដ្ឋានពីថេរវេលានៃការឃុំខ្លួនបណ្តោះអាសន្ន និងមានយោងតាមបញ្ញត្តិច្បាប់)

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ដោយសារមិនមានវិធានការត្រួតពិនិត្យតាមផ្លូវតុលាការណាមួយដែលមានលក្ខណៈគឹងរឹង និងអាចធានាឲ្យមានការបំពេញកិច្ចការប្រកបដោយប្រសិទ្ធភាព ចំពោះស្ថានភាពតម្រូវទាំងអស់នេះ ហើយមានតែការឃុំខ្លួនដែលជាមធ្យោបាយតែមួយគត់ ដើម្បីសម្រេចនូវគោលដៅខាងលើ។

ហេតុដូច្នេះ សម្រេច

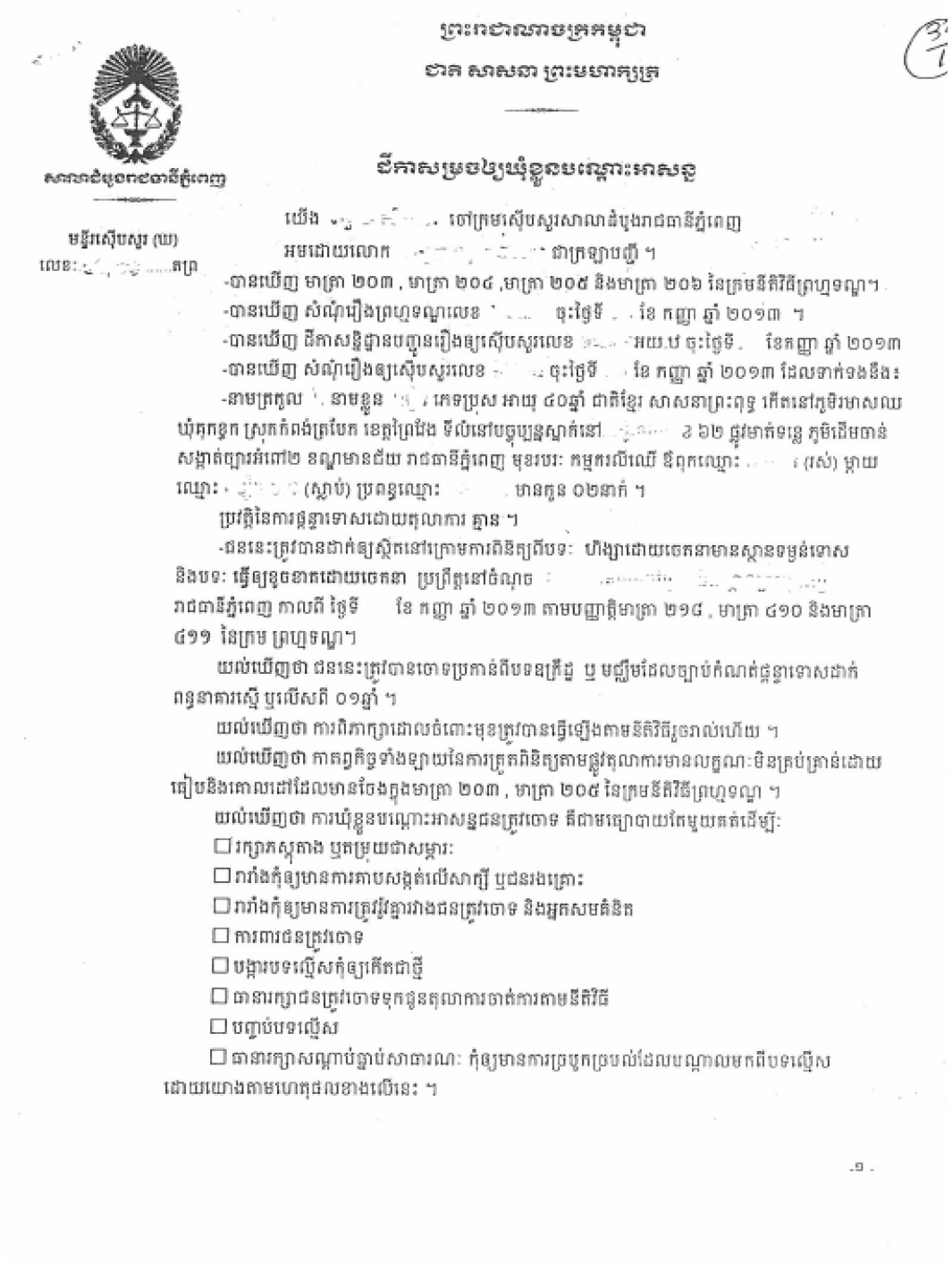
ឃុំខ្លួនជនត្រូវចោទឈ្មោះ.....ជាបណ្តោះអាសន្នរយៈពេលអតិបរមា.....។

ធ្វើនៅ.....ថ្ងៃទី.....ខែ.....ឆ្នាំ.....

ចៅក្រមស៊ើបសួរ

ក្រឡាបញ្ជី

Appendix III
Old Court Order Form for Pre-Trial Detention



ព្រះរាជាណាចក្រកម្ពុជា

ជាតិ សាសនា ព្រះមហាក្សត្រ

សាលាដំបូងរាជធានីភ្នំពេញ

មន្ត្រីស៊ើបសួរ (ឃ)

លេខ:.....តប្រ

ដីកាសម្រេចឲ្យឃុំខ្លួនបណ្តោះអាសន្ន

យើង ..... ចៅក្រមស៊ើបសួរសាលាដំបូងរាជធានីភ្នំពេញ

អមដោយលោក ..... ជាក្រឡាបញ្ជី ។

-បានឃើញ មាត្រា ២០៣ , មាត្រា ២០៤ ,មាត្រា ២០៥ និងមាត្រា ២០៦ នៃក្រមនីតិវិធីព្រហ្មទណ្ឌ។

-បានឃើញ សំណុំរឿងព្រហ្មទណ្ឌលេខ ..... ចុះថ្ងៃទី ..... ខែ កញ្ញា ឆ្នាំ ២០១៣ ។

-បានឃើញ ដីកាសន្និដ្ឋានបញ្ជូនរឿងឲ្យស៊ើបសួរលេខ ..... អយ.ប ចុះថ្ងៃទី ..... ខែកញ្ញា ឆ្នាំ ២០១៣

-បានឃើញ សំណុំរឿងឲ្យស៊ើបសួរលេខ ..... ចុះថ្ងៃទី ..... ខែ កញ្ញា ឆ្នាំ ២០១៣ ដែលទាក់ទងនឹង៖

-នាមក្រកូល ..... នាមខ្លួន ..... ភេទប្រុស អាយុ ៤០ឆ្នាំ ជាតិខ្មែរ សាសនាព្រះពុទ្ធ កើតនៅភូមិរមាសឈូក ឃុំគុកខ្នុក ស្រុកកំពង់ត្រែក ខេត្តព្រៃវែង ទីលំនៅបច្ចុប្បន្នស្នាក់នៅ ..... ផ្លូវមាត់ទន្លេ ភូមិដើមចាន់ សង្កាត់ច្បារអំពៅ២ ខណ្ឌមានជ័យ រាជធានីភ្នំពេញ មុនរបរ: កម្មការលើឈើ ឪពុកឈ្មោះ ..... (រស់) ម្តាយឈ្មោះ ..... (ស្លាប់) ប្រពន្ធឈ្មោះ ..... មានកូន ០២នាក់ ។

ប្រវត្តិនៃការផ្តន្ទាទោសដោយតុលាការ គ្មាន ។

-ជននេះត្រូវបានដាក់ឲ្យស្ថិតនៅក្រោមការពិនិត្យពីបទ: ហឹង្សាដោយចេតនាមានស្ថានទម្ងន់ទោស និងបទ: ធ្វើឲ្យខូចខាតដោយចេតនា ប្រព្រឹត្តនៅចំណុច ..... រាជធានីភ្នំពេញ កាលពី ថ្ងៃទី ..... ខែ កញ្ញា ឆ្នាំ ២០១៣ តាមបញ្ញត្តិមាត្រា ២១៨ , មាត្រា ៨១០ និងមាត្រា ៨១១ នៃក្រម ព្រហ្មទណ្ឌ។

យល់ឃើញថា ជននេះត្រូវបានចោទប្រកាន់ពីបទឧក្រិដ្ឋ ឬ មជ្ឈឹមដែលច្បាប់កំណត់ផ្តន្ទាទោសដាក់ពន្ធនាគារស្មើ ឬលើសពី ០១ឆ្នាំ ។

យល់ឃើញថា ការពិភាក្សាដោលចំពោះមុខត្រូវបានធ្វើឡើងតាមនីតិវិធីរួចរាល់ហើយ ។

យល់ឃើញថា កាតព្វកិច្ចទាំងឡាយនៃការត្រួតពិនិត្យតាមផ្លូវតុលាការមានលក្ខណៈមិនគ្រប់គ្រាន់ដោយរៀបនឹងគោលដៅដែលមានចែងក្នុងមាត្រា ២០៣ , មាត្រា ២០៥ នៃក្រមនីតិវិធីព្រហ្មទណ្ឌ ។

យល់ឃើញថា ការឃុំខ្លួនបណ្តោះអាសន្នជនត្រូវចោទ គឺជាមធ្យោបាយតែមួយគត់ដើម្បី:

☐ រក្សាភស្តុតាង ឬតម្រុយជាសម្ភារៈ

☐ ការពារកុំឲ្យមានការតាមសង្កត់លើសាក្សី ឬជនរងគ្រោះ

☐ ការពារកុំឲ្យមានការត្រូវរ៉ូវគ្នារវាងជនត្រូវចោទ និងអ្នកសមគំនិត

☐ ការពារជនត្រូវចោទ

☐ បង្ការបទល្មើសកុំឲ្យកើតជាថ្មី

☐ ធានារក្សាជនត្រូវចោទមកចូនតុលាការចាត់ការតាមនីតិវិធី

☐ បញ្ចប់បទល្មើស

☐ ធានារក្សាសណ្តាប់ធ្នាប់សាធារណៈ កុំឲ្យមានការប្រមូលប្រជុំដែលបណ្តាលមកពីបទល្មើសដោយយោងតាមហេតុផលខាងលើនេះ ។