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Challenges to the Implementation of the Right to Legal Representation for Children in Criminal Proceedings in Cambodia

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Summary

Given the current climate of abuse of power, human rights violations and judicial corruption in Cambodia, justice is not attainable for those who are poor but the rich, powerful and well-connected. Such lawless status quo of Cambodia makes children in criminal proceedings, including child criminal defendants, victims and witnesses particularly vulnerable to having their right to legal representation denied. This consequently hinders their right to a fair trial and the access to justice based on the rule of law. It is important to note that Cambodia had been spending nearly one decade on the drafting of the Law on Juvenile Justice (LJJ). Although the LJJ has recently been adopted, it has not yet entered into force, which means that a distinct judicial system for children in criminal proceedings in Cambodia is still missing. It is also important to bear in mind that although there exist legislations requiring the judicial actors to guarantee the legal and procedural protections for children in criminal proceedings, such legal protection standards are rarely adhered to and enforced in practice.

For these reasons, the study aims to critically examine the challenges to the implementation of the right to legal representation for children in the criminal justice system of Cambodia and to show a pattern of systematic and structural problems that are interrelated with one another. All this is done in order to effectively address the challenges to the implementation of the right to legal representation for children in criminal proceedings in Cambodia.

In doing so, this study first provides a contextual analysis on general situation and recent development of Cambodia in term of political, economic and social development, human rights concerns and status of protection of children's rights for a better understanding of the topic. The study also highlights relevant international human rights legal instruments, including the International Covenant on Civil and Political Rights (ICCPR) and the United Nations Convention on the Rights of the Child (CRC). National legislations of Cambodia concerning the guarantee of the right to legal representation for children in the criminal justice in Cambodia are also discussed.

Moving further, this study examines four potential challenges that are commonly referred to as the key structural deterrents to the effective implementation of the right to legal representation for children in criminal proceedings in Cambodia.

For one thing, it is widely acknowledged that the key actors in the criminal justice system, including legal and judicial professionals, whose work is to implement the children protection standards at the ground level, do not

possess adequate and appropriate knowledge, skills and professionalism in handling children related cases. Research surveys reveal that many of judicial authorities do not possess basic knowledge and understanding on human rights law and children's rights. They also committed misconducts while performing their judicial duties. It is therefore crucial to ensure that those judicial professionals are provided with continuous legal trainings and education on human rights for proper functioning of their work.

At the same time, it has been found that children related cases are too often not of particular interest of lawyers and the courts due to the fact that children lack financial capacity for paying extra fee for their cases. Strict monitoring on the misconducts of the legal and judicial professionals should therefore be imposed and strengthened.

Related to the problems of the misconducts and low interest in handling children cases by the judicial professionals, this study also discusses the systematic issue concerning the endemic corruption within the judiciary. The paper stresses on the important roles of the Anti-Corruption Unit (ACU) of Cambodia in fighting against judicial corruption, which is a hindrance to the enjoyment of human rights of individuals, including the right to legal representation for children.

Beyond those issues, the implementation of the right to legal representation for children through the legal aid system is facing chronic lack of resources, both financial resources and human resources. In particular, the national legal aid budget allocated for the legal aid services by the government is insufficient while the donor funding keeps shrinking. Furthermore, the current number of legal aid lawyers available is far from adequate to correspond to the high demand of those in need of legal aid services, including children in criminal proceedings.

In response to the problems within its legal aid system, the government of Cambodia should increase the amount of the legal aid budget by creating a fixed budget policy and legislation, and by coordinating the pooling of funds from all financiers and donors for better administration of the legal aid resources. The capacity and number of lawyers working on legal aid cases can be addressed through an increased number of lawyers being admitted to the Bar Association of the Kingdom of Cambodia (BAKC), the use of paralegals as well as the promotion of pro-bono services.

Considering and analyzing those main challenges, we can see that the law, the knowledge of the law, the relevant resources, including financial resource and human resource, and the implementation of the law are genuinely interrelated. One cannot view and address them separately if one aims for the

effective implementation of the right to legal representation for children in criminal proceedings in Cambodia in accordance with the international human rights standards. Nonetheless, due to the endemic corruption which takes place in various sectors of Cambodia, the laws and legal framework which protect the right to legal representation for children in criminal proceedings are rather sound in theory but not in practice. Regardless of the challenges mentioned, there remains opportunities and promise in achieving such aim given the firm and continuous commitment of Cambodia in upholding children's rights.

Preface

I would never have been able to finish my thesis without the guidance, help, encouragement, comments, and supports from all the people around me. Particularly, I remain grateful to my supervisor, professors, friends and family, some of whom it is possible to give particular mention here.

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Abbreviations

ACU	Anti-Corruption Unit
ADHOC	Cambodian Human Rights and Development Association
BAKC	Bar Association of the Kingdom of Cambodia
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CCHR	Cambodian Center for Human Rights
CDP	Cambodian Defenders Project
CHRAC	Cambodian Human Rights Actions Committee
CHRC	Cambodian Human Rights Committee
CJWG	Child Justice Working Group
CPP	Cambodian People's Party
CRC	Convention on the Rights of the Child
CSOs	Civil Society Organizations
CWCC	Cambodian Women Crisis Center
DANIDA	Danish International Development Agency
ECHR	European Convention on Human Rights
EWMI	East-West Management Institute
HRC	Human Rights Committee
IBAHRI	International Bar Association's Human Rights Institute
IBJ	International Bridges to Justice
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
LAC	Legal Aid of Cambodia
LICADHO	Cambodian League for the Promotion and Defense of Human Rights
LJJ	Law on Juvenile Justice
LSCW	Legal Support for Children and Women
LTC	Lawyer Training Center

MoJ	Ministry of Justice
NGOs	Non-Governmental Organizations
OHCHR	Office of the High Commissioner for Human Rights
PJJ	Protection of Juvenile Justice
RAJP	Royal Academy of Judicial Professions
TI	Transparency International
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNICEF	United Nations Children's Fund
UNTAC	United Nations Transitional Authority in Cambodia

Chapter 1: Introduction

1.1 Background

Cambodians have suffered through civil wars and genocide and are still suffering under the current climate of abuse of power, corruption, and widespread human rights violations. Among other things, legal aid services in Cambodia remain very limited and the judiciary is perceived as the most corrupt institution in the country.¹ For these reasons, justice is not available and accessible for all. Some vulnerable groups, including the poor and children cannot fully have access to justice and enjoy their fundamental human rights, such as the right to a fair trial and legal representation. As a Cambodian, the author of this paper has involved in human rights field as a student, an intern and a volunteer, particularly at the Extraordinary Chambers in the Courts of Cambodia and the Office of the High Commissioner for Human Rights (OHCHR) in Cambodia. Getting a chance to visit a minor in a correctional center in outskirts of Phnom Penh, the author witnessed how a minor being detained in a prolonged pre-trial detention without himself knowing why he was detained and without legal assistance provided. The author's legal background and experiences involving fair trial rights and the rule of law have inspired her to develop a study into the questions of the right to legal representation in criminal cases for children in Cambodia as discussed in this paper.

As one essential aspect of the right to a fair trial and access to justice, the right to legal representation in criminal proceedings is an important foundation for a democratic society based on the rule of law.² This right is embedded under the right to a fair trial which is a fundamental right guaranteed under international human rights law.³ Furthermore, the right to legal representation enjoys a broad notion, which includes the “right to have access to justice, to obtain redress and to have legal assistance in the preparation of the defence” of the accused.⁴

¹ United Nations Development Programme (UNDP). (2016). *A Transparent and Accountable Judiciary to Deliver Justice for All*, p. 11; Transparency International. (2015). 2015 Corruption Perceptions Index; Transparency International. (2013). *Global Corruption Barometer*, p. 17.

² UN Human Rights Committee (HRC). *General comment No. 32. Article 14, Right to equality before courts and tribunals and to fair trial*. (23 August 2007). CCPR/C/GC/32. [hereinafter HRC. General Comment No. 32].

³ OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR). (2012). *Legal Digest of International Fair Trial Rights*, p. 119.

⁴ UNICEF. (2003). *Justice for Children: Detention as a Last Resort, Innovative Practices in the East Asia and Pacific Region: Legal Representation for Children in Need of Special*

International and regional legal frameworks have provided for the right to legal representation in their respective human rights legal instruments. Those include the Universal Declaration of Human Rights (UDHR),⁵ the ICCPR,⁶ the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),⁷ the Statute of the International Criminal Court (ICC),⁸ the African Charter on Human and Peoples' Rights,⁹ the American Convention on Human Rights,¹⁰ and the European Convention on Human Rights (ECHR).¹¹ The existence of legal protection of the right to legal representation contained in those legal instruments demonstrates the well-recognized status of the protection of said right by the international community and the States.

Under the standards set by international human rights legal instruments concerning the right to legal representation, States have obligation to ensure the access to legal representation and assistance for the accused persons at every stage of the criminal proceedings.¹² Additionally, States are under legal obligation to provide free legal aid and assistance to the accused "where the interests of justice so require."¹³ Furthermore, due to physical and mental immaturity of children, children in criminal proceedings including child defendants, victims and witnesses have exposed to various vulnerabilities in a given society.¹⁴ They belong to a particular vulnerable group that needs

Protection – Cambodia [hereinafter "Legal Representation for Children in Need of Special Protection"]. UNICEF East Asia and Pacific Region, p. 22.

⁵ Universal Declaration of Human Rights. G.A. res. 217A (III), U.N. Doc A/810. [hereinafter UDHR]. Art. 11.

⁶ International Covenant on Civil and Political Rights. 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171. [hereinafter ICCPR]. Art. 14(3).

⁷ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85. [hereinafter CAT]. Art. 7.

⁸ Rome Statute of the International Criminal Court (last amended 2010). UNGA. 17 July 1998, ISBN No. 92-9227-227-6. [hereinafter Statute of the ICC]. Art. 67(1)(d).

⁹ African Charter on Human and Peoples' Rights. Organization of African Unity (OAU). 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982). Art. 7(1)(d).

¹⁰ American Convention on Human Rights. Organization of American States (OAS). Costa Rica. 22 November 1969. Art. 8(2)(d).

¹¹ European Convention for the Protection of Human Rights and Fundamental Freedoms. Council of Europe. 4 November 1950, ETS 5. [hereinafter ECHR]. Art. 6(3)(d).

¹² ICCPR. Art. 14(3)(d); Statute of the ICC. Art. 67(1)(d); ECHR. Art. 6(3)(c); Charter of Fundamental Rights of the European Union. Art. 47; American Convention on Human Rights. Art. 8(2)(e); UN Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, August 27-September 7, 1990 [hereinafter UN Basic Principles on Lawyers], para. 3.

¹³ *Ibid.*

¹⁴ HRC, *CCPR General Comment No. 17: Article 24 (Rights of the Child)*, 7 April 1989, [hereinafter HRC, General comment No. 17], para. 4; HRC, *CCPR General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty)*, 10 April 1992, [hereinafter HRC, General Comment No. 21], para. 13; Hodgkin, R. & Newell, P.

special protections and safeguards from the society and the States.¹⁵ More specifically, children in criminal proceedings shall be able to have access to legal representation from their State throughout the criminal proceedings. This is to ensure that their right to have access to justice, a fair trial and rehabilitation into the society are upheld and promoted.

Recognizing the vulnerabilities of children in criminal proceedings, States and the international community have over the years developed legal standards and mechanisms to establish special protection measures to ensure the protection and promotion of children rights through the juvenile justice system.¹⁶ Among them, the CRC has been recognized as a milestone instrument which was widely ratified by all States, except the United States of America and Somalia.¹⁷

The United Nations Children’s Fund (UNICEF) and various experts on children’s rights have observed and pointed out that the number of crimes committed by children is significantly on the rise around the world, including Central and Eastern Europe, Africa, Asia and Latin America.¹⁸ While the number of children in criminal proceedings remains high,¹⁹ it is a pressing need for the international community to make sure that States enforce and implement the standards and the guidance on child justice by developing systems, structures and tools which uphold the child justice standards.

Nonetheless, the Committee on the Rights of the Child has expressed its concern on the fact that there remains a big gap for many States parties to achieve the full compliance with the child justice standards set in the CRC.²⁰ Specifically, some areas to be improved are “the guarantee of procedural rights, the development and implementation of measures without resorting to

Implementation Handbook for the Convention on the Rights of the Child [hereinafter “Implementation Handbook for the CRC”]. UNICEF. (Third Edition). (2007), p. 253.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ Convention on the Rights of the Child. Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]; Kilbourne, S. (1996). *U.S. Failure to Ratify the U.N. Convention on the Rights of the Child: Playing Politics with Children’s Rights*. 6, *Transnat’l L. & Contemp. Probs.* 437. 438-41. As cited in Odala, V. (2012). *The Spectrum of Child Justice in the International Human Rights Framework: From “Reclaiming the Delinquent Child” to Restorative Justice*. *Am. U. Int’l L. Rev.*, p. 555.

¹⁸ UNICEF. (1998). *Innocenti Digest: Juvenile Justice*, pp. 6-7.

¹⁹ Odala, V. (2012). *The Spectrum of Child Justice in the International Human Rights Framework: From “Reclaiming the Delinquent Child” to Restorative Justice*, p. 547.

²⁰ Committee on the Rights of the Child. *General Comment No. 10. Children’s Rights in Juvenile Justice*. (Apr. 25, 2007). CRC/C/GC/10. [hereinafter CRC. General Comment No. 10], para. 1.

judicial proceedings, and the use of deprivation of liberty of children in conflict with the law only as a measure of last resort.”²¹

In specific context of Cambodia where 41% of its total population are children under the age of 18,²² children are the future of the country and play significant roles in developing the society. Due to the vulnerable status of children and the fact that the number of crimes, involving children both as victims and defendants, has particularly increased, children in criminal proceedings shall be given greater attention when addressing the issue of the right to legal representation.²³ Unfortunately, no clear or specific data concerning the number of children involving in crimes as offenders, victims and witnesses is made public or available. Furthermore, in cases where children come into contact with the criminal proceedings, their parents often play very limited roles due to various reasons, including the lack of knowledge and financial resources.²⁴ As such, the government of Cambodia bears significant roles in providing special protection for children and ensuring that their right to legal representation in the criminal justice system are protected and respected.

Cambodia is a State Party to the CRC, the ICCPR, the UDHR and other international human rights treaties that guarantee the respect for children’s rights, including the rights of children involving in criminal proceedings. While acknowledging its human rights obligation regarding the rights of the child, Cambodia has failed to implement the right to legal representation in criminal cases for children due to various challenges involving systematic and structural problems.

In order to effectively tackle the hindrances to the implementation of the right to legal representation for children in criminal proceedings in Cambodia, those challenges need to be studied and the amendments given should be taken into serious consideration.

1.2 Research Question and Purpose

As a State Party to the CRC and other core human rights instruments, Cambodia has legal obligations to ensure the protection and safeguard of children’s rights. The right to legal representation is one of the fundamental aspects of a democratic society and the rule of law. Children are of particular

²¹ CRC. General Comment No. 10, para. 1.

²² Nicholson, A. (April 2012). *Symposium on Recent Developments concerning the Convention on the Rights of the Child: Child Justice Programs in Vietnam and Cambodia* [hereinafter “Child Justice Programs in Vietnam and Cambodia”], p. 5.

²³ UNICEF Cambodia. *Children Protection*, p. 5.

²⁴ *Ibid.*

interest when addressing this issue owing to their vulnerable status. However, due to various challenges within the criminal justice system of the country, the right to legal representation for children in criminal proceedings in Cambodia has often been overlooked and failed to be implemented. As such, it is significant to identify the potential challenges that hinder the effective implementation of the right to legal representation in criminal cases for children in Cambodia in order to address and tackle the problems effectively.

The main research questions that this study seek to address and analyze are the potential challenges to the implementation of the right to legal representation for children in criminal proceedings in Cambodia as well as the solutions corresponding to those challenges. More specifically, this paper aims to provide a systematic overview of the challenges to the implementation of the right concerned and to show a pattern of those problems. The author has a holistic view, aiming at showing a pattern and structural problems to the implementation of said right rather than capturing only certain part of the whole picture in order to effectively tackle the hindrances to the implementation of the right to legal representation for children in Cambodia.

In this paper, the most important challenges include the lack of knowledge, skills and professionalism on children's protection issues, low interest in handling children's cases, endemic corruption within the judiciary and ineffective legal aid system in the country.

The purpose of this study is to examine and discuss each identified challenge critically. Additionally, this paper also suggests amendments to each challenge by looking at the studies, research surveys and successful practices of other States concerning the implementation of the right to legal representation for children in criminal proceedings.

1.3 Theory

Justice is the foundation and the heart of a democratic society and the rule of law. The existence of the access to justice is correlated with the enforcement of the right to a fair trial in the criminal proceedings. In other words, the right to a fair trial is instrumental to the effective implementation and enforcement of all human rights.²⁵

²⁵ OHCHR and the International Bar Association (IBA). (2003). *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*. [hereinafter "Human Rights Training Manual"]. Professional Training Series No. 9, pp. 215-216.

In order to protect the extensive human rights of individuals in the criminal proceedings based on the rule of law, the right to a fair trial has been enshrined in various international human rights legal instruments. The right to a fair trial is guaranteed and protected at all levels of legal frameworks. For instance, at the international level, the UDHR, ICCPR, CAT, CRC and Statute of the ICC have imposed legal obligations on States parties to protect the right to a fair trial for everyone in criminal investigations.²⁶ Similarly, at the regional level, the right to a fair trial is also guaranteed under the African Charter on Human and People's Rights, the American Convention on Human Rights, the Association of Southeast Asian Nations' Human Rights Declaration and the ECHR.²⁷

Under the norms of international law, the right to a fair trial enjoys a broad notion, covering the equality before the law, presumption of innocent and minimum guarantees that include informed charges, adequate time for defence, communication with counsel of the accused's own choosing, trial without undue delay, access to legal assistance and legal aid.²⁸

With a focus on criminal proceedings, when discussing the aspects of fair trial rights, one cannot leave out the importance of the right to have access to legal representation of the accused persons. The availability or absence of legal assistance and representation directly affects one's enjoyment of the fair trial rights and the access to justice.²⁹ For this reason, the accused persons are entitled to the right to "defend themselves in person or through legal counsel of their own choosing."³⁰

In addition, international laws have established legal obligations for States to ensure the implementation of the right to legal representation and free legal assistance for those in need and when justice is at stake. Particularly, the United Nations Human Rights Committee (HRC) has determined that when States failed to ensure the right to have access to legal representation and no effective legal assistance was given to the accused persons, the States violated their legal obligation under Article 14(3) of the ICCPR.³¹ Having said that,

²⁶ UDHR. Art. 11; ICCPR. Art. 14(3); CAT. Art. 7; CRC, Art. 40; Statute of the ICC. Art. 67(1)(d).

²⁷ African Charter on Human and Peoples' Rights. Art. 7(1)(c); American Convention on Human Rights. Art. 8(2)(d); Association of Southeast Asian Nations (ASEAN), *ASEAN Human Rights Declaration*, 18 November 2012. Art. 20; ECHR. Art. 6(3)(c).

²⁸ ICCPR, Art. 14(3); UDHR, Art. 11; ECHR, Art. 6; OHCHR and IBA. (2003). *Human Rights Training Manual*, p. 215.

²⁹ HRC. General Comment No. 32, para. 10.

³⁰ HRC. General Comment No. 32. paras. 37-39.

³¹ OHCHR and IBA. (2003). *Human Rights Training Manual*, pp. 237 & 271; See Communication No. R.2/8, *B. Weismann Lanza and A. Lanza Perdomo v. Uruguay* (Views adopted on 3 April 1980), in UN doc. *GAOR, A/35/40*, para. 16; Communication No. R.1/6, *M. A. Millán Sequeira v. Uruguay* (Views adopted on 29 July 1980), para. 16.

according to the HRC, some forms of the violations of fair trial rights include the absence of lawyer for the accused in any stages of trial proceedings,³² denial of the accused's request of communication with their lawyers,³³ denial of access to a lawyer during pre-trial investigations and detention,³⁴ and ineffective defence by the State appointed lawyer.³⁵ The rationale behind the guarantee of the access to legal assistance is that when the interest of justice is at stake, it is crucial for the accused to be provided with legal assistance at every stage of the proceedings, even if the accused refuse to have one, in order for them to effectively defend their cases and be fairly tried before the courts.³⁶

Furthermore, international human rights law also guarantees the right to free legal assistance and legal aid for the safeguard of justice when the accused are unable to afford the payment of their defence.³⁷ This right is significant in many respects, especially when the accused persons are detained, deprived of liberty, or under criminal proceedings. Noticeably, the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, which was adopted by the General Assembly in December 2012 by consensus, shows that States and the international community have reaffirmed the significance of legal aid in securing the access to justice for all.³⁸ The scope of the right to have free legal assistance assigned to the accused lies on whether "the interests of justice" is at stake in addition to the financial inability of the accused persons.³⁹

International and national scholarships and human rights experts have expressed their agreement on the fact that children, who find themselves in the criminal justice system, are of particular attention and shall be prioritized when it comes to legal aid. Due to physical and mental immaturity of children,

³² *Robinson v. Jamaica*, 30 March 1989, UNHRC, 223/1987, paras. 10.2 & 10.3; *Chikunova v. Uzbekistan*, 16 March 2007, UNHRC, 1043/2002, para. 7.4; *Sharifova et al. V. Tajikistan*, UN HRC, 1 Apr 2008, para. 6.

³³ *Kelly v. Jamaica*, 17 July 1996, UNHRC, 537/1993, para. 9.2; *Gridin v. Russian Federation*, 20 July 2000, UNHRC, 770/1997, para. 8.5; *Carranza Alegre v. Peru*, 28 October 2005, UNHRC, 1126/2002, paras. 3.7 & 7.5.

³⁴ *Kasimov v. Uzbekistan*, 30 July 2009, UNHRC, 1378/2005, para. 9.6; *Toshev v. Tajikistan*, 30 March 2011, UNHRC, 1499/2006, para. 6.7.

³⁵ *Butovenko v. Ukraine*, 19 July 2011, UNHRC, 1412/2005, para. 7.8.

³⁶ Open Society. (April 2013). *Case Digests: International Standards on Criminal Defence Rights: UN Human Rights Committee Decisions*. Open Society Justice Initiative, pp. 17-25; OSCE/ODIHR. (2012). *Legal Digest of International Fair Trial Rights*, pp. 118-119; OHCHR and IBA. (2003). *Human Rights Training Manual*, p. 235.

³⁷ HRC. General Comment No. 32, para. 38.

³⁸ UN General Assembly. *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems* adopted by the General Assembly in December 2012, A/RES/67/187. [hereinafter UN Principles and Guidelines on Access to Legal Aid].

³⁹ Open Society. (April 2013). *Case Digests: International Standards on Criminal Defence Rights: UN Human Rights Committee Decisions*, p. 25.

children in criminal proceedings shall be given special protections and safeguards concerning their right to legal representation in the criminal proceedings.⁴⁰ Having said that, in the HRC's General Comment No. 32, the HRC has stressed that children are entitled to enjoy the minimum procedural guarantees in the criminal proceedings at least equal to those of adults.⁴¹ The UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems also emphasizes on the special protections and specific provisions needed for children.⁴² Particularly, for better protection and promotion of children's rights, States shall establish an appropriate criminal justice system for children that fosters the access to justice, enjoyment of rights and rehabilitation for children. Mistreatment and neglect of children do not only mean that children's rights are not protected and respected, these also bring about various associated problems that require States to handle at a higher cost in the future for social development.

For these reasons, the right to legal representation is an enabling right and a foundation for the enjoyment of other human rights. It is a precondition for the existence of the right to a fair trial, access to justice and other fundamental rights. The effective implementation of the right to legal representation will bring about an effective, credible and trustful criminal justice system for all.

Despite States' acknowledgement on the importance of the right to legal representation and efforts of the international community to promote the respect of such right, justice remains unattainable for all. In countries where the criminal justice system is fragmented, the rich, powerful and well-connected groups of the societies are well fit in the system than the vulnerable groups, such as children and the poor.⁴³

Furthermore, for a country like Cambodia, that endured more than three-decade of civil wars and has suffered endemic corruption issue in its judicial system, children are significant forces that contribute to the future development and reforms of the country. As such, it shall be the central attention of the government of Cambodia to ensure that special protections are provided for children who come into contact with the criminal justice. This is the means to guarantee that children in criminal proceedings are at

⁴⁰ HRC, General comment No. 17, para. 4; HRC, General Comment No. 21, para. 13; Hodgkin, R. & Newell, P. (2007). *Implementation Handbook for the CRC*, p. 253.

⁴¹ HRC. General Comment No. 32, paras. 42-44.

⁴² UN Principles and Guidelines on Access to Legal Aid. Principle 11, paras. 34 and 35.

⁴³ Wan-Hea Lee, OHCHR Representative in Cambodia's Statement during the National Conference on Legal Aid in Cambodia. (November 2013). As quoted in Crothers, L. (November 2013). *Lack of Legal Aid in Cambodia Puts Children, Poor at Risk*. The Cambodia Daily. Retrieved from <https://www.cambodiadaily.com/archives/lack-of-legal-aid-in-cambodia-puts-children-poor-at-risk-48219/>.

equal footing to the access to justice and a fair trial in the criminal justice system in Cambodia.

Although in theory Cambodia has to some extents established legislations and legal protections which guarantee the right to legal representation for children in criminal proceedings, the implementation of those legal standards remains far from satisfaction. The challenges to the implementation of the right to legal representation for children in criminal proceedings include not only the lack of legal knowledge and skills related to child protection standards among judicial professionals but also judicial corruption and poor enforcement of the legal aid system.⁴⁴ These challenges form a pattern, showing the structural problems embedded within the Cambodian society that hinder the effective implementation of the legal standards concerning the right to legal representation for children in criminal proceedings. Those major problems are intertwined that cannot be addressed without mentioning the others.

Therefore, in order to make a change to the current situation where children are not always accorded with the right to legal representation in the criminal justice system, it is crucial to address the challenges and the solutions to the implementation of the right to legal representation for children in criminal proceedings in Cambodia.

1.4 Research Methodology

The author conducts the studies on the current topic with a holistic view, aiming at providing a systematic overview showing a pattern of the problems that hinder the effective implementation of the right to legal representation in criminal cases for children in Cambodia. Such holistic approach is justified by the analyses on the performances of the judicial stakeholders such as judicial police, lawyers, prosecutors and judges, the judiciary and the legal aid system, which are the key actors in enforcing the legal standards concerning the right to legal representation for children in criminal proceedings. The problems surrounding the functioning of those key actors sufficiently show the pattern of the structural problems that hamper the implementation of the right to legal representation for children in criminal proceedings in Cambodia. Therefore, the author is of the view that by examining the challenges faced by the key judicial actors involving in the criminal justice system in Cambodia, the paper is able to give a better picture

⁴⁴ Travers, E. (2011). *Upholding Children's Rights in the Judicial System: An NGO's Experience of Working for Juvenile Justice in Cambodia*. [hereinafter "Upholding Children's Rights in the Judicial System in Cambodia"]. Effectus Newsletter. Issue 12, p. 9; Cambodian Center for Human Rights (CCHR). (October 2014). *Children in the Cambodian Criminal Justice System*. CCHR Briefing Note, p. 9.

and context which the implementation of the right to legal representation for children should be viewed and assessed.

In a specific context of Cambodia where the criminal justice system is fragmented, the linkages between each challenge cannot be overlooked. The problems to the implementation of the right to legal representation in criminal cases for children in Cambodia are interlinked that cannot be separately discussed. A more focus study on the topic, by pointing out and discussing one or two most important challenges, is not necessarily better than a structure that the author is showing. That is because a narrow and specific research scope and methodology will not be able to capture the realistic situation and the whole picture of the problem in a country like Cambodia that faces with chronic and endemic structural problems within the criminal justice system.

For instance, one cannot just point out the problem of poor legal aid system in Cambodia while ignoring the fact that there is limited human resource, particularly a small number of lawyers in the country. Similarly, even when the problem of limited number of lawyers is highlighted, it is unlikely that the status of the implementation of the right to legal representation for children will be improved if the issue regarding the unwillingness of the legal practitioners in handling children's cases are not focused. Likewise, without pointing out the corruption issue, nothing of those being suggested can practically bear the desired outcome. Therefore, the author is of the view that showing a pattern and structural problems to the implementation of the right to legal representation for children in criminal proceedings in Cambodia can provide better contribution to the improvement of the situation concerned.

To achieve the aim and purpose of this paper, the author has conducted this study using the classical legal research method in the form of qualitative research. This thesis examines and analyzes existing international legal doctrines and commentaries, national legal provisions, and relevant reports concerning the protection of the right to legal representation for children in criminal proceedings, including reports of the UN, international organizations, State and Non-Governmental Organizations (NGOs).

In particular, relevant provisions enshrined in the CRC and the ICCPR which create binding legal obligations on Cambodia will be highlighted while relevant national laws governing the criminal justice system in Cambodia will also be discussed. Furthermore, this study will draw interpretation and analysis from the reports and studies of the leading NGOs in Cambodia such as Cambodian Center for Human Rights (CCHR), Cambodian Human Rights Actions Committee (CHRAC), East-West Management Institute (EWMI) and Danish International Development Agency (DANIDA), who have conducted research studies surrounding the topic.

Last but not least, secondary sources both data available online and in library, such as books, existing literatures, journal articles, and research surveys related to the right to legal representation for children in criminal proceedings will also be taken into consideration.

1.5 Delimitations and Scope

Recognizing various international legal instruments and soft laws guaranteeing the right to legal representation for children in criminal proceedings, the paper gives a closer look at the standards set forth under the ICCPR as well as the CRC to which Cambodia is a State Party.

Due to the constraint of time and available research resources, this study is designed to serve as an academic paper that aims at showing a pattern and linkages of the structural problems to the implementation of the right to legal representation for children in criminal proceedings in Cambodia. It is neither a paper that provides comprehensive details on each challenge addressed nor it is a specialized paper aiming at providing comprehensive solutions to tackle the challenges addressed in the paper. Notwithstanding, four potential hindrances to the implementation of the right to legal representation for children in criminal proceedings in Cambodia and possible amendments addressing the respective challenges are highlighted as thorough as possible within the scope and the framework of research of this paper.

The notion of the right to legal representation includes the right to access to justice, to obtain redress and to have legal assistance in the preparation of defence. Additionally, while noting that the right to legal representation is applicable to both civil and criminal proceedings, this paper focuses on the standards of the right to legal representation in the criminal proceedings only. Furthermore, this paper is not set to provide an exhaustive list of obligations that States need to provide at different stages of the criminal proceedings, but to highlight an overall obligation to provide legal representation for children in criminal cases at all relevant stages.

In examining the national legal legislations and frameworks of Cambodia, the study faces difficulty in accessing the texts of the newly adopted LJJ. The available version of LJJ is its 2013 draft version with a non-official English translation, which this paper makes analysis and relies on.

Finally, for the purpose of the study, the terms “children in criminal proceedings” refer to child criminal defendants, victims and witnesses. By that, this paper makes no differentiation between male and female or rural and urban children, although evidence shows that female and rural children are more vulnerable to the abuses of rights. This is because this study aims for an

effective implementation of the right to legal representation for all children in criminal proceedings, not just particular groups among them.

1.6 Structure of the Thesis

This paper consists of four chapters. **Chapter I** provides an introduction to the research question that particularly covers a brief background concerning the topic, research purpose, theory, methodology, and delimitations and scope of the study.

In **Chapter II**, the author highlights the significance of the right to legal representation for everyone and children specifically, both in the frameworks of international human rights law and in the context of Cambodia's legal system. Additionally, applicable international human rights legal instruments and relevant national legal provisions and protection mechanism of Cambodia are also examined and discussed in the same chapter.

Moving further, **Chapter III** shows a systematic overview and pattern of the major challenges that weaken the implementation of the right to legal representation for children in criminal proceedings in Cambodia. Those challenges include the lack of knowledge, skills and professionalism on child protection issues among judicial professionals, the low interest in handling children's cases, the endemic corruption within the judiciary and the ineffective legal aid system. While critically analyzing each of those challenges, suggested amendments to each challenge will also be provided respectively.

Finally, **Chapter IV** offers concluding remarks of the author regarding the issues of the implementation of the right to legal representation for children in criminal proceedings in Cambodia.

Chapter 2: Access to Legal Representation

Introduction

The right to legal representation is a precondition for a democratic society based on justice, fairness and the rule of law. Such right is incorporated under the frameworks of the right to a fair trial, guaranteed under the ICCPR and the UDHR.⁴⁵ The right to legal representation is meant to ensure the proper implementation of human rights standards and safeguard the effective administration of civil and criminal proceedings through the justice system.⁴⁶

With a particular focus on criminal cases, the right to legal representation is crucial for everyone who is exposed to the justice system, including the defendants, victims and witnesses.⁴⁷ According to the HRC, all human beings are entitled to minimum guarantees in criminal proceedings, which include the access to legal representation in all stages of the criminal proceedings.⁴⁸ This comprises the “right to have access to justice, to obtain redress, and to have legal assistance in the preparation of the defence” of the accused persons.⁴⁹

Moreover, due to the vulnerability of children both physically and mentally, they require greater attention from the States for the protection and respect of their rights.⁵⁰ As such, the international community has called upon States to establish special protection measures in their criminal justice systems to ensure the proper implementation of the rights of the child. In other words, when it comes to children in criminal proceedings, States bear legal obligations to provide for effective procedural guarantees during all stages of the criminal proceedings for child defendants, victims and witnesses.⁵¹

⁴⁵ ICCPR. Art. 14(3); UDHR. Art. 11.

⁴⁶ OSCE/ODIHR. (2012). *Legal Digest of International Fair Trial Rights*, p. 19.

⁴⁷ Reimer, J. K. (January 2015). *A System Just for Children: Voices of Child Victims and Witnesses about Their Experiences in the Cambodian Criminal Justice System* [hereinafter “A System Just for Children”]. HAGAR Cambodia, p. 13.

⁴⁸ HRC. General Comment No. 32, paras. 2-3 and 38; OSCE/ODIHR. (2012). *Legal Digest of International Fair Trial Rights*, p. 109.

⁴⁹ HRC. General Comment No. 32; UNICEF. (2003), *Legal Representation for Children in Need of Special Protection*, p. 22.

⁵⁰ HRC, General comment No. 17, para. 4; HRC, General Comment No. 21, para. 13; Hodgkin, R. & Newell, P. (2007). *Implementation Handbook for the CRC*, p. 253.

⁵¹ CRC. General Comment No. 10, paras. 4(d) and 23; Hodgkin, R. & Newell, P. (2007). *Implementation Handbook for the CRC*, p. 170.

It is undisputable that children are the future of their countries, contributing to the development and prosperity of the States and the world. Their upbringing, education and livelihood will not only affect the future of their families, but also the society, the State, as well as the world. It is therefore crucial for the States to pay particular attention on the well-being of the children in their respective countries, especially when children come into contact with the criminal justice system of the States.

While States have recognized their legal obligations to protect and respect children's rights through the ratifications of international human rights treaties, such as the CRC, ICCPR, UDHR and CAT, the rights of children in criminal proceedings are not properly enforced in the criminal justice systems of their countries. Their rights have often been violated due to the limited legal protections offered in practice. In particular, child offenders and child victims are not always entitled to an appropriate legal representation as the laws provide. This fact is proven true especially in the countries that are rooted with poverty, corruption and impunity. For instance, in a country like Cambodia that has ratified all of the core international human rights treaties including the CRC, ICCPR, UDHR, CAT and others, the status of child protection remains a major issue to be tackled as children are often neglected and forgotten in the criminal justice system in Cambodia.⁵² More specifically, there is a limited access to justice and fair trial for children as defendants, victims or witnesses since they do not always enjoy the right to legal representation throughout the criminal justice process due to various structural problems within the justice system in Cambodia.

It is also important to note that the fact that legal protection and justice for children were not given great emphasis was the fruit of colonization suffered by Cambodia since the past.⁵³ Additionally, the causes leading to children committing criminal offenses in Cambodia are actually the results of embedded social, cultural, structural and legal systems of the Cambodian society. It is in such context that the status of children's rights in Cambodia should be analyzed and assessed.

Therefore, it is of particular importance to discuss about the international legal instruments, national laws and protection mechanisms that provide for legal protections for children in criminal proceedings in Cambodia. This will enable us to identify the loopholes and the challenges to the implementation

⁵² CCHR. (October 2014). *Children in the Cambodian Criminal Justice System*, pp. 1 & 9; Travers, E. (2011). *Upholding Children's Rights in the Judicial System in Cambodia*, pp. 1-9.

⁵³ Nicholson, *supra* note 22, p. 2.

of the right to legal representation for children, which in turn contribute to the effective enforcement of children's rights in general.

2.1 Country Profile and Context Analysis

In order to gain a better understanding on the topic in Cambodia's context, it is critical to briefly look at the country's background in political, economic and social context, as well as the potential human rights and children's rights concerns in the country.

2.1.1 Political, Economic and Social Context

Cambodia is located in South-East Asia, sharing its borders with Thailand, Vietnam and Laos.⁵⁴ Throughout its history, Cambodia's development was interrupted by the colonization, foreign invasions and civil wars. In particular, Cambodia was colonized by France in 1863 and only until 1953 that it was able to gain independence from the colonial power.⁵⁵ Later on, Cambodia also suffered the foreign invasions and civil wars for nearly three decades.⁵⁶ The 1991 Paris Peace Agreement brought an end to the armed conflicts.⁵⁷ In 1993, Cambodia held the first national election under the support of the United Nations Transitional Authority in Cambodia (UNTAC).⁵⁸ The Cambodian Constitution was also established.⁵⁹ As the fruit of the 1993 election, a coalition government was formed to restore peace and stability within the country.⁶⁰ However, in 1997, a coup and internal fighting ended the coalition government.⁶¹ Since then, the Cambodian People's Party (CPP) has been the ruling party of the country, making Prime Minister Hun Sen, the Head of Government in Cambodia.⁶² By the time of the writing, the Prime Minister

⁵⁴ Strangio, S. (2014). *Hun Sen's Cambodia*, p. xvi; Whitaker, D. (1979). *Cambodia: Country Study*, p. 7.

⁵⁵ Strangio, S. (2014), pp. 5-8; Whitaker, D. (1979), pp. 35-37.

⁵⁶ Strangio, S. (2014), pp. x; 2-41; Chandler, D. (2008). *A History of Cambodia*, pp. 255-285.

⁵⁷ Strangio, S. (2014), pp. 42-43; Brinkley, J. (2011). *Cambodia's Curse: The Modern History of a Troubled Land*, pp. 67-68; Paris Conference on Cambodia (1991), *Agreement on a Comprehensive Political Settlement of the Cambodia Conflict*.

⁵⁸ Strangio, S. (2014), pp. x; 55; Brinkley, J. (2011), pp. 67-68; Paris Conference on Cambodia (1991), *Agreement on a Comprehensive Political Settlement of the Cambodia Conflict*.

⁵⁹ Strangio, S. (2014), p. 59; Brinkley, J. (2011), p. 75.

⁶⁰ Strangio, S. (2014), pp. 58-60; Chandler, D. (2008), p. 288; Shawcross, W. (2000). *Deliver us from evil: Peacekeepers, warlords, and a world of endless conflict*, p. 98.

⁶¹ Strangio, S. (2014), pp. x-xi; 76-84.

⁶² *Ibid*, pp. 85; 98-99 & 114.

Hun Sen has been in power for three decades.⁶³ The current Head of State is King Norodom Sihamoni.

Cambodia is a liberal multiparty democracy under a constitutional monarchy.⁶⁴ Based on the principle of division of powers and the check and balance, Cambodia consists of three main branches, namely the executive, the legislature and the judiciary.⁶⁵ More specifically, the executive branch is exercised by the government, while the legislative branch is represented by the Senate and the National Assembly.⁶⁶ The judiciary is an independent body separated from the other branches.⁶⁷ Influenced by its colonial power and the UNTAC, Cambodia adopts and follows civil law system, while common law and customary law have been incorporated gradually within its legal system.⁶⁸

In term of economy, several main sectors that contribute to the progress of the national economy include garment industry, tourism, construction, and agriculture.⁶⁹ Among those sectors, 51% of the Cambodian population depend on the job opportunities from the agricultural sectors for income.⁷⁰ Despite stable economic growth over the last decade, Cambodia remains one of the poorest countries in the region because of endemic corruption, limited human resources, high illiteracy, and great income inequality.⁷¹ As of 2012, there were approximately 17.7% of the total population living below the

⁶³ Strangio, S. (2014), p. xiii; Human Rights Watch. (updated January 2015). *Cambodia: 30 Years of Hun Sen Violence, Repression*. Retrieved from <https://www.hrw.org/news/2015/01/13/cambodia-30-years-hun-sen-violence-repression>; The Guardian. (updated January 2015). *Hun Sen, Cambodia's Prime Minister, Marks 30 Years of Hardline Rule*. Retrieved from <http://www.theguardian.com/world/2015/jan/14/hun-sen-cambodias-prime-minister-marks-30-years-of-hardline-rule>.

⁶⁴ Constitution of the Kingdom of Cambodia. Adopted by the Constitutional Assembly on 21 September 1993. Second Plenary Session. [hereinafter *Cambodian Constitution*], Arts. 1 & 51.

⁶⁵ *Cambodian Constitution*. Arts. 1 & 51.

⁶⁶ *Cambodian Constitution*. Art. 51.

⁶⁷ *Cambodian Constitution*. Art. 51.

⁶⁸ Hor, P., Kong, P. & Menzel, J. (2012). *Introduction to Cambodian Law*. Konrad-Adenauer-Stiftung, Cambodia, pp. 7-8.

⁶⁹ Lum, T. (July 2007). *Cambodia: Background and U.S. Relations*. CRS Report for Congress, p. 7.

⁷⁰ Strangio, S. (2014), pp. 140-141; UN Data. (updated 2016). *Cambodia*. Retrieved from <http://data.un.org/CountryProfile.aspx?crName=Cambodia>.

⁷¹ Lum, T. (July 2007). *Cambodia: Background and U.S. Relations*. CRS Report for Congress, p. 7; Nicholson, A. (April 2012). *Child Justice Programs in Vietnam and Cambodia*, p. 5; The World Bank. (updated April 2016). *Cambodia: Overview*. Retrieved from <http://www.worldbank.org/en/country/cambodia/overview>.

poverty line with an income of less than \$1.20 per day.⁷² About 90% of them live in the countryside.⁷³

Similar to other countries that have experienced a population boom, Cambodia's population has grown rapidly with a steady population growth rate of 1.8% since 2010.⁷⁴ In 2015, Cambodia's population is estimated at 15.7 million, which about 41% of them are under the age of 18.⁷⁵ Furthermore, the number of children is estimated to increase rapidly in the coming years, so is the proportion of children.⁷⁶ The large proportion of children within the country offers both opportunities and challenges for the development of Cambodia. To be more specific, children are the future of the country that their encounters within the society and the justice system will influence greatly on their perception and attitude toward the legal system and their willingness to abide by the laws.⁷⁷ If properly nurtured, the large proportion of children population can be a moving force for the reforms and development of the country. Alternatively, if children are exploited and are not protected by the State, such large proportion of youth can pose a great challenge to the development and the justice system of the country putting heavy burden on the State to address and overcome the problems arose.

2.1.2 Human Rights Concerns and Status of Protection of Children's Rights

Widespread human rights violations have taken place in the Cambodian society due to the abuse of power and the corruption within the country. According to the 2015 Report of the International Bar Association's Human Rights Institute (IBAHRI), the judiciary in Cambodia has been facing with the problems of bribery and corruption.⁷⁸ Similarly, the recent Corruption Perceptions Index of the Transparency International (TI) shows that Cambodia is perceived as the most corrupt country in the region where

⁷² The World Bank. (updated April 2016). *Cambodia: Overview*. Retrieved from <http://www.worldbank.org/en/country/cambodia/overview>.

⁷³ *Ibid.*

⁷⁴ UN Data. (updated 2016). *Cambodia*. Retrieved from <http://data.un.org/CountryProfile.aspx?crName=Cambodia>.

⁷⁵ Nicholson, *supra* note 22, p. 4.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ International Bar Association's Human Rights Institute (IBAHRI). (September 2015). *Justice versus Corruption: Challenges to the independence of the judiciary in Cambodia* [hereinafter "Challenges to the independence of the judiciary in Cambodia"], p. 7.

political and financial influences appear to take place in most if not all judicial activities.⁷⁹

Since the judiciary is perceived as the most corrupt institution in Cambodia, the justice system has failed to serve the interest of everyone. Particular vulnerable groups, including the poor and children, cannot fully have access to justice and enjoy their fundamental human rights such as the right to legal representation, and thus their right to a fair trial and the rule of law cannot be achieved.⁸⁰

It is important to note that children are especially vulnerable to manipulation and inducement to commit crimes and other unlawful acts by criminals or manipulators due to their defenceless status, both physically and psychologically.⁸¹ Other factors such as violence, abuses, poverty, corruption and limited education and healthcare have greatly worsen the vulnerable status of children either as defendants, victims or witnesses in the criminal justice system of Cambodia.⁸² As such, it is vital for the States to ensure that there exists the legal protection and mechanism to guarantee the protection and respect of children's rights not only under international law but also the domestic legal system.

With regards to the protection of children's rights, Cambodia has recognized its legal obligations to protect, promote and respect children's rights as it ratified the CRC in 1992. While children's rights are recognized and incorporated into Cambodia's legal system, the success of the implementation of their rights in reality is yet far from the desirable outcomes.⁸³ Currently, there is no separate juvenile justice system for children involving in criminal proceedings.⁸⁴ It means that children who are exposed to the criminal justice system either as defendants, victims or witnesses could not fully enjoy their

⁷⁹ UNDP. (2016). *A Transparent and Accountable Judiciary to Deliver Justice for All*, p. 11; IBAHRI. (September 2015). *Challenges to the independence of the judiciary in Cambodia*, p. 7; Transparency International. (2015). *The 2015 Corruption Perceptions Index*; Phun, V. & Holligan, J. (2011). *Rule of Law for Human Rights in the ASEAN Region: A Base-line Study: Cambodia*. Konrad-Adenauer-Stiftung, p. 59.

⁸⁰ IBAHRI. (September 2015). *Challenges to the independence of the judiciary in Cambodia*, p. 7; Wan-Hea Lee, OHCHR Representative in Cambodia's Statement during the National Conference on Legal Aid in Cambodia. (November 2013). As quoted in Crothers, L. (November 2013). *Lack of Legal Aid in Cambodia Puts Children, Poor at Risk*. The Cambodia Daily.

⁸¹ HRC, General comment No. 17, para. 4; HRC, General Comment No. 21, para. 13; Hodgkin, R. & Newell, P. (2007). *Implementation Handbook for the CRC*, p. 253; Travers, E. (2011). *Upholding Children's Rights in the Judicial System in Cambodia*, pp. 2-4; Nicholson, A. (April 2012). *Child Justice Programs in Vietnam and Cambodia*, pp. 1-5.

⁸² Nicholson, *supra* note 22.

⁸³ Reimer, *supra* note 47.

⁸⁴ White & Case LLP. (December 2013). *Access to Justice for Children: Cambodia*, pp. 12-13.

rights to special procedural guarantees as provided by the relevant international human rights legal instruments.⁸⁵ In particular, children in criminal proceedings could not have entitlement to the right to legal representation as guaranteed by international law and domestic laws. This means that when children come into contact with the criminal proceedings, their rights to have access to justice, to a fair trial, to receive reparation, and to legal assistance in the preparation of their defence cannot be fulfilled.⁸⁶

Noticeably, crimes committed by children were often for economic and financial gains due to poverty and the lack of education.⁸⁷ There have been cases where children were subject to involuntary confession, tortured, and tried without due process and legal representation.⁸⁸ It is also not uncommon to see children being put in prison or detention for a long period of time for offences committed even the law requires that pre-trial detention of juvenile shall be used as “a measure of last resort.”⁸⁹ According to the Annual Report of the Cambodia’s General Department of Prisons, as of December 2010, there were more than 700 children being held in prisons, which approximately 30% of them being put in pre-trial detention.⁹⁰ The percentage of children offenders being held in prisons in pre-trial detention and for a lengthy period has increased overtime.⁹¹ It is also interesting to highlight the differences between the statistic provided by the government’s institution since 2010 and by the CCHR, a leading local NGO, in its recent report concerning the percentage of children being held in pre-trial detention in Cambodia. Specifically, the report of the CCHR provided that about 87% of child suspects were held in pre-trial detention.⁹² Unfortunately, no empirical or official data from the government concerning the number of children as detainee, defendants, victims or witnesses is available. The lack of such data

⁸⁵ UDHR. Art. 10; ICCPR. Art. 14; CRC. Arts. 37 & 40.

⁸⁶ Inter-Agency Coordination Panel on Juvenile Justice (IACPJJ). (2005). *Protecting the Rights of Children in Conflict with the Law: Creation of a Child Protection Unit with the Bar Association* [hereinafter “Creation of a Child Protection Unit with the Bar Association”], p. 35; UNICEF. (2003). *Legal Representation for Children in Need of Special Protection - Cambodia*, p. 22.

⁸⁷ Travers, E. (2011). *Upholding Children’s Rights in the Judicial System in Cambodia*, p. 2; NGOCRC. (September 2013). *The information from CSOs, Cambodia: Access to Justice for Children*, pp. 2-3.

⁸⁸ Run, S. (31 December 2014). *Legal Aid of Cambodia*. Annual Report, pp. 17-19; White & Case LLP. (December 2013). *Access to Justice for Children: Cambodia*, p. 4; NGOCRC. (September 2013). *The information from CSOs, Cambodia: Access to Justice for Children*, pp. 2-3.

⁸⁹ *Supra* note 87.

⁹⁰ Prison figures at 15 December 2010. General Department of Prisons Annual Report 2010; Travers, E. (2011). *Upholding Children’s Rights in the Judicial System in Cambodia*, p. 2.

⁹¹ UNICEF. (2003), *supra* note 4, pp. 6.-7

⁹² CCHR. (October 2014). *Children in the Cambodian Criminal Justice System*, p. 5.

and number poses a great challenge to the effort to implement the right to legal representation for children in Cambodia.

It is further reported that children are often detained at the police station for interrogation even in the absence of their legal representatives, parents or guardians.⁹³ In addition, it is rare for children to have access to legal representation during the investigating stages of the legal proceedings. This has negatively affected the quality of the defence for child defendants even the legal representation is available at trial stages.⁹⁴

Likewise, as for the child victims and witnesses, they are not entitled to proper legal protection within the criminal justice system of Cambodia as the State has not offered comprehensive supports and safeguards to them just yet.⁹⁵ Nonetheless, NGOs and civil society groups play significant and active roles in offering supports to children in criminal proceedings in Cambodia, including child defendants, victims and witnesses.⁹⁶

The demand for legal protections for children in criminal proceedings, such as the procedural safeguards during the criminal proceedings, has been acknowledged by the government of Cambodia. Cambodia had drafted its first LJJ since 2006.⁹⁷ As promised by the Ministry of Social Affairs that the LJJ will be passed by the end of 2016,⁹⁸ after almost a decade, the LJJ was finally adopted by the Council of Ministers on 22 April 2016.⁹⁹ Nevertheless, the LJJ has not yet entered into force and the implementation of the right to legal representation for children in criminal cases remains under various potential challenges.

This Chapter will further the discussion and analysis on the applicable international legal frameworks as well as domestic legal framework, relating to the guarantee of the right to legal representation for children in criminal proceedings in Cambodia. Some efforts of Cambodia in recent development on child protections, concerning their right to legal representation in criminal cases, will also be taken into consideration while discussing the loopholes and

⁹³ NGOCRC. (September 2013). *The information from CSOs, Cambodia: Access to Justice for Children*, pp. 2-3.

⁹⁴ NGOCRC. (September 2013). *The information from CSOs, Cambodia: Access to Justice for Children*, pp. 2-3; Nicholson, A. (April 2012). *Child Justice Programs in Vietnam and Cambodia*, p. 5.

⁹⁵ NGOCRC. (September 2013), *supra* note 93.

⁹⁶ *Ibid.*

⁹⁷ Holman, Z. (6 January 2016). *Youth Justice Law 'Due This Year'*. The Phnom Penh Post. Retrieved from <http://www.phnompenhpost.com/national/youth-justice-law-due-year>.

⁹⁸ *Ibid.*

⁹⁹ Nicholson, A. (25 April 2016). *Introduction of the Juvenile Justice Law in Cambodia*. Children's Rights International. Retrieved from <http://www.childjustice.org/index.php/en/156-juvenile-justice-law-cambodia>.

gaps within the current child protection legal frameworks and system in Cambodia.

2.2 International Legal Instruments on Access to Legal Representation for Children

It is well recognized that the right to legal representation is a pre-requisite for the full realization of the right to a fair trial and rule of law within a society.¹⁰⁰ The need to provide special safeguard measures for children coming into contact with the criminal justice system has also been widely acknowledged by the international community. These have led to the establishment of various international human rights legal instruments addressing the right to legal representation for everyone and especially for children as defendants, victims and witnesses. Those international legal frameworks include the UDHR, ICCPR, CAT, Statute of the ICC, CRC, ECHR, Charter of Fundamental Rights of the European Union, American Convention on Human Rights, and the African Charter on Human and People's Rights.¹⁰¹

This Section will be looking at the legal standards concerning the right to legal representation for children as enshrined in the provisions of the CRC and the ICCPR to which Cambodia is a State Party.

2.2.1 The United Nations Convention on the Rights of the Child

Cambodia has ratified the CRC since 1992. The provisions enshrined in the CRC are directly applicable to Cambodia as provided under Article 31 of the Constitution of Cambodia, stating that “Cambodia shall recognize and respect the UDHR, and other international human rights conventions related to human rights, women's rights and children's rights.”¹⁰² This has been reaffirmed by the Constitutional Council of Cambodia in its 2007 decision on the applicability of the international human rights treaties by the courts of Cambodia, confirming that international laws ratified by Cambodia are considered as sources of law in the courts of Cambodia.¹⁰³

¹⁰⁰ OSCE/ODIHR. (2012). *Legal Digest of International Fair Trial Rights*, pp. 109-110.

¹⁰¹ UDHR. Art. 11; ICCPR. Art. 14; CAT. Art. 7; Statute of the ICC. Art. 67; CRC. Art. 40; ECHR. Art. 6; Charter of Fundamental Rights of the European Union. Art. 47; American Convention on Human Rights. Art. 8(2)(e); African Charter on Human and Peoples' Rights. Art. 7(1)(d).

¹⁰² Cambodian Constitution. Art. 31.

¹⁰³ The Constitutional Council of Cambodia, Case No 131/003/2007 of 26 June 2007, Decision No 092/003/2007 CC.D, 10 July 2007; IBAHRI. (September 2015). *Challenges to*

As a milestone international human rights instrument protecting and guaranteeing the rights of the child, the CRC crystalized the notion of the international community since the establishment of the UDHR that views childhood as a significant period of life which shall be entitled to special care, protection and assistance.¹⁰⁴ Having said that, the CRC uphold the rights of the child based on four main pillars, namely the principle of non-discrimination, the best interests of the child, children’s right to life, survival and development, and their right to be heard.¹⁰⁵

Specifically, the CRC provides that children shall have equal opportunity to enjoy their rights without being discriminated regardless of “their or their parents or legal guardians’ race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.”¹⁰⁶ The principle of “the best interests of the child” is to be upheld in all decisions involving children.¹⁰⁷ Furthermore, the States shall ensure that children are protected from harm and exploitation, including all forms of abuse, violence and punishment.¹⁰⁸ This for instance means that the detention of children suspects is permitted “only as a measure of last resort.”¹⁰⁹ Additionally, States are bound to respect the right to a fair trial of children in criminal proceedings, which includes their right to legal representation, legal assistance and free legal aid.¹¹⁰

It is important to note that the rights set forth under the CRC are applicable to all children, meaning that the right to legal representation is to be enjoyed by all children, either as defendants, victims or witnesses.¹¹¹

2.2.1.1 Provisions concerning legal representation for children

When discussing the administration of criminal justice for children in criminal proceedings, it is crucial to analyze Article 12, Article 37 and Article 40 of the CRC which touch upon the guarantees of children’s right related to the right to legal representation in criminal judicial procedures.

the independence of the judiciary in Cambodia, p. 23; CCHR. (October 2014). *Children in the Cambodian Criminal Justice System*, pp. 1-2.

¹⁰⁴ UDHR. G.A Res. 217 A (III), UN Doc. A/810 at 71 (1948).

¹⁰⁵ OHCHR and IBA. (2003). *Human Rights Training Manual*, p. 404.

¹⁰⁶ CRC. Arts. 1 and 2.

¹⁰⁷ CRC. Art. 3.

¹⁰⁸ CRC. Arts. 33-39.

¹⁰⁹ CRC. Arts. 33-39.

¹¹⁰ CRC. Art. 40.

¹¹¹ United Nations Office on Drugs and Crime (UNODC). (2009). *Justice Matters involving Child Victims and Witnesses of Crime. Model Law and Related Commentary*. Preamble, p. 3.

a. Article 12

Under Article 12 of the CRC, children are entitled to the right to be heard, which requires States not only to ensure that children can “express their views freely in all matters affecting them” but also to give serious consideration on their views expressed “in accordance with the age and maturity of the child.”¹¹² Adding to that, the CRC stresses in the same Article that “the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”¹¹³

The Committee on the Rights of the Child, in its General Comment No. 10, further added that children’s rights to be heard “either directly or through a representative” in criminal proceedings shall be guaranteed at all stages of the justice process.¹¹⁴ In other words, children in criminal proceedings are entitled to adequate legal or other appropriate assistance from the State as required under Article 12(2) of the CRC in order for children to actively participate as a moving force to improve, reform and fulfil their rights in the justice system.¹¹⁵

b. Article 37

Moving further, Article 37(d) of the CRC grants children who are deprived of liberty the “right to prompt access to legal and other appropriate assistance,” specifically in cases of detention.¹¹⁶ Children are to be provided at least the same and equal rights as adults at all relevant stages of the criminal proceedings.¹¹⁷

The aim is to protect the interests of the child and to guarantee the efficient defence for children being detained.¹¹⁸ It is of particular importance that

¹¹² CRC. Art. 12; Hodgkin, R. & Newell, P. (2007). *Implementation Handbook for the CRC*, p. 149; OHCHR and IBA. (2003). *Human Rights Training Manual*, p. 407; Husain, S, Y. (November 2010). *A Voice for the Voiceless: A Child’s Right to Legal Representation in Dependency Proceedings*. The George Washington Law Review. Vol. 79. No. 1, pp. 248-249.

¹¹³ *Ibid.*

¹¹⁴ CRC. General Comment No. 10, paras 12; Hodgkin, R. & Newell, P. (2007). *Implementation Handbook for the CRC*, p. 170; Committee on the Rights of the Child, Report on the forty-third session, September 2006, Day of General Discussion, Recommendations, para. 48.

¹¹⁵ *Ibid.*

¹¹⁶ CRC. Art. 37(d).

¹¹⁷ OHCHR and IBA. (2003). *Human Rights Training Manual*, p. 411; Report of the Committee on the Rights of the Child. UN doc. CRC/C/87, Report on the twenty-first session (1999), para. 247.

¹¹⁸ OHCHR and IBA. (2003). *Human Rights Training Manual*, pp. 235 & 411.

Article 37(d) of the CRC refers to not only the assistance from legal perspectives, but also other appropriate assistance that may be in “the best interests of the child.”¹¹⁹

c. Article 40

Adding to that, Article 40 of the CRC provides further details concerning the safeguards and procedural guarantees with regards to the administration of criminal justice for children.¹²⁰ It is a comprehensive provision that elaborate on States’ obligations to guarantee the fair trial rights to children in criminal proceedings through the access to legal representation, legal assistance and fairness in the criminal justice system.¹²¹ This provision also requires States to take into account the “minimum age of criminal responsibility” of children.¹²² This Article further refers to the States’ obligations to uphold children’s reintegration and roles in the society by providing minimum procedural guarantees for a fair and quick resolution of judicial proceedings, and establishing alternative sentences for “the best interests of the child” offenders.¹²³

For the foregoing, under the legal framework of the CRC, children who find themselves in the criminal justice system are entitled to enjoy their right to legal representation which is a right to safeguard the fair trial and justice for children. Therefore, Cambodia is obliged to incorporate the legal standards set forth under the CRC into its national legislations and the practices of the criminal justice system in Cambodia for the proper protection and implementation of the right to legal representation for children in criminal proceedings.

2.2.2 The International Covenant on Civil and Political Rights

As inspired by the fundamental human rights discussed in the UDHR in 1948, the ICCPR has crystalized those fundamental human rights concepts into a binding international legal instrument in 1966 which came into force in 1976.¹²⁴ Just like the case of the ratification of the CRC, Cambodia ratified

¹¹⁹ *Ibid*, p. 424.

¹²⁰ CRC. Art. 40.

¹²¹ CRC. Art. 40(2)(b)(ii); OHCHR and IBA. (2003). *Human Rights Training Manual*, p. 415; Hodgkin, R. & Newell, P. (2007). *Implementation Handbook for the CRC*, pp. 170, 565 & 613-614.

¹²² CRC. Art. 40(3) & Art. 40(4); Hodgkin, R. & Newell, P. (2007). *Implementation Handbook for the CRC*, pp. 613-620; UNICEF. (1998). *Innocenti Digest: Juvenile Justice*, p. 4.

¹²³ *Ibid*.

¹²⁴ ICCPR. 16 December 1966, United Nations, Treaty Series.

the ICCPR in 1992.¹²⁵ Cambodia, as a consequence, is obliged to abide by the provisions enshrined in the ICCPR and incorporate those human rights standards in its justice system and practices.¹²⁶

In connection with the protection of the right to legal representation, the ICCPR addresses the fundamental human rights for every individual rather than for specific groups of people. In other words, the ICCPR does not specifically address on the administration of criminal justice system for children in detail. However, it is incorrect to claim that the ICCPR failed to protect the right to legal representation for children in criminal proceedings.

To be more specific, it is important to look at and analyze relevant provisions contained in the ICCPR which contributes to the protection of children's right to legal representation for fairness in the criminal justice system.

2.2.2.1 Provisions concerning legal representation for children

It is noteworthy that the ICCPR was the first binding human rights instrument that extends its protections over children in criminal proceedings before the establishment of the CRC. The HRC in its General Comment No. 17 and General Comment No. 21 has emphasized that every child is subject to the enjoyment of special measures of legal protection due to the vulnerable status of children.¹²⁷ Though did not clearly provide for the age of criminality for children accused of or committed criminal offences, the ICCPR stressed that “the age for the above purpose should not be set unreasonably low,” taking into account “their physical and mental immaturity.”¹²⁸ The Committee further noted that all persons under the age of 18 shall be treated as juveniles under the Covenant.¹²⁹

a. Article 14

More specifically, concerning the guarantee of the right to legal representation for children in criminal proceedings, Article 14(3)(d) on the right to a fair trial of the ICCPR provides three procedural guarantees of fair

¹²⁵ United Nations Treaty Collection. (updated April 2016). *Ratification of the International Covenant on Civil and Political Rights*. Retrieved from https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=IV-4&chapter=4&lang=en.

¹²⁶ Cambodia Constitution. Art. 31; The Constitutional Council of Cambodia, Case No 131/003/2007 of 26 June 2007, Decision No 092/003/2007 CC.D, 10 July 2007.

¹²⁷ HRC, General comment No. 17, para. 4; HRC, General Comment No. 21, para. 13.

¹²⁸ HRC. General Comment No. 32, paras. 42-43; HRC. General Comment No. 17, para. 4; OHCHR and IBA. (2003). *Human Rights Training Manual*, p. 402.

¹²⁹ *Ibid.*

trial rights.¹³⁰ Those guarantees include the “right to be present during the trial,” the right to “defend themselves in person or through legal counsel of their own choosing,” and the “right to have legal assistance” for accused who lack financial resource for the payment of the defence and when “the interests of justice so require.”¹³¹

The HRC noted that children are to be accorded with at least equal minimum safeguards as adults in the administration of criminal justice system.¹³² Such procedural guarantees are to be available for the children at all stages of the criminal proceedings, ranging from the pre-trial stage, hearing stage and post-trial stage.¹³³

Focusing on the right to legal representation for children, the HRC has determined that when States failed to protect and respect the right to have access to legal representation and legal assistance of the accused, the States violated Article 14(3) of the ICCPR.¹³⁴ Some of the acts that constituted the violations of fair trial rights include the absence of lawyer for the accused in any stages of trial proceedings,¹³⁵ denial of representation during an interrogation,¹³⁶ denial of the accused’s request of communication with their lawyers,¹³⁷ denial of access to a lawyer during pre-trial investigation and detention,¹³⁸ and ineffective defence by the State appointed lawyer.¹³⁹ It is to

¹³⁰ ICCPR. Art. 14(3)(d); HRC. General Comment No. 32, paras. 36-38.

¹³¹ ICCPR. Art. 14(3)(d); HRC. General Comment No. 32, paras. 36-38.

¹³² HRC. General Comment No. 32, para. 42.

¹³³ OHCHR and IBA. (2003). *Human Rights Training Manual*, pp. 271, 274, 277, 308 & 415; OSCE/ODIHR. (2012). *Legal Digest of International Fair Trial Rights*, p. 118; Lawyer Committee for Human Rights. (March 2000). *What is a fair trial? A Basic guide to Legal Standards and Practice*, pp. 5-6 and 17-18.

¹³⁴ OHCHR and IBA. (2003). *Human Rights Training Manual*, pp. 237 & 271; Communication No. R.2/8, *B. Weismann Lanza and A. Lanza Perdomo v. Uruguay* (Views adopted on 3 April 1980), para. 16; Communication No. R.1/6, *M. A. Millán Sequeira v. Uruguay* (Views adopted on 29 July 1980), para. 16.

¹³⁵ *Robinson v. Jamaica*, 30 March 1989, UNHRC, 223/1987, paras. 10.2 & 10.3; *Chikunova v Uzbekistan*, 16 March 2007, UNHRC, 1043/2002, para. 7.4; *Sharifova et al. V. Tajikistan*, UN HRC, 1 Apr 2008, para. 6.6.

¹³⁶ *Gridin v Russian Federation*, HRC Communication 770/1997, UN Doc CCPR/C/69/D/770/1997 (2000), para. 8.5; *Penarrieta and Others v Bolivia*, HRC Communication 176/1984, UN Doc CCPR/C/31/D/176/1984 (1988), para 16; *Lyashkevich v Uzbekistan*, HRC Communication 1552/2007, UN Doc CCPR/ C/98/D/1552/2007 (2010), para. 9.4.

¹³⁷ *Kelly v. Jamaica*, 17 July 1996, UNHRC, 537/1993, para. 9.2; *Gridin v. Russian Federation*, 20 July 2000, UNHRC, 770/1997, para. 8.5; *Carranza Alegre v. Peru*, 28 October 2005, UNHRC, 1126/2002, paras. 3.7 & 7.5.

¹³⁸ *Kasimov v. Uzbekistan*, 30 July 2009, UNHRC, 1378/2005, para. 9.6; *Toshev v. Tajikistan*, 30 March 2011, UNHRC, 1499/2006, para. 6.7.

¹³⁹ *Butovenko v. Ukraine*, 19 July 2011, UNHRC, 1412/2005, para. 7.8.

ensure that the accused's right to legal representation and the proper implementation of the criminal justice are upheld.¹⁴⁰

For the foregoing, we can see that both the CRC and the ICCPR are significant human rights legal instruments that impose legal obligations on Cambodia. The government of Cambodia shall accord and guarantee the procedural safeguards, relating to the access to legal representation for all children who find themselves in the criminal justice system of the country. It is therefore important to look at Cambodia's national legislations and mechanism in place in order to analyze as to whether Cambodia has fulfilled its legal obligations under the standards set by the CRC and the ICCPR, concerning the right to legal representation for children in criminal proceedings.

2.3 National Legal Instruments and Protection Mechanism on Access to Legal Representation for Children

As previously mentioned, Cambodia has ratified various international human rights treaties, including the CRC and ICCPR since 1992. As a State Party to those treaties, Cambodia hence has recognized its legal obligations to ensure the effective implementation of the rights enshrined under the CRC and the ICCPR, concerning the right to legal representation for children in criminal proceedings.

Furthermore, recognizing the vulnerability of children and the need for changes for proper administration of criminal justice system for children, Cambodia has shown its commitments and efforts in making the enjoyment of children rights in Cambodia a reality.¹⁴¹ In particular, for nearly a decade ago, Cambodia had been drafting the LJJ which aims at ensuring special protections for child defendants and child victims in the criminal justice system of the country. It is therefore important to look at the legal protections relating to the right to legal representation for children in criminal proceedings in Cambodian legal instruments and mechanisms to get an insight on how the right is protected and guaranteed.

¹⁴⁰ Open Society. (April 2013). *Case Digests: International Standards on Criminal Defence Rights: UN Human Rights Committee Decisions*. Open Society Justice Initiative, pp. 17-25; OSCE/ODIHR. (2012). *Legal Digest of International Fair Trial Rights*, pp. 118-119; OHCHR and IBA. (2003). *Human Rights Training Manual*, p. 235.

¹⁴¹ UNICEF Cambodia. (October 2014). *Violence Against Children in Cambodia: Core Commitments to Prevent and Respond to Violence Against Children*. Presented by the Government of Cambodia.

2.3.1 The Constitution of the Kingdom of Cambodia

The Constitution of Cambodia was adopted by the Constitutional Assembly in September 1993 after Cambodia's first national election took place.¹⁴² The Constitution is "the supreme law of Cambodia" which requires that "laws and decisions by the State Institutions shall have to be in strict conformity with the Constitution."¹⁴³ Besides explicitly recognizing the CRC and related international human rights treaties, the Constitution of Cambodia upholds the protection and respect of children's rights by granting special protection for children in its statutory framework.¹⁴⁴ In other words, Cambodia has ensured that the rights of children are guaranteed at the highest possible level of legal protection given that such rights are stipulated under the provisions of the Cambodian Constitution which is the supreme source of law in the country.

More specifically, Article 31 of the Constitution specifies that Cambodia recognizes and respects human rights as guaranteed under "the UDHR, Covenants, and Conventions concerning human rights, women's and children's rights."¹⁴⁵ Additionally, Article 48 of the Constitution further specifies that "the State shall protect the rights of children as stipulated in the Convention on Children."¹⁴⁶ Cambodia thereby incorporates the CRC, the ICCPR and other children's rights related treaties which Cambodia has ratified as the sources of law and legal obligations in the legal system of Cambodia.

As such, the adherence of access to justice and fair trial for children in criminal proceedings, including their right to legal representation form parts of the Constitution of Cambodia, which entails the legal obligation of Cambodia to fulfill the implementation of children's rights.

2.3.2 The Cambodian Criminal Procedure Code

The Criminal Procedure Code (CPC) of Cambodia, which was promulgated in August 2007, aims at providing clear rules for the determination of the existence of a criminal offence.¹⁴⁷ As one of the significant legal instruments that govern the justice system of Cambodia, the CPC of Cambodia specifically provides for the protection of the right to legal representation for

¹⁴² Cambodian Constitution, pp. 1-2.

¹⁴³ Cambodian Constitution. Art. 150 (Former Article 131).

¹⁴⁴ Cambodian Constitution. Art. 31.

¹⁴⁵ Cambodian Constitution. Art. 31.

¹⁴⁶ Cambodian Constitution. Art. 48.

¹⁴⁷ Cambodian National Council for Children (CNCC). (2010). *1st and 2nd National Report on the Implementation of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, p. 6.

children during all stages of criminal process, ranging from the police custody, the investigating stages and trial stages.

In particular, Article 98 provides that after twenty-four hours of being held in police custody, the detainees including children shall enjoy the right to access legal representation.¹⁴⁸ Article 100 sets out the obligation of judicial police to ensure that the child detainees' parents, legal representative or person who is responsible for that child are informed and notified about the detention of the child.¹⁴⁹

During the investigating stage and trial stages, the CPC guarantees that children are subject to the enjoyment of their right to legal representation in all criminal justice procedures. To be more specific, Article 143 of the CPC requires the investigating judge to inform the children of their right to legal representation and to appoint a lawyer for them if they cannot obtain one.¹⁵⁰ Similarly, it is further required under Article 301 that children are entitled to access to legal representation and legal assistance or be appointed with lawyers throughout the trial stages of the criminal proceedings.¹⁵¹

The CPC thereby guarantees the procedural rights of children who are accused of violating the criminal law of Cambodia. Particularly, their right to legal representation in all stages of the criminal procedures, which is a fundamental element to ensure that the right to a fair trial and access to justice for children in criminal proceedings are protected under the CPC.

2.3.3 The Penal Code

The Penal Code of Cambodia is one of the fundamental legal frameworks on child protection in the criminal justice system of the country. Promulgated in November 2009, the Penal Code aims at specifying the offences, listing criteria for pointing out the persons who could be declared as responsible for the offences, and determining the penalties for certain applicable crimes.¹⁵²

Although the Penal Code does not specifically address the matter concerning the right to legal representation for children in criminal proceedings, the Penal Code also aims at providing legal protection for children who come into contact with the criminal law. Particularly, Article 38 of the Penal Code sets

¹⁴⁸ Cambodian Criminal Procedure Code (CPC). Art. 98.

¹⁴⁹ Cambodian CPC. Art. 100.

¹⁵⁰ Cambodian CPC. Art. 143; OHCHR. (March 2014). *Annotated Cambodian Code of Criminal Procedure: Annotations to ECCC and Select International Jurisprudence*. [Pre-Trial and General Rules: Article 143. Notification of Placement under Judicial Investigation], p. 48.

¹⁵¹ Cambodian CPC. Art. 301.

¹⁵² CNCC, *supra* note 147.

out the age of criminal responsibility of children at the age of 18 and above.¹⁵³ However, as stipulated under Article 39 of the Penal Code, children from the age of 14 to 18 can also be held criminally responsible if “the circumstances of the offence or character” of the children justify it.¹⁵⁴

With the strict exception allowing the imposition of criminal penalty on children aged 14 to 18, the Penal Code also offers protections for children in criminal proceedings by placing child suspects under “supervision, education, protection and assistance.”¹⁵⁵

2.3.4 The Law on Juvenile Justice

The LJJ of Cambodia had been in the process of drafting since October 2006.¹⁵⁶ It is reported that the Draft LJJ had been under review for a number of times since 2009 in order to ensure that the Law is consistent with the provisions of international law, the Penal Code and the CPC of Cambodia.¹⁵⁷ After a decade of drafting, the LJJ was adopted by the Council of Ministers of Cambodia on 22 April 2016.¹⁵⁸ The adoption of this law is a result of many years’ efforts and inputs of the Ministry of Justice, development partners, UNICEF, and civil society groups.¹⁵⁹

The LJJ is enacted to specifically deal with the children who are accused of violating the Penal Code or found guilty of committing crimes. This Law aims at establishing comprehensive procedures, granting legal protection as well as procedural guarantees for children in the criminal justice system. In particular, the LJJ contains provisions dealing with: 1. juvenile delinquency; 2. designating experts to work for children including specially-trained police, judges and prosecutors; 3. creating child-friendly legal procedures during interviews, investigations and trials stages; 4. providing assistance and services through social workers to children, such as psycho-social support,

¹⁵³ The Penal Code of Cambodia. Art. 38.

¹⁵⁴ The Penal Code of Cambodia. Art. 39.

¹⁵⁵ The Penal Code of Cambodia. Arts. 39, 40 & 41.

¹⁵⁶ Child Rights International Network (CRIN). (April 2014). *Cambodia Children’s Rights References in the Universal Periodic Review*. Retrieved from <https://www.crin.org/en/library/publications/cambodia-childrens-rights-references-universal-periodic-review>.

¹⁵⁷ NGOCRC. (June 2013). *UPR Submission on Child Rights in the Kingdom of Cambodia*, p. 11.

¹⁵⁸ Nicholson, A. (25 April 2016). *Introduction of the Juvenile Justice Law in Cambodia*. Children’s Rights International; Fresh News Asia. (April 2016). សេចក្តីប្រាប់ស្តីពី យុត្តិធម៌ អនីតិជន បានអនុម័តជាផ្លូវការហើយ ក្នុងកិច្ចប្រជុំគណៈរដ្ឋមន្ត្រី នៅព្រឹកនេះ. Retrieved from <http://m.freshnewsasia.com/index.php/en/22500-2016-04-22-03-45-12.html>.

¹⁵⁹ NGOCRC. (June 2013). *UPR Submission on Child Rights in the Kingdom of Cambodia*, p. 11; Nicholson, A. (25 April 2016). *Introduction of the Juvenile Justice Law in Cambodia*. Children’s Rights International.

case monitoring, case follow-up, rehabilitation and reintegration services; 5. establishing diversion procedures at all stages of the proceedings including the use of community services, and 6. reversing prison sentence for children at each court proceeding.¹⁶⁰

Concerning the procedural rights to which children in criminal proceedings are entitled, the LJJ of Cambodia contains specific provisions on the right to legal representation for children while being held in the police custody, investigating stage and trial stages.¹⁶¹ Based on the Draft LJJ (draft version from November 2013), the draft law guarantees that children are entitled to the right to legal representation by “a lawyer of their own choosing,” and to be appointed with a lawyer if there is not one available for the children.¹⁶² The right to legal representation, legal assistance and legal aid are to be accorded to the children at the earliest stage and throughout all stages of the criminal proceedings.¹⁶³

Having said that, practically, there has been no separate clearly defined law administering juvenile justice in Cambodia since the newly adopted LJJ has not been introduced into practice yet. The protections that children in criminal proceedings are granted now are those contain in the Constitution of Cambodia, the CPC and the Penal Code, which most of those provisions are brief and insufficiently clear to serve as proper and effective guides for administering criminal justice for children.¹⁶⁴ Last but not least, although the LJJ has recently been adopted, the introduction of the law into the legal practice of the criminal justice system of Cambodia remains a matter of concern due to the lack of human resource, inadequate enforcement mechanism and widespread corruption in the judicial system.

2.3.5 Child Protection Unit of the Bar Association of the Kingdom of Cambodia

The BAKC was created in 1995 to bring together all registered lawyers practicing in Cambodia.¹⁶⁵ In order to ensure that justice is equally attainable to the vulnerable poor in the criminal justice system of Cambodia, the Legal

¹⁶⁰ Raoul Wallenberg Institute (RWI). (2015). A Measure of Last Resort? The Current Status of Juvenile Justice in ASEAN Member States. *Chapter III. The State of Juvenile Justice in Cambodia* [hereinafter “The State of Juvenile Justice in Cambodia”], p. 34; CRIN. (April 2014). *Cambodia Children’s Rights References in the Universal Periodic Review*.

¹⁶¹ Cambodian Draft Law on Juvenile Justice (LJJ). Arts. 6, 19, 30 & 54.

¹⁶² Cambodian Draft LJJ. Arts. 6, 19, 30 & 54.

¹⁶³ Cambodian Draft LJJ. Arts. 6, 19, 30 & 54.

¹⁶⁴ CCHR, *supra* note 92, pp. 3 & 9.

¹⁶⁵ Law on the Bar of Cambodia. Art. 8.

Aid Department of the BAKC was established.¹⁶⁶ Furthermore, recognizing the critical need to foster legal protections for children in criminal proceedings who are entitled to special cares and safeguards, the Child Protection Unit was set up under the framework of the Legal Aid Department of the BAKC in May 2000.¹⁶⁷ It is noteworthy that the UNICEF has played significant roles in the establishment of the Child Protection Unit by supporting the creation of the Unit, providing technical assistance to the Unit, and facilitating the cooperation with other development partners, NGOs and government institutions.¹⁶⁸

As of 2016, there are a total of 1,172 lawyers registered under the BAKC, about 816 of whom are practicing lawyers providing legal services.¹⁶⁹ Among those practicing lawyers, only nine of them are lawyers working for the Legal Aid Department which provides legal aid services to the poorest in criminal cases.¹⁷⁰ Attached to the Legal Aid Department, the Child Protection Unit consists of four lawyers offering legal representation and legal services in juvenile related cases from its headquarter in Phnom Penh.¹⁷¹

Moreover, with the State's limited funding of only \$73,000 per year for the Legal Aid Department, there is no office in other 24 provinces of the country besides its only headquarter in Phnom Penh.¹⁷² The Legal Aid Department mainly performs its work in Phnom Penh while its lawyers may represent clients anywhere in the country.¹⁷³ This has caused obstacles for the implementation of the right to legal representation for the poor, especially children in rural areas as the legal aid lawyers based in Phnom Penh could not effectively and properly prepare defending strategies for the cases involving the defendants and victims in the provinces.¹⁷⁴

For these reasons, as a general overview of the legal aid service provided by the BAKC, it is reported that there are not always an appropriate legal

¹⁶⁶ IACPJJ. (2005). *Creation of a Child Protection Unit with the Bar Association*, p. 35; UNICEF. (2003). *Legal Representation for Children in Need of Special Protection - Cambodia*, p. 22; BAKC's official website. Retrieved from <http://www.bakc.org.kh/en/structure>.

¹⁶⁷ UNICEF. (2003). *Supra* note 4.

¹⁶⁸ IACPJJ. (2005). *Creation of a Child Protection Unit with the Bar Association*, p. 35.

¹⁶⁹ Run, S. (April 2016). *Role of Professional Bodies and Legal Aid Organizations in Cambodia*, p 3.

¹⁷⁰ *Ibid*, p 4.

¹⁷¹ Council for Legal and Judicial Reform (CLJR) and the East-West Management Institute (EWMI). (December 2006). *Legal Aid in Cambodia: Practices, Perceptions and Needs. A Study based on a National Survey*, p. 14.

¹⁷² IBAHRI. (September 2015). *Challenges to the independence of the judiciary in Cambodia*, p. 46; Run, S. (April 2016). *Role of Professional Bodies and Legal Aid Organizations in Cambodia*, p 7.

¹⁷³ UNICEF. (2003). *Supra* note 4, p. 27.

¹⁷⁴ Run, S. (April 2016), *supra* note 169, p 12.

representation and legal assistance for children in criminal proceedings in Cambodia, either as child defendants, victims or witnesses.¹⁷⁵

Conclusion

Besides the legislations and mechanism mentioned above, the government of Cambodia has also put its efforts in enhancing the access to justice and the right to legal representation for children through its various initiatives. Those include the establishment of the Plan of Action for Implementing the Legal and Judicial Reform of 29 April 2005,¹⁷⁶ the creation of the Inter-Ministerial Child Justice Working Group in 2006 (CJWG),¹⁷⁷ and the formalization of partnership of the NGO Working Group on Child Justice and CJWG in 2009.¹⁷⁸ All those initiatives are established with the aims of enhancing the cohesiveness, collaboration and cooperation between all key actors in the child justice sector in Cambodia.

In spite of the fact that Cambodian government has been working hard to ensure the effective implementation of the right to legal representation for children in criminal cases in Cambodia, there have been various potential challenges that hinder the effective implementation of the right mentioned. Significantly, those potential challenges need to be analyzed and addressed promptly and put together as a whole picture to properly see the problems at hand and tackle the barriers to the realization of the right to legal representation for children in criminal proceedings in Cambodia.

¹⁷⁵ Reimer, J. K. (January 2015). *A System Just for Children*, p. 44; UNICEF. (2003). *Legal Representation for Children in Need of Special Protection - Cambodia*, p. 22.

¹⁷⁶ Nicholson, *supra* note 22, pp. 5-6.

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*

Chapter 3: Analyses on the Challenges and Amendments to the Implementation of the Right to Legal Representation for Children in Criminal Proceedings in Cambodia

Introduction

Cambodia has put efforts in fulfilling its human rights obligations as a State Party to the CRC, the ICCPR and other human rights treaties by establishing legal frameworks, aiming at protecting the right of children in criminal proceedings. The laws and legal frameworks also guarantee the procedural safeguards for child defendants, victims and witnesses, including their right to legal representation which is an essential right that enables children to fully realize their right to a fair trial and the access to justice.¹⁷⁹

Comparing to the colonial past where children's rights were not prioritized in State's policy, current situation of Cambodia shows that Cambodia has placed certain emphasis on child protection and has to some extents adhered to international standards concerning child protection in the criminal justice system.¹⁸⁰

In spite of that improvement, various major problems persist with the implementation of the right to legal representation for children in criminal proceedings in Cambodia. Noting with concern, currently there is no a separate criminal justice system for children in criminal proceedings in Cambodia as the entry into force and the introduction of the LJJ remain pending.¹⁸¹ As strongly suggested by the Committee on the Rights of the Child, a distinct juvenile justice system should be established since it is a crucial tool contributing to the realization of special protections for children in criminal proceedings in Cambodia.¹⁸² With a specialized criminal justice system for children, it is believed that children are given more considerations

¹⁷⁹ See section 2.3 of this paper.

¹⁸⁰ UNICEF Cambodia. (October 2014), *supra* note 141.

¹⁸¹ *Supra* note 52.

¹⁸² Committee on the Rights of the Child. *Concluding Observations: Cambodia 24th Session*, 3 June 2000, CRC/C/15/Add. 128, para. 66.

by the courts. Through that, children will not be treated with the same treatments and same system as adults, and children-specific rights will be upheld.¹⁸³ Unfortunately, with the current criminal justice system of Cambodia where there is no specialized court on children issues, more often than not, children and their special protections are neglected and forgotten by the laws and the system.¹⁸⁴

As for the status and situation of the right to legal representation for children in the criminal justice system of the country, research surveys and studies have shown that children are not always accorded with the access to legal representation.¹⁸⁵ Studies have further stressed that children commonly lack access to legal representation in the police custody.¹⁸⁶ This fact closely links to the increasing reports of child abuses within the police custody and prolonged pre-trial detention of children.¹⁸⁷ It is also rare that children were given legal representation at the investigating stage though they were provided with lawyers at trial stages.¹⁸⁸

With regards to child victims and witnesses, reports reveal that there has not been sufficient and formal protection and legal assistance available for them in the criminal proceedings from the State.¹⁸⁹ This has significantly reduced the fulfillment of welfare needs and legal supports for those children in the criminal proceedings.¹⁹⁰ Noticeably, for all cases involving children in criminal proceedings, those who live in the provinces and remote areas of

¹⁸³ Travers, E. (2011). *Upholding Children's Rights in the Judicial System in Cambodia*, p. 2; Noel, J. F., Atabekian, V., Sidoti, C. & Hecht, M. *Making Children's Rights Work: Country Profiles on Cambodia, Indonesia, Sri Lanka, Timor Leste, and Viet Nam*. International Bureau for Children's Rights (IBCR). (2006), p. 22.

¹⁸⁴ Nicholson, A. (April 2012). *Child Justice Programs in Vietnam and Cambodia*, p. 3;

Travers, E. (2011). *Upholding Children's Rights in the Judicial System in Cambodia*, p. 9.

¹⁸⁵ UNICEF. (2003). *Legal Representation for Children in Need of Special Protection - Cambodia*, p. 22; IACPJJ. (2005). *Creation of a Child Protection Unit with the Bar Association*, pp. 35-37; Johnson, A. K. (January 2015). *Eliminating Physical and Humiliating Punishment of Children in Cambodia: A Review of Existing Legislation and Policy*. Save the Children, pp. 6-7.

¹⁸⁶ NGOCRC. (September 2013). *The information from CSOs, Cambodia: Access to Justice for Children*, p. 2; Travers, E. (2011). *Upholding Children's Rights in the Judicial System in Cambodia*, pp. 4-5; CCHR. (October 2014). *Children in the Cambodian Criminal Justice System*, pp. 5-6.

¹⁸⁷ UN Principles and Guidelines on Access to Legal Aid. *Introduction*, para. 3; Isobel, M. (April 2013). *Arrest Rights Brief No. 3: The Right to Legal Aid*. Open Society Justice Initiative, para. 8; NGOCRC. (September 2013). *The information from CSOs, Cambodia: Access to Justice for Children*, p. 2; Travers, E. (2011). *Upholding Children's Rights in the Judicial System in Cambodia*, pp. 4-5; CCHR. (October 2014). *Children in the Cambodian Criminal Justice System*, pp. 5-6.

¹⁸⁸ *Supra* note 186.

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

Cambodia have been facing particular risks of having no or limited access to legal representation and assistance.¹⁹¹

Having said that, this has been one of the major concerns and threats to the protection of children's rights, especially their right to a fair trial. This is because the quality of the defence for children can be negatively affected and diminished when they were not promptly accorded with legal representation and legal assistance at the earliest stages of the criminal proceedings, counting from the time of their detention during the police custody.¹⁹²

The enjoyment of the right to legal representation for children in criminal proceedings is the center interest of this paper. Reiterating the purpose and rationale of this paper, it is of particular importance to provide a systematic overview showing the structural problems in the implementation of the right to legal representation for children in criminal proceedings in Cambodia. In specific context of Cambodia, the challenges to the implementation of said right need to be seen in a pattern as those challenges are interrelated. Addressing one or two challenges or view those challenges separately thus will neither make a difference nor improve the situation in the criminal justice system of Cambodia. As such, it is the structure that this paper provides that counts and it is neither the purpose of this paper, nor it is necessary to go into depth or detail of every single headline discussed in this Chapter.

The realization of children's rights rest upon not only the existence of the laws but also the implementation and enforcement of those legal standards. Counting from the ground level, the judicial stakeholders including judicial police, lawyers, prosecutors and judges, the judiciary and the legal aid system are the key actors and mechanism whose roles are to ensure the appropriate application of child protection standards in the practice of the justice system. Until time when there exists a distinct juvenile justice system, it is therefore significant to pay particular attention on the functioning of those key actors and address the associated problems arising from their performances in order to foster the effective implementation of the right concerned. Those potential problems include the lack of child protection related knowledge, skills and professionalism among the judicial professionals, their low interest in handling children's cases, the judicial corruption and the ineffective legal aid system. Serious consideration and analysis of those potential challenges to

¹⁹¹ NGOCRC. (September 2013). *The information from CSOs, Cambodia: Access to Justice for Children*, p. 2; UNICEF. (2003). *Legal Representation for Children in Need of Special Protection - Cambodia*, p. 29.

¹⁹² NGOCRC. (September 2013). *The information from CSOs, Cambodia: Access to Justice for Children*, p. 2; Travers, E. (2011). *Upholding Children's Rights in the Judicial System in Cambodia*, pp. 4-5.

the implementation of the right to legal representation for children in criminal proceedings in Cambodia are provided in this Chapter.

Besides analyzing the four potential challenges in ensuring the right to legal representation in criminal cases for children in Cambodia, this Chapter further suggests amendments to each challenge respectively.

3.1 Lack of knowledge, skills and professionalism on child protection issues

The roles and functions of judicial police, lawyers, prosecutors and judges cannot be neglected when discuss issues concerning the access to justice, the fair trial rights and the rule of law for the defendants and the victims of crimes.¹⁹³ All of those actors play significant roles in ensuring the proper implementation of the right to legal representation in the administration of justice system in Cambodia. Greater attention and special protection are needed from them when the cases involve children as defendants, victims and witnesses due to their vulnerabilities and special status.

International laws as well as domestic laws of Cambodia have set legal standards governing the conducts of those administering the criminal justice system. In particular, pursuant to Article 2 of the UN Code of Conducts for Law Enforcement Officials, it is required that judicial police “shall respect and protect human dignity and maintain and uphold human rights of all persons.” They shall not engage in or “commit any act of corruption.”¹⁹⁴ Moreover, lawyers shall be allowed to perform their work independently to ensure the effectiveness and equal accessibility of legal services for the accused persons “in accordance with the law and recognized standards of professionalism and ethics.”¹⁹⁵ Similarly, legal frameworks require judges and prosecutors to abide by the “recognized principles of good conducts and

¹⁹³ Code of Conduct for Law Enforcement Officials, UN General Assembly resolution 34/169, December 17, 1979 [hereinafter UN Code of Conducts for Law Enforcement Officials]; UN Basic Principles on Lawyers; Basic Principles on the Independence of the Judiciary, UN General Assembly resolution 40/32, November 29, 1985 and resolution 40/146, December 13, 1985 [hereinafter UN Basic Principles on the Judiciary]; UN Standard Minimum Rules for the Administration of Juvenile Justice, UN General Assembly resolution 40/33, November 29, 1985; Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, August 27-September 7, 1990.

¹⁹⁴ UN Code of Conducts for Law Enforcement Officials. Art. 7.

¹⁹⁵ UN Basic Principles on Lawyers. Art. 25; Cambodian Constitution. Arts. 128 & 129.

professional ethics.”¹⁹⁶ Those standards include competence, morality, impartiality as well as independence.¹⁹⁷

Besides the standards governing the conducts of the judicial and legal professionals in the criminal justice, when it comes to juvenile justice which is a new approach for Cambodia dealing with children in criminal proceedings, one main challenge is to convince and make sure that judicial police, lawyers, prosecutors and judges understand and accept the approach of the juvenile justice. Specifically, it is reported that the concern to the proper implementation of the administration of juvenile justice, including the respect of the right to legal representation for children, lays upon the lack of fundamental understanding and knowledge of the existing laws, the new law and the rights asserted for children in criminal proceedings.¹⁹⁸ In relation to that, reports have stressed that the level of knowledge on children’s right issues and child safeguard standards among the law enforcement officials, judicial officials and related stakeholders is still low.¹⁹⁹ Particularly, those who are practically working on children related cases do not possess good knowledge and understanding of the laws, including the CRC, the ICCPR and relevant domestic legal provisions, needless to mention the newly adopted LJJ.²⁰⁰

For all these, Cambodian population are lack of the legal knowledge concerning their human rights and the general awareness on the right to legal representation is also limited as the public are not well informed by the relevant judicial authorities of such information.

3.1.1 Law Enforcement Officials

While national legislations of Cambodia seem promising on the protection of children’s rights and the roles and conducts of the judicial stakeholders involving in the criminal justice system, the reality of the practices of child protection relating to the access to legal representation poses a critical concern.

¹⁹⁶ Bangalore Principles of Judicial Conduct. (2002); Cambodian Constitution. Art. 128; Cambodian Law on Judges and Prosecutors. Arts. 4, 8 & 50.

¹⁹⁷ *Ibid.*

¹⁹⁸ Nicholson, A. (April 2012). *Child Justice Programs in Vietnam and Cambodia*, p. 9; Travers, E. (2011). *Upholding Children’s Rights in the Judicial System in Cambodia*, pp. 4-5; CCHR. (October 2014). *Children in the Cambodian Criminal Justice System*, p. 9; UNICEF. (2003). *Legal Representation for Children in Need of Special Protection - Cambodia*, p. 29.

¹⁹⁹ RWI. (2015). *The State of Juvenile Justice in Cambodia*, pp. 45-46; Survey conducted by PJJ as cited in Travers, E. (2011). *Upholding Children’s Rights in the Judicial System in Cambodia*, p. 6.

²⁰⁰ *Ibid.*

It is common for children in Cambodia to be detained at the police station and put in custody without the access to their parents, legal guardians or lawyers.²⁰¹ Studies have shown that in many occasions, judicial police have failed to offer access to legal representation for children after 24 hours of the detention as required by laws.²⁰² It has also been reported that the judicial police requested for “informal” payment from lawyers, parents or legal guardian of the child detainees to be able to meet the children who were held in the pre-trial detention.²⁰³ Extra fee was also claimed by the law enforcement officials when certain inquiries are requested by the lawyers of the children, including for receiving complaint or for taking matters to trial to speed up the trial.²⁰⁴ Furthermore, research surveys provided that judicial police failed to inform the children and their parents or legal guardians about their right to have access to legal representation.²⁰⁵ They also did not take action when there were the requests for lawyers from the child detainees.²⁰⁶ This has been the case not only for child defendants but also child victims and witnesses.²⁰⁷

Given the ethical issues, the lack of awareness about the duties and responsibilities by the judicial police and the limited understanding of child related issues, the current situation of protection of the right to legal representation for children in criminal proceedings is not at a desirable standard yet. All of these hinder the effective legal defence of the cases for children since without prompt legal representation and assistance at the earliest stage of the criminal proceedings, children are at a higher risk of being tried at adults’ standards and being wrongly convicted accordingly.²⁰⁸ These issues have brought about various problems concerning the rights of the child, including ill-treatment of children in the police station, prolonged pre-trial detention, overcrowding condition of detention and wrongful conviction of children.²⁰⁹ This significantly undermines the right to have access to justice,

²⁰¹ NGOCRC. (September 2013), *supra* note 93, p. 2.

²⁰² Cambodian CPC. Arts. 93, 100 & 143; DANIDA. (September 2011). *Options for Approaches to Legal Aid Services Delivery in Cambodia*, p. 9; Travers, E. (2011). *Upholding Children’s Rights in the Judicial System in Cambodia*, pp. 4-5; CCHR. (October 2014). *Children in the Cambodian Criminal Justice System*, pp. 2-5.

²⁰³ DANIDA. (September 2011). *Options for Approaches to Legal Aid Services Delivery in Cambodia*, p. 26.

²⁰⁴ Cambodian Human Rights Actions Committee (CHRAC). (November 2010). *Legal Aid Services in Cambodia: Report of a Survey among Legal Aid Providers*, p. 14.

²⁰⁵ NGOCRC. (September 2013), *supra* note 93, pp. 2-5.

²⁰⁶ *Ibid*, p. 2.

²⁰⁷ *Ibid*, p. 9.

²⁰⁸ White & Case LLP. (December 2013). *Access to Justice for Children: Cambodia*, p. 4; Travers, E. (2011). *Upholding Children’s Rights in the Judicial System in Cambodia*, pp. 4-5.

²⁰⁹ Isobel, M. (April 2013). *Arrest Rights Brief No. 3: The Right to Legal Aid*, para. 8; Travers, E. (2011). *Upholding Children’s Rights in the Judicial System in Cambodia*, pp. 3-4; CCHR. (October 2014). *Children in the Cambodian Criminal Justice System*, p. 8;

a fair trial and the rule of law for children in criminal proceedings within the country.

3.1.2 Judiciary

Similar concerns with regards to the knowledge, skills and professionalism on children's issues also apply to the performances and work of the prosecutors and judges relating to implementation of the right to legal representation for children in criminal proceedings in Cambodia.

During the investigating stage, it is rare for children to have access to legal representation although the laws require them to be appointed with lawyers if they do not have one.²¹⁰ In addition, the issue of low quality and limited details of case investigations conducted by the investigating judges often demand lawyers to further conduct their own investigations despite the fact that the investigation of the cases is within the duties and responsibilities of the judicial officials.²¹¹ This illustrates that the judicial officials are either not well aware of their duties or they failed to perform their duties appropriately as provided by law even if they are aware of their responsibilities.

More often, children are informed and given the right to legal representation at the later stages of the criminal proceedings.²¹² This clearly undermines and limits the quality of legal representation and their defence at the trial stages.²¹³ The availability of a reasonable time for the case preparation and defence is shrunk due to the fact that lawyers were informed about the cases only at the trial stages. Nonetheless, in some cases, the judges adjudicated without the appointment of lawyers as required by laws.²¹⁴

It is reported that it is common for members of the judiciary to accept bribes or extra fee for their work during their professional duties.²¹⁵ For instance, lawyers are frequently demanded by judges and judicial officials to pay an unofficial fee to perform the follow-up on cases and track the progress of the

OHCHR Cambodia. (visited 2016). *Legal Aid in Cambodia*. Retrieved from http://cambodia.ohchr.org/EN/PagesFiles/legal_aid.htm.

²¹⁰ Cambodian CPC. Arts. 143 & 301.

²¹¹ CHRAC. (November 2010). *Legal Aid Services in Cambodia: Report of a Survey among Legal Aid Providers*, p. 14; DANIDA. (September 2011). *Options for Approaches to Legal Aid Services Delivery in Cambodia*, pp. 8-9.

²¹² NGOCRC. (September 2013), *supra* note 93, pp. 2-3.

²¹³ *Ibid.*

²¹⁴ RWI. (2015). *The State of Juvenile Justice in Cambodia*, p. 46; White & Case LLP. (December 2013). *Access to Justice for Children: Cambodia*, p. 4; IACPJJ. (2005). *Creation of a Child Protection Unit with the Bar Association*, p. 35.

²¹⁵ IBAHRI, *supra* note 78, pp. 28-30.

cases.²¹⁶ It has been complained by the legal aid lawyers that they were not guaranteed “the equality of arms” between them and the prosecution by the courts as they represented clients who required legal aid that could not offer bribes to the court.²¹⁷

Adding to that, in the cases involving child victims and witnesses, it is noted that judges do not have sufficient knowledge and understanding on special protections to be accorded to the child victims and witnesses, in term of special protections for children both legally and psychologically.²¹⁸ Judges have also failed to pay proper attention on their special needs.²¹⁹

Due to little awareness concerning the duties and responsibilities among the judicial officials, children in criminal proceedings were not informed about their entitlement to the procedural guarantees in the criminal justice system. There have been adverse effects derived from the malpractice concerning the access to legal representation for children by the judicial officials. Specifically, the children, their parents and legal guardians were not informed about their right to legal representation. They thus are not aware of their right to legal representation as well as the ways they can have access to legal representation and assistance.²²⁰

3.1.3 Lawyers

The limited child protection related knowledge, skills and professionalism among lawyers is another practical hindrance to the implementation of the right to legal representation for children in criminal proceedings. More specifically, the lack of knowledge and professionalism in dealing with children related cases has been stressed by various civil society organizations (CSOs) as a challenge to the implementation of said right.²²¹ Lawyers have been reported to defence the cases without proper knowledge of the cases.²²² This means that the lawyers lack a proper preparation for the defence and they also often appear at the hearing only during the trial stages. As such, little

²¹⁶ IBAHRI. (September 2015). *Challenges to the independence of the judiciary in Cambodia*, p. 29; CHRAC. (November 2010). *Legal Aid Services in Cambodia: Report of a Survey among Legal Aid Providers*, p. 14.

²¹⁷ IBAHRI, *supra* note 78, p. 47.

²¹⁸ UNICEF. (2003). *Supra* note 4, p. 29.

²¹⁹ *Ibid.*

²²⁰ CHRAC. (November 2010). *Legal Aid Services in Cambodia: Report of a Survey among Legal Aid Providers*, pp. 13-14; DANIDA. (September 2011). *Options for Approaches to Legal Aid Services Delivery in Cambodia*, pp. 8-9.

²²¹ DANIDA. (September 2011). *Options for Approaches to Legal Aid Services Delivery in Cambodia*, pp. 9-10; CHRAC. (November 2010). *Legal Aid Services in Cambodia: Report of a Survey among Legal Aid Providers*, p. 14; NGOCRC. (September 2013). *The information from CSOs, Cambodia: Access to Justice for Children*, p. 3.

²²² *Ibid.*

actual legal services and assistance were provided to the children throughout the proceedings and the right to legal representation for children in criminal proceedings is not properly enforced.

Another critical point to raise concerning the quality of the lawyers representing children in criminal proceedings is that there is a lack of lawyers specializing in children related cases.²²³ Given their physical and psychological vulnerabilities and special status, children as defendants, victims and witnesses are entitled to the special safeguards and protections from the lawyers representing them. For instance, it is essential for the lawyers to equip with specialized skills in dealing with children who are traumatized and defenseless, including techniques in interviewing the affected children and offering “psycho-social supports” to them.

Furthermore, the lawyers governed under the BAKC have been under fire due to their ethical and professional issues in dealing with legal aid cases, including children related cases. The lack of responsiveness from the BAKC is a particular concern raised by the provincial courts despite the fact that Article 29 of the Law on the Bar requires that lawyers are funded to represent the poor.²²⁴ It is reported that lawyers demanded extra payment for their time and the travel expense to the provinces in dealing with the appointed children cases as those lawyers are based in Phnom Penh.²²⁵ This makes legal aid services no longer free and accessible. Such fact has led to the conclusion that the channel to have access to legal representation through legal aid services from the BAKC is not anymore a first priority choice for children in criminal proceedings.

As discussed above, all of these shortcomings concerning the implementation of the laws on the right to legal representation for children in criminal proceedings are the potential hindrance to the fulfillment of children’s right to a fair trial and to have access to justice.

²²³ IACPJJ. (2005). *Creation of a Child Protection Unit with the Bar Association*, pp. 35-36; NGOCRC. (September 2013). *The information from CSOs, Cambodia: Access to Justice for Children*, p. 2.

²²⁴ DANIDA. (September 2011). *Options for Approaches to Legal Aid Services Delivery in Cambodia*, p. 8; CHRAC. (November 2010). *Legal Aid Services in Cambodia: Report of a Survey among Legal Aid Providers*, p. 11; UNICEF. (2003). *Legal Representation for Children in Need of Special Protection - Cambodia*, p. 29; Cambodian Law on the Bar. Art. 29.

²²⁵ DANIDA. (September 2011). *Options for Approaches to Legal Aid Services Delivery in Cambodia*, p. 8; IBAHRI. (September 2015). *Challenges to the independence of the judiciary in Cambodia*, p. 48.

3.1.4 Suggested Amendments

As discussed, the limited awareness among the judicial actors about the knowledge of the laws, their duties and responsibilities, and the child's protection standards are the practical problems to the enforcement of the right to legal representation for children in criminal proceedings. Among the juvenile justice standards, the right to legal representation for children is of particular concern since it is an enabling right to unlock the enjoyment of other fundamental rights of children in criminal proceedings. With legal representation, children have access to justice, enjoy their right to a fair trial and have their procedural guarantees safeguarded in the justice system. As such, it is important that the government of Cambodia takes initiatives and serious actions to tackle the shortcomings of its criminal justice system to fit with the special needs of child defendants, victims and witnesses.

a. Making continuous professional and legal trainings compulsory

For one thing, attention should be paid on the continuous trainings for all legal professionals, including the judicial police, lawyers, prosecutors and judges working in the criminal justice system.

Pursuant to the international legal standards regarding the roles and functions of judicial professionals, continuous professional and legal trainings play essential roles in enhancing the capacity of the administration of justice within a country.²²⁶ National legislations of Cambodia also set out provision relating to the education and training for judges, prosecutors and lawyers.²²⁷

In particular, the Royal Academy of Judicial Professionals (RAJP) and the Lawyer Training Center (LTC) have developed formal legal trainings on human rights knowledge and matters involving the administration of criminal justice for prosecutors, judges and lawyers. However, those professional and legal education are more about trainings as the requirements before being accepted into the judicial professions rather than the continuous professional and legal trainings for the practicing judges, prosecutors and lawyers in performing their work in the administration of justice.²²⁸ Consequently, the

²²⁶ UNHRC, *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, 9 April 2010, UN Docs A/HRC/14/26, [36]; UNODC. (2009). *Chapter II. General Provisions on Assistance to Child Victims and Witnesses, Article 6. Functions of the [national authority] [office] for the protection of child victims and witnesses in Justice Matters involving Child Victims and Witnesses of Crime*. Model Law and Related Commentary, p. 10.

²²⁷ Cambodian Law on Judges and Prosecutors. Art. 19; Cambodian Law on the Bar. Arts. 8-17; IBAHRI. (September 2015). *Challenges to the independence of the judiciary in Cambodia*, pp. 38-39.

²²⁸ *Ibid.*

judicial professionals are not provided with adequate trainings and legal education to further enhance their working capacity. Reports have shown that knowledge, skills and professionalism of those working in the justice system in Cambodia remain a concern which make them unable to handle cases effectively, especially in the cases involving children issues.²²⁹ Therefore, further trainings on human rights, especially children's rights and professional conducts are needed to improve the capacity and competency of relevant judicial stakeholders. This is also to raise the awareness about their roles and responsibilities in adhering to the standards set forth under the laws concerning the right to legal representation for children in criminal proceedings.

Such continuous trainings should be made mandatory for all practicing lawyers and judicial officials to improve their education on human rights, professionalism and ethics.²³⁰ The trainings and human rights education should not be done only through the RAJP and the LTC but should be available nationwide. This can be done through the work of the Cambodian Human Rights Committee (CHRC) whose mandates are to “investigate and remedy complaints on human rights violations, collect and disseminate information on the implementation of human rights, organize trainings and provide human rights educations to relevant judicial authorities and general public.”²³¹

Additionally, it is important that such trainings take place at a similar pace for judicial actors at all levels regardless of their ranking and duty station. It means that low ranking judicial officials and those working at remote areas should not be forgotten since each actor's role is influential and can potentially affect the outcome of the effective implementation of the right to legal representation for children in criminal proceedings.

Only when all judicial actors know about their duties and responsibilities and are well-trained that the general public and children in criminal proceedings, including their parents and legal guardians, are well-informed of their right to legal representation and aware of how to reach out to legal services. By knowing and understanding the roles of lawyers, the right to legal representation and the means to obtain legal assistance, children in criminal proceedings will be subject to better treatment in the criminal justice system as they know how to demand for the rights to which they are entitled. This in

²²⁹ Reimer, J. K. (January 2015). *A System Just for Children*, pp. 19-20; IACPJJ. (2005). *Creation of a Child Protection Unit with the Bar Association*, p. 35.

²³⁰ IBAHRI, *supra* note 78, pp. 65-66.

²³¹ Cambodian Human Rights Committee's official website. (as of April 2016). Retrieved from http://chrc.gov.kh/about_detail/?n_id=18; CCHR. (March 2012). *National Human Rights Bodies in Cambodia*. CCHR Institution Series, Volume 3.

turn contributes to the fulfillment of the right to legal representation for children in the criminal justice system in Cambodia.

b. Sharpening expertise on children related issues

Moving a step further, in relations to the trainings and awareness-raising on the protection for children in criminal proceedings, it is crucial to pay attention on the special trainings, guidelines and expertise regarding children-specific protections and related issues. Given Article 5 of the Draft LJJ requires a child-friendly justice system in the administration of juvenile justice, guidelines, trainings and awareness raising regarding a wide range of rights and specialized procedures for children are needed.²³² In other words, all judicial stakeholders are required to possess a specialized expertise on the children protection issues.

To be more specific, it is important for the judicial officials and lawyers to possess child-friendly techniques in interviewing, questioning and dealing with children in criminal proceedings, including child defendants, victims and witnesses.²³³ Furthermore, for an effective juvenile justice system, it is also required that children are provided with “psycho-social supports” throughout the judicial processes.²³⁴

To that end, relevant judicial stakeholders should be provided with comprehensive and specialized trainings on the children related issues. The specialized trainings should focus not only on the legal aspects but also on upgrading children related skills, covering skills in advocacy and communication with traumatized children and in investigating the cases.²³⁵ It is also crucial to ensure that such specialized trainings are available for all judicial officials working on the juvenile justice, including those working in prisons, provincial courts and authorities of low rank position.

Several positive outcomes can be expected from the increased expertise on children related issues among judicial officials. For instance, this could lead to a decrease in cases on inappropriate behavior by the judicial officials toward child victims and witnesses in justice process.²³⁶ Additionally, there will be better involvement and stronger voices from children in the criminal justice system which is a positive sign of having better access to justice. Last

²³² RWI. (2015). *The State of Juvenile Justice in Cambodia*, p. 43.

²³³ Reimer, *supra* note 47, p. 38.

²³⁴ Cambodian Draft LJJ. Art. 11; RWI. (2015). *The State of Juvenile Justice in Cambodia*, p. 44.

²³⁵ Reimer, *supra* note 47, pp. 19-20.

²³⁶ *Ibid*, p. 45.

but not least, this will bring about the improvement of the quality of legal defence for children in the juvenile justice system.

3.2 Low Interest in Handling Children's Cases

It is a welcoming fact that Cambodia has enacted the LJJ which was finally adopted by the Council of Ministers on 22 April 2016 after a decade of drafting.²³⁷ Having a set of comprehensive provisions that specifically deals with children in criminal proceedings is significant for the proper administration of juvenile justice.²³⁸ Nevertheless, while having the LJJ is a positive step and achievement, it is self-evidence that the implementation of the rules set forth under the law remains the key to the full realization of child protection within the juvenile justice system of Cambodia.

As evidenced above, to certain extent, Cambodia does have legal provisions guaranteeing the procedural safeguards for children in criminal proceedings.²³⁹ It is required that children are accorded with the right to legal representation and legal assistance at every stage of the criminal proceedings.²⁴⁰ This includes during the police custody, investigating stage and trial stages.²⁴¹ Nonetheless, those existing legal provisions are often not adhered to in practice. Learning from its failures in implementing the standards set by those legal provisions and framework, it is well aware that Cambodia will encounter similar challenges in introducing the newly adopted LJJ into its criminal justice system. The adherence of the law in practice heavily depends on the acceptance and the application of the law by judicial authorities, including judicial police, lawyers, prosecutors and judges in the administration of juvenile justice.

Although it is reported that there is a sign showing the improvement of overall awareness and understanding on children's rights among the judicial officials owing to the trainings conducted by NGOs, the challenges persist when it comes to the cases involving children in criminal proceedings.²⁴² Members of the national and international organizations working on the rights of children in criminal proceedings in Cambodia provided that one of the main challenges to the access to legal representation for children is the lack of interest in handling such cases by the lawyers, prosecutors and judges.²⁴³ As such, it remains problematic as to whether the guarantee of the right to legal

²³⁷ Nicholson, A. (25 April 2016). *Supra* note 99.

²³⁸ CCHR, *supra* note 92, p. 9.

²³⁹ See section 2.3 of this paper.

²⁴⁰ *Ibid.*

²⁴¹ *Ibid.*

²⁴² RWI. (2015). *The State of Juvenile Justice in Cambodia*, p. 44.

²⁴³ *Ibid.*, p. 46.

representation for children in criminal proceedings stipulated under the laws would be upheld by the judicial stakeholders.

According to the IBAHRI's 2015 Report concerning justice and corruption in the judiciary of Cambodia, the cases which involve parties with a limited financial capacity in the proceedings tend to receive little or no attention from the courts due to their inability to pay bribes to the courts.²⁴⁴

Besides the lack of interest from the judges, lawyers have also shown a low interest in providing free legal services to children in criminal proceedings. Although there is a high demand for legal representation from children in the provinces and remote areas and the laws require that legal representation shall be given to children in the criminal proceedings, lawyers have expressed an unwillingness in handling children related cases.²⁴⁵ It is difficult to keep qualified lawyers to work on the cases outside Phnom Penh as the lawyers tend to choose the places where they can potentially make more income.²⁴⁶ As briefly highlighted, given the unethical conducts of lawyers to demand for extra payment from their clients in representing the cases, lawyers foresee the fact that children in criminal proceedings lack financial capacity to pay for such fee as most of them are from the poor families in provinces. Thus, it remains that children are not provided with the access to legal representation in the criminal proceedings in Cambodia.

All in all, the lack of awareness on the duties and roles among the judicial stakeholders, the limited knowledge and understanding on children's issues and the lack of specialists in children related cases are the significant barriers to the proper implementation of the right to legal representation for children in criminal proceedings. For one thing, these shortcomings have made the general public, including children in criminal proceedings, their parents and legal guardians unable to have access to information on their right to legal representation in the criminal proceedings as guaranteed in the law. Specifically, the general public lack awareness and understanding on their rights and the means to access legal services guaranteed by law.

Additionally, the children in need of legal representation in the provinces and remote areas are put at a higher risk of having ineffective legal representation or no access to legal assistance and services. In other words, they could be

²⁴⁴ IBAHRI, *supra* note 78, p. 29.

²⁴⁵ DANIDA. (September 2011). *Options for Approaches to Legal Aid Services Delivery in Cambodia*, p. 8; IACPJJ. (2005). *Creation of a Child Protection Unit with the Bar Association*, p. 35; UNICEF. (2003). *Legal Representation for Children in Need of Special Protection - Cambodia*, p. 29; CHRAC. (November 2010). *Legal Aid Services in Cambodia: Report of a Survey among Legal Aid Providers*, p. 14.

²⁴⁶ Run, S. (April 2016), *supra* note 169, p 12.

tried without lawyers appointed for them by the courts or having ineffective legal defence for their cases. Similarly, with regards to the cases involving child victims and witnesses, the absence of advice, assistance and safeguards for them prevents them from making complaints for adjudication through the court system. Consequently, this could weaken the public trusts on the court system; the voices of child victims and witnesses could not be heard, and their significance in contributing to the rule of law within the criminal justice system will be degraded.

3.2.1 Suggested Amendments

a. Enhancing the discipline and ethics of legal professions

Concerning the lack of interest in handling children’s cases and the limited understanding on child’s protections by the judicial professionals, besides enhancing awareness on their roles and duties to uphold children’s rights, strict monitoring of the non-compliance of their roles and laws shall be imposed.

Judges and prosecutors are required to abide by the “principle of good conduct,” honesty, competence and “professional ethics.”²⁴⁷ Similarly, the BAKC has established rules governing the ethics and conducts of lawyers, stipulating under the Code of Ethics of the Attorney Entered into the Bar Association of the Kingdom of Cambodia (Code of Ethics) which requires lawyers to apply and respect professional rules.²⁴⁸ The ethical rules include “the principles of conscience, humanity and tact.”²⁴⁹ Prosecutors, judges and lawyers are subject to disciplinary sanctions if they breach the professional conducts and ethics.²⁵⁰

Regardless of those provisions, there have been cases of judges and lawyers’ misconducts being reported. For instance, it is reported that judicial officials often involve in bribes during the performances of their professional duties, such as demanded for the case follow-up fee and so on.²⁵¹ There are also cases where some lawyers who were appointed for the legal aid cases failed to appear and represent their clients in the courts, and demanded for bribes from their clients who requested for legal aid from the BAKC.²⁵² In light of those cases, there have been few complaints made by the public to the competent

²⁴⁷ Cambodian Law on Judges and Prosecutors. Art. 4.

²⁴⁸ Internal Regulations of the BAKC. Art. 1.

²⁴⁹ BAKC’s Code of Ethics. (2013). Art. 6.

²⁵⁰ Cambodian Constitution. Art. 21; Cambodian Law on Judges and Prosecutors. Arts. 20 & 43; Cambodian Law on the Bar. Art. 63.

²⁵¹ IBAHRI, *supra* note 78, pp. 28-29.

²⁵² *Ibid*, p. 52.

authorities and no comprehensive actions have been taken against the misconduct of the legal and judicial professionals.²⁵³

As such, the employment of strict monitoring of the misconducts of judicial stakeholders through the disciplinary measures and consequences provided by laws, such as the transfer and removal of judges, prosecutors and lawyers,²⁵⁴ is necessary to deter the future non-compliance from those who work in the administration of criminal justice.

Noting with concern, the effectiveness of monitoring of the misconducts in the judiciary and the disciplinary sanctions against the non-compliance closely depends on the proper functioning of the enforcement mechanism in place. Accountability of those who commit misconducts within their judicial professions cannot be achieved within a society where corruption persists. This issue will be highlighted and further discussed below.

3.3 Corruption within the Judiciary

Judiciary is one of the three branches of a democratic society that works independently to interpret the laws and make judgements based on legal application. The judiciary which governs the courts and the justice system is a significant actor that enforces the laws and the respect of human rights based on the rule of law. Hence, it is impossible for a legal system of a country to function properly based on the rule of law if corruption persists within the judiciary.

Cambodia is now perceived as the most corrupt country among Southeast Asian nations, and has been under fire for its status of corruption which has taken root in almost every sector of the country.²⁵⁵ Among other things, corruption within the judiciary of Cambodia is on a high alert as the judicial corruption undermines not only the public trust in the legal system but also the access to legal representation and justice.²⁵⁶ The breeding ground for the existence of corruption within the justice system remains prevalent due to the fact that those who commit bribes throughout the judicial process can go unpunished without sanction and prosecution despite the existence of the law

²⁵³ *Ibid*, pp. 28-29 & 52.

²⁵⁴ Cambodian Law on Judges and Prosecutors. Art. 43; Cambodian Law on the Bar. Art. 63.

²⁵⁵ *Supra* note 1.

²⁵⁶ IBAHRI. (September 2015). *Challenges to the independence of the judiciary in Cambodia*, p. 8; Hor, P., Kong, P. & Menzel, J. (2012). *Introduction to Cambodian Law*, p. 264; Travers, E. (2011). *Upholding Children's Rights in the Judicial System in Cambodia*, p. 8.

criminalizing corruption.²⁵⁷ As a consequence, the public confidence on legal profession is significantly low since justice has been exploited by the wealthy and powerful groups within the society.²⁵⁸

To achieve the equality before the law for children, it is fundamental that children in criminal proceedings are protected and guaranteed with the right to legal representation, a fair trial and the access to justice within the justice system. Nonetheless, it is reported that children in criminal proceedings are at risk and being forgotten within the criminal justice system of Cambodia, especially those who are from the poor families and remote areas.²⁵⁹

Judicial corruption in Cambodia has occurred in various stages of criminal proceedings by various actors. In particular, in the police stage, reports on impediments to child-friendly practices in Cambodia's justice system have shown that corruption took place during the police investigation and the trial stages.²⁶⁰ As briefly touched upon, judges and judicial officials involve in demanding for bribes for performing the tasks under their duties, such as checking the progress of the cases, following-up on the cases, receiving a complaint, or taking a matter to trial.²⁶¹ According to the meeting between the IBAHRI and a group of lawyers working in Cambodia as cited in the IBAHRI's 2015 Report concerning justice and corruption in the judiciary of Cambodia, payment of bribes happened in majority of cases heard by the courts.²⁶² Furthermore, lawyers also engage in the practice of giving bribes as they believe that it is the only way available for them to win over the opponent of the cases.²⁶³

Given the specificity and vulnerabilities of children, the impacts resulted from corruption within the justice system will be intensified when children come into contact with the criminal justice system. Since children in criminal proceedings lack financial capacity to pay for bribes, their cases receive little

²⁵⁷ Pech, P. As cited in Jensen, A. & Pheap, A. (January 2016). *Cambodia Perceived as Most Corrupt in Region*. The Cambodia Daily. Retrieved from <https://www.cambodiadaily.com/news/cambodia-perceived-as-most-corrupt-in-region-106639/>.

²⁵⁸ Wan-Hea Lee, OHCHR Representative in Cambodia's Statement during the National Conference on Legal Aid in Cambodia. (November 2013). As quoted in Crothers, L. (November 2013). *Lack of Legal Aid in Cambodia Puts Children, Poor at Risk*. The Cambodia Daily; Pech, P. As cited in Jensen, A. & Pheap, A. (January 2016). *Cambodia Perceived as Most Corrupt in Region*. The Cambodia Daily.

²⁵⁹ UNICEF. (2003). *Supra* note 4.

²⁶⁰ Reimer, *supra* note 47, p. 22.

²⁶¹ See sections 3.1.1 & 3.1.2 of this paper; IBAHRI. (September 2015). *Challenges to the independence of the judiciary in Cambodia*, p. 29; Reimer, J. K. (January 2015). *A System Just for Children*, p. 23; CHRAC. (November 2010). *Legal Aid Services in Cambodia: Report of a Survey among Legal Aid Providers*, p. 14.

²⁶² IBAHRI, *supra* note 78, p. 29.

²⁶³ *Ibid*, p. 8.

attention from the courts.²⁶⁴ Without payment of bribes, children's cases thus face with the common consequences embedded in the Cambodian justice system, such as procedural delays, ill-treatments, prolonged pre-trial detention, and denied access to legal representation and justice.²⁶⁵ For these reasons, corruption within the judiciary is a barrier that obstructs and deters children, including child defendants, victims and witnesses from enjoying their rights especially the right to legal representation in the criminal justice system based on a fair trial, justice and the rule of law.

3.3.1 Suggested Amendments

Combating endemic corruption is crucial for building public confidence on the justice system and securing a society based on the rule of law. Nonetheless, bearing in mind, corruption has taken place in various sectors in Cambodia and it is a systematic challenge that hinders the effective implementation of human rights standards guaranteed under the laws. Such structural challenge requires extensive study with specific focus that cannot be effectively and comprehensively addressed within the scope of this research and it is also not the purpose of this paper to do so.

Meanwhile, certain amendments are suggested to contribute to the fight against the corruption within the judiciary which in the long run strengthen the respect of the right to legal representation and the access to justice for everyone, including children in criminal proceedings.

a. Increasing the general budget allocated to the judiciary

It is suggested that the government of Cambodia should increase the general budget allocated to the judiciary to increase the salaries of the judicial officials and to provide adequate facilities and services to foster the proper functioning of the judiciary.²⁶⁶ The rationale behind this approach is that judges and relevant judicial officials engage in bribes during the performance of their duties due to the low and insufficient income that make it unable for them to support their families and well-being. Therefore, by increasing the budget for the judiciary, those involved in the justice system may be less attracted to bribes when their salaries are adequate to support their well-being.

It is important to note that this approach alone will neither work out nor be able to overcome the shortcomings in the justice system if the relevant judicial

²⁶⁴ *Ibid*, p. 29.

²⁶⁵ IBAHRI. (September 2015). *Challenges to the independence of the judiciary in Cambodia*, p. 29; UNICEF. (2003). *Legal Representation for Children in Need of Special Protection - Cambodia*, pp. 22-29.

²⁶⁶ IBAHRI, *supra* note 78, p. 62.

stakeholders do not possess appropriate knowledge, skills and professionalism in performing their duties in cases involving children in criminal proceedings. It will also not yield positive result if there is no strict monitoring on the misconducts of the judicial professionals. Without taking actions to tackle those issues at the same pace, the implementation of the right to legal representation for children will still fall short of the desired standard.

b. Enforcing legal actions against judicial corruption

Another approach is to strengthen the criminality of corruption through legal provisions and enforcement. Cambodia established an anti-corruption mechanism in 1999 and the acts of corruption are criminalized in details in the 2010 Anti-Corruption Law.²⁶⁷ The ACU of Cambodia is tasked with the mandates to oversee the corruption at every level and sector in Cambodia through the means of education, prevention and law enforcement, and to crackdown on all forms of corruption with the cooperation and participation from the public.²⁶⁸ The general public can submit complaints in any forms, including handing in person, dropping in ACU's complaint box, reporting online through phone, fax, emails or submitting through other agencies.²⁶⁹

Whilst the ACU is supposed to be an independent institution tackling corruption throughout Cambodia,²⁷⁰ its independence and effectiveness remain the concern of the public and the international community.²⁷¹ Despite its activeness in receiving complaints from the public, the ACU does not receive public trust as it is believed that the ACU has been politicized and been used as a tool by the government to prosecute and mute its opponent, including civil society.²⁷² More specifically, the ACU handled the complaint selectively by dealing with smaller cases and covering up the cases involving the corruption of high ranking officials or the powerful one.²⁷³

As such, skeptics remains as to what extent the corruption within the judiciary can be tackled. It also remains to be seen the impacts that the fight against

²⁶⁷ Strangio, S. (2014). *Hun Sen's Cambodia*, pp. 150-151; Nuon, S. (December 2011). *Preventing Corruption: Effective Administrative and Criminal Justice Measures*, p. 122.

²⁶⁸ Cambodia's Anti-Corruption Law. Art. 2.

²⁶⁹ Nuon, S. (December 2011). *Preventing Corruption: Effective Administrative and Criminal Justice Measures*, p. 126.

²⁷⁰ Cambodia's Anti-Corruption Law. Art. 11.

²⁷¹ Strangio, S. (2014). *Hun Sen's Cambodia*, p. 151; Partnership for Research in International Affairs and Development (PRIAD). (2012). *Corruption and Anti-Corruption in Cambodia – 2012 in Review*, p. 1.

²⁷² Strangio, S. (2014). *Hun Sen's Cambodia*, p. 151; Joint Statement (28 April 2016). *CSOs Call upon Authorities to Immediately Cease Harassment of Human Rights Defenders*. LICADHO-Cambodia, p. 1; Son, C. as cited in Jensen, A. & Pheap, A. (January 2016). *Cambodia Perceived as Most Corrupt in Region*. The Cambodia Daily.

²⁷³ Strangio, S. (2014). *Hun Sen's Cambodia*, p. 151.

judicial corruption have on the implementation of the right to legal representation for children in criminal proceedings given the current human rights situation in Cambodia.

3.4 Ineffective Legal Aid System

Legal aid is an essential means to guarantee the access to legal representation in the criminal justice which is a precondition for a fair trial, the access to justice and a society based on the rule of law.²⁷⁴ International legal frameworks guarantee the right to legal representation, legal assistance and legal aid in the criminal justice system for individuals who lack financial capacity to pay for the legal services, and when “the interests of justice so require”.²⁷⁵ Legal aid should be defined as broad as possible to cover wider range of protections for the victims and the accused persons who lack financial means to afford legal services throughout the justice process.²⁷⁶ Special protections and safeguards are also provided for children in criminal proceedings in order to ensure that children are entitled to the right to legal representation, which is an essential element of the fair trial rights and the access to justice.²⁷⁷ For “the interest of justice,” legal aid shall be provided promptly throughout the preliminary investigations and all relevant trial stages.²⁷⁸

The government of Cambodia has acknowledged the importance of legal aid and has expressed its commitment in supporting the legal aid services and the access to justice through various national legislations, national action plan, reform strategy and enforcement mechanism.²⁷⁹ At the national level, the Constitution of Cambodia as well as the CPC, the Penal Code and the LJJ guarantee the right to legal representation for individuals and children in the criminal proceedings.²⁸⁰ Focusing on children in criminal proceedings, the BAKC plays a significant role in ensuring that children who are accused of criminal offences and child victims from poor families are able to have access to legal aid through the Child Protection Unit under the Legal Aid Department of the BAKC.²⁸¹

²⁷⁴ UN HRC. *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, 15 March 2013, A/HRC/23/43, para. 3.

²⁷⁵ ICCPR. Art. 14(3)(d); HRC. General Comment No. 32, para. 38.

²⁷⁶ UN HRC. *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, 15 March 2013, A/HRC/23/43, paras. 26-28.

²⁷⁷ HRC. General Comment No. 32, paras. 42-44.

²⁷⁸ Open Society, *supra* note 39, pp. 25-26.

²⁷⁹ See section 2.3 of this paper.

²⁸⁰ *Ibid.*

²⁸¹ See section 2.3.5 of this paper.

Despite the existing protections given by the relevant legislations and mechanism in place, currently there is no specific comprehensive law regulating legal aid in Cambodia. It is common for children in criminal proceedings to have their right to legal representation denied.²⁸² Concerns have been raised regarding the capacity of the legal aid services provided by the BAKC as the demand for legal aid services from the poor keeps increasing.²⁸³ The gaps in the protection of children's right to legal representation make the responsibilities in providing legal aid services heavily rest upon the legal aid NGOs in addition to the BAKC.²⁸⁴

As such, children in criminal proceedings are particularly vulnerable in the justice system that it is necessary for the government of Cambodia to promptly identify the problems within its legal aid system and address those shortcomings with serious commitment.

3.4.1 Inadequate budget for legal aid

International standards and guidelines provide that States should take appropriate actions to ensure that an adequate budget is available to enable an effective legal aid system to function within the criminal justice.²⁸⁵ Furthermore, it is significant that specific provisions on legal aid budget are created to guarantee the sustainability of the national legal aid system as well as to reduce the reliance of legal aid funding on actors other than the government.²⁸⁶

Based on current practice of legal aid in Cambodia, legal aid services provided to children in criminal proceedings mainly come from two important actors, namely the BAKC and the legal aid NGOs.²⁸⁷ Both of the legal aid providers have been under common challenges due to the limited amount of funding available for them to effectively implement their wide range of legal aid work and the high demand for legal aid services.²⁸⁸

3.4.1.1 Government Funded Programme: Child Protection

²⁸² Run, S. (31 December 2014). *Legal Aid of Cambodia*. Annual Report, pp. 17-19; White & Case LLP. (December 2013). *Access to Justice for Children: Cambodia*, p. 4; IACPJJ. (2005). *Creation of a Child Protection Unit with the Bar Association*, p. 35.

²⁸³ Starygin, S. (March 2010). *Country Profile: A Review of the New Juvenile Offenders Status in Cambodia*. International Journal of Applied Criminal Justice, vol. 34, no. 1, p. 8.

²⁸⁴ IBAHRI, *supra* note 78, p. 47.

²⁸⁵ UN Principles and Guidelines on Access to Legal Aid. Guideline 12: Funding the nationwide legal aid system, paras. 60-62; UN HRC. *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, 15 March 2013, A/HRC/23/43, paras. 73-79; Isobel, M. (April 2013). *Arrest Rights Brief No. 3: The Right to Legal Aid*, para. 18.

²⁸⁶ *Ibid.*

²⁸⁷ IBAHRI, *supra* note 78, p. 47.

²⁸⁸ DANIDA, *supra* note 203, p. 7.

Unit

The BAKC has the mandate to provide funding to lawyers who represent the poorest population in the criminal justice system under the legal aid scheme.²⁸⁹ The Legal Aid Department of the BAKC is funded by the financial contributions from the members of the BAKC and from the government.²⁹⁰ Nonetheless, in practice, the main source of its legal aid funding remains heavily dependent on the budget allocated by the government. Every year the BAKC is set to receive funding from the government of Cambodia channeled through the Ministry of Justice (MoJ) at the amount of approximately \$73,000.²⁹¹ It is noted that the legal aid budget given to the BAKC has increased from about \$50,000 per year in 2011 to \$73,000 annually.²⁹² It is also important to note that the total population of Cambodia has increased by an estimated one million people since 2011. That is from more than 14 million people in 2011 to around 15.7 million people in 2016.²⁹³ The growing number of the population of Cambodia mirrors the increasing demand for legal aid services and challenges the sufficiency of the increased legal aid funding from the government.

Despite the increased annual budget for legal aid, the most common constraint to the delivery of legal aid remains the limited financial capacity of the BAKC to appropriately address the growing demand of legal aid services from the poor and children. It is reported that the budget allocated for legal aid from the government is basically inadequate to even cover the nominal fee of legal aid lawyers needless to mention about the inability to cope up with the growing demand of legal aid services.²⁹⁴ Additionally, currently, there are only nine legal aid lawyers working in the Legal Aid Department of the BAKC, which its only office is located in Phnom Penh.²⁹⁵ It is clear that the current legal aid budget is insufficient for the BAKC to cover all the legal aid work in the provinces.²⁹⁶ Without an office in other 24 provinces throughout the country, it practically means that those nine legal aid lawyers need to travel to handle the legal aid cases outside Phnom Penh.

These consequently bring about deterrents to the access to legal representation for children in criminal proceedings, particularly those in the

²⁸⁹ Cambodia's Law on the Bar. Art. 29.

²⁹⁰ UNICEF. (2003). *Supra* note 4, p. 27.

²⁹¹ IBAHRI. (September 2015). *Challenges to the independence of the judiciary in Cambodia*, p. 46; Run, S. (April 2016). *Role of Professional Bodies and Legal Aid Organizations in Cambodia*, p. 7.

²⁹² DANIDA, *supra* note 203, p. 10.

²⁹³ Nicholson, *supra* note 22, p. 4.

²⁹⁴ IBAHRI, *supra* note 78, p. 37

²⁹⁵ Run, S. (April 2016), *supra* note 169, p. 4.

²⁹⁶ *Ibid*, p. 7.

remote areas as the distance and the traveling time for lawyers to communicate with the children negatively affect the effectiveness of the case preparation and defence.²⁹⁷ For these reasons, children in criminal proceedings are too often denied of their right to legal representation while being in the fragmented criminal justice system.

3.4.1.2 Donors Funded Programme: Legal Aid Non-Governmental Organizations

As a key legal aid provider in the criminal justice system of Cambodia, legal aid NGOs play substantial roles in ensuring the access to legal representation and legal assistance for all those in need. Practically, they have even been referred to as a first priority for the provincial courts and those in need of legal aid to approach for legal assistance due to the poor responsiveness of the legal aid services from the BAKC.²⁹⁸

Given the fact that there is no comprehensive framework governing the legal aid services in Cambodia, legal aid NGOs were not considered within the government's legal aid scheme. Legal aid NGOs exclusively depends on the funding from the foreign donors.²⁹⁹ This fact often leads to the concern on the sustainability of the legal aid services provided by the NGOs since donor funding are subject to navigation based on specific interests and themes favored by those international donors.³⁰⁰

In practice, the issue concerning legal supports for children in criminal proceedings, particularly their right to legal representation in the criminal justice system of Cambodia remains the area of particular interest for international donors.³⁰¹ However, those specialized legal aid funding shows that donors are interested in enforcing legal aid services for children in cases concerning human trafficking, rape and sexual exploitation of children rather than a general legal aid services for all children in criminal proceedings in all areas of cases.³⁰² The existing legal aid NGOs with specialized programme on children's cases, especially on human trafficking, rape and domestic violence cases include: Cambodian Human Rights and Development Association (ADHOC), Cambodia Acted, Cambodian Defenders Project (CDP), Cambodian Women Crisis Center (CWCC), International Bridges to

²⁹⁷ *Ibid*, p 12.

²⁹⁸ DANIDA, *supra* note 203, pp. 7-8.

²⁹⁹ *Ibid*, p. 7.

³⁰⁰ DANIDA. (September 2011). *Options for Approaches to Legal Aid Services Delivery in Cambodia*, p. 3; IBAHRI. (September 2015). *Challenges to the independence of the judiciary in Cambodia*, p. 47.

³⁰¹ CHRAC, *supra* note 204, p. 12.

³⁰² *Ibid*.

Justice (IBJ), Legal Aid of Cambodia (LAC), Cambodian League for the Promotion and Defense of Human Rights (LICADHO), Legal Support for Children and Women (LSCW), and Protection of Juvenile Justice (PJJ).

As a matter of concern, recent data reveals that the donor funded programme through the legal aid NGOs has been under constraint due to the general decline of financial supports from the international donors over several years.³⁰³ This has worsened the current situation of legal aid services provided for the poor while children in criminal proceedings are put at a higher risk of being denied access to legal representation and a fair trial given their specific vulnerability in the criminal justice system.

3.4.1.3 Suggested Amendments

There is a general agreement among legal aid providers that budget provided for legal aid services in Cambodia is critically insufficient and thus needs to be increased to an appropriate level for effective functioning of legal aid delivery for the poor as well as children in criminal proceedings. Several approaches have been suggested by relevant stakeholders.

a. Creating a fixed allocation of national budget for legal aid through a specific legislation on legal aid

For one thing, to tackle the current shortage of legal aid funding, the government of Cambodia should re-evaluate and re-calculate the amount of budget to be allocated for the legal aid services to cope up with the high and growing demand for legal aid services, and increase its funding accordingly. In other words, to ensure sustainable legal aid services, there needs to be a comprehensive national budget plan and strategy specifically for legal aid.³⁰⁴ To achieve this end, it is predicted that the processes of improving legal aid would take some time while the present capacity of the government is gradually improved to a desired level.

For this reason, in the meantime, the roles of the international donors in securing the available funding for the legal aid services in Cambodia cannot be overlooked. It is essential for the donors to consider the legal aid services as a long term service and continuous work that function to strengthen the access to justice and secure the rule of law within the country.

³⁰³ IBAHRI. (September 2015). *Challenges to the independence of the judiciary in Cambodia*, p. 47; DANIDA. (September 2011). *Options for Approaches to Legal Aid Services Delivery in Cambodia*, p. 10; CHRAC. (November 2010). *Legal Aid Services in Cambodia: Report of a Survey among Legal Aid Providers*, p. 7.

³⁰⁴ CHRAC, *supra* note 204, p. 16.

b. Formalizing the pooling of legal aid funds

To increase the funding for legal aid services as well as to facilitate the pooling of fund for the long term use, it is suggested that the government of Cambodia should establish a formal legal aid pooling of fund mechanism.³⁰⁵ Such mechanism works to coordinate the contribution of the government and the donors for a long term and sustainable legal aid. It is believed that the mechanism will not only increase the available funding for the legal aid services generally but also facilitate and allow smaller donors to contribute to the pooling of funds.³⁰⁶ At the same time, this will encourage and engage other actors, including private sectors and individuals to participate in supporting legal aid services through their financial contributions.

Nevertheless, if being implemented, this pooling of funds mechanism needs to be strictly stipulated by specific policies or legislations, be made transparent and be closely monitored to avoid any acts of corruption.

3.4.2 Managerial problem of national legal aid budget

It is noted that the national budget for legal aid provided to the BAKC is channeled through the MoJ. According to a Sub-Degree No. 1008 dated 22 October 2013 on the transfer of the legal aid budget, the MoJ has the authority to manage the legal aid budget and consider all legal aid requests from those in need, including children in criminal proceedings. To be more specific, the legal aid budget is managed by and distributed through the MoJ which lacks an appropriate mechanism or a procedure for doing so.³⁰⁷

Such mechanism for managing the legal aid budget may act as deterrent to the effective and smooth procedures of the process for requesting legal aid and thus lead to the problem of delayed justice and case backlogs in the criminal justice system. Particularly, it has been noted by the OHCHR that from the issued date of the Sub-Degree on the transfer of legal aid budget to the beginning of 2014, the BAKC legal aid lawyers had not been providing legal representation at the Court of Appeal and this has caused delays in cases being heard.³⁰⁸

³⁰⁵ DANIDA. (September 2011). *Options for Approaches to Legal Aid Services Delivery in Cambodia*, pp. 5 & 21-22; CHRAC. (November 2010). *Legal Aid Services in Cambodia: Report of a Survey among Legal Aid Providers*, p. 16.

³⁰⁶ *Ibid.*

³⁰⁷ Legal and Judicial Reforms donors meeting on 31 January 2014.

³⁰⁸ Sub-Degree No. 1008, dated 22 October 2013 on the Transfer of Legal Aid Budget; Legal and Judicial Reforms donors meeting on 31 January 2014.

It remains unclear as to whether such managerial issue of the legal aid budget was overcome but it is proven by various recent research surveys on legal aid that the delivery of legal aid services by the BAKC is inadequate and unresponsive, making the access to justice for the poor and children a critical concern.³⁰⁹

3.4.2.1 Suggested Amendments

Previously, the legal aid budget provided by the government of Cambodia to the BAKC was channelled through the Council of Ministers; however, it has been proven that the BAKC experienced difficulties in receiving the allocated budget which resulted in halted legal aid delivery.³¹⁰ As a lesson learnt from the previous experience, there exists a need for the current mechanism that manages the national legal aid budget to be streamlined, given that the MoJ lacks an appropriate mechanism and procedures in managing and distributing the legal aid budget. The managerial issue concerning legal aid services is crucial for a smooth process of legal aid delivery for children in criminal proceedings. A smooth, clear and simple procedure in handling legal aid related cases will act as a facilitator that creates a friendly environment and encourages the courts and lawyers to take up and properly handle legal aid cases. This in turn contributes to the implementation of the right to legal representation for children in criminal proceedings and secure a society based on the rule of law.

3.4.3 Limited numbers of legal aid lawyers

In accordance with the international standards relating to human resources for a functioning legal aid system, it is provided that the staffing for the legal aid system of the States should be able to adequately accommodate the needs and demands for legal aid services from those in need, especially the vulnerable groups, including children in criminal proceedings.³¹¹

In the present legal aid system in Cambodia, closely link to the problem of insufficient legal aid budget, the capacity and number of lawyers providing legal aid services are greatly insufficient to accommodate the growing demand for legal aid services. With a number of 641 practicing lawyers in

³⁰⁹ IBAHRI. (September 2015). *Challenges to the independence of the judiciary in Cambodia*, p. 7; DANIDA. (September 2011). *Options for Approaches to Legal Aid Services Delivery in Cambodia*, p. 8.

³¹⁰ DANIDA, *supra* note 203.

³¹¹ UN Principles and Guidelines on Access to Legal Aid. *Guideline 13: Human Resources*, paras. 63-66; Isobel, M. (April 2013). *Arrest Rights Brief No. 3: The Right to Legal Aid*, para. 18.

2012,³¹² the number of lawyers as of April 2016 has increased to 1,172 lawyers.³¹³ Among them, 816 lawyers are practicing lawyers in Cambodia.³¹⁴ It should be noted that a relatively large proportion of total population of Cambodia currently suffer poverty and live in the countryside.³¹⁵ Thus, it is obvious that they are unable to afford legal costs when they are in need of legal services. This further proves that children in criminal proceedings are particularly vulnerable in the current climate of legal aid system.

Based on research surveys on legal aid services in Cambodia from 2006 until present, the number of lawyers fluctuated over time in a worrying trend. In 2006, it is reported that there were 89 lawyers providing legal aid services; four of whom were legal aid lawyers working for the Child Protection Unit of the BAKC.³¹⁶ By October 2010, survey revealed that there were 119 legal aid lawyers, 29 of whom worked non-full time on legal aid cases.³¹⁷ As of November 2013, based on the number updated by the OHCHR in Cambodia, it shows that the number of legal aid lawyers was at 112; among them only 74 lawyers working on legal aid cases on a full time basis.³¹⁸ Noting with concern, recent data shows that that legal aid services provided for the poorest population are from the work of 56 lawyers of the legal aid NGOs and 9 lawyers of the Legal Aid Department of the BAKC.³¹⁹ All these illustrates that despite the growth in an overall number of the practicing lawyers in Cambodia, the number of lawyers working on legal aid cases does not increase but is relatively shrinking.

Noticeably, since 2006, there is no statistic available concerning the number of legal aid lawyers working in the Child Protection Unit of the BAKC whose duties are to provide legal representation and legal aid services to children in criminal proceedings. Through these data, it can be seen that the legal aid services provided by all legal aid providers in Cambodia are wholly inadequate to catch up with the high and increasing demand for legal aid services. The number of legal aid lawyers is small and diminishing over time, leaving no legal aid lawyers working in some provinces. This puts children in criminal proceedings both as child defendants and victims at an imminent

³¹² Dunlap, B. (April 2014). *Rule of Law Without Lawyers: American Legal Reformers and the Cambodian Lawyer Shortage*, p. 2.

³¹³ Run, S. (April 2016), *supra* note 169.

³¹⁴ *Ibid.*

³¹⁵ The World Bank. (updated April 2016). *Cambodia: Overview*. Retrieved from <http://www.worldbank.org/en/country/cambodia/overview>.

³¹⁶ CLJR and EWMI, *supra* note 171, p. 14.

³¹⁷ CHRAC, *supra* note 204, p. 8

³¹⁸ OHCHR, Number and location of legal aid lawyers (updated by OHCHR as of November 2013).

³¹⁹ Run, S. (April 2016), *supra* note 169, p. 4.

threat to having their right to legal representation denied that no justice is available for them in the criminal justice system of Cambodia.

Regarding the ways in which one can be a licensing lawyer in Cambodia, it is important to note that the BAKC maintains central and exclusive roles in cultivating human resources in legal profession. At the present time, one can become a lawyer through two different ways. Firstly, pursuant to the regulations of the BAKC and Article 31 of the Law on the Bar, the LTC is the only training institution in Cambodia where individuals who have passed the bar exam may become qualified as a practicing lawyer after two years of legal education, trainings and internship.³²⁰ Secondly, Article 32 of the Law on the Bar provides that an individual who has served as a judge for over five years, Khmer citizens with a Bachelor degree in law and over two years of working experience in legal and judicial fields, Khmer lawyers who have registered abroad and individuals with a doctorate in law can become a licensing lawyer in Cambodia. All examination, selection, training and education of lawyers are exclusively under the power of the BAKC.³²¹

Every year, approximately 50 to 60 lawyers are being admitted into legal professions through the LTC, plus a small number of whom got admitted through Article 32 of the Law on the Bar.³²² With the current rate of lawyers being admitted into the BAKC and practical restriction on the number of individuals who can be qualified as lawyers, there exists a chronic shortage of lawyers within the legal system of Cambodia.³²³

3.4.3.1 Suggested Amendments

a. Increasing the number of lawyers being admitted to the BAKC

As previously noted, the State is suggested to adhere to the international standards concerning staffing for the legal aid system in order to ensure that its human resource capacity for legal aid system is sufficient to effectively function in addressing the needs demanded by those in need of legal aid services.³²⁴

³²⁰ Internal Regulations of the BAKC. Arts. 11-13; Cambodian Law on the Bar. Art. 31; IBAHRI. (September 2015). *Challenges to the independence of the judiciary in Cambodia*, pp. 44& 49.

³²¹ IBAHRI, *supra* note 78, pp. 43-49

³²² *Ibid.*, p. 49.

³²³ *Ibid.*

³²⁴ UN Principles and Guidelines on Access to Legal Aid. *Guideline 13: Human Resources*, paras. 63-66; Isobel, M. (April 2013). *Arrest Rights Brief No. 3: The Right to Legal Aid*, para. 18.

Concerns have been raised regarding a small admission number of lawyers into the BAKC as the current high demand of legal services calls for more number of lawyers to carry out their legal profession with a greater number and a broader geographical reach.³²⁵ Taking into account the fact that some provinces in Cambodia have few number of lawyers with none of them being legal aid lawyers, it is important that the intervention in increasing the number of lawyer intake has a particular focus on the ability of the lawyers to perform their legal work in those strategic provinces. To be more specific, the rate and the number of admission of lawyers under Article 31 of the Law on the Bar through the LTC should be increased, with a minimum quota requirement for the lawyer students coming from specific provinces and locations.³²⁶

Similarly, with regards to the admission of lawyers to practice law in Cambodia through Article 32 of the Law on the Bar, the number should also be increased. It is highly believed that with the increased number of lawyers providing legal services in Cambodia, there will be greater human resources for delivering legal aid services for those in need of legal representation, especially the children in criminal proceedings.

Indeed, while increasing the number of lawyers being admitted into the BAKC, it is crucial that the selection, evaluation and admission procedures are done based on the merit and the principles of transparency, fairness and corruption-free. Otherwise, it may bring about further problems involving the qualification and independence of the legal professions working in the justice system.

b. Promoting pro-bono services

Increasing the number of lawyers alone will not work out for a better delivery of legal aid services if those lawyers are not interested in providing contribution to the legal aid system. The pro-bono scheme has been introduced under international law as an alternative model, contributing to the work of legal aid services that States should take into consideration and employ to foster the proper functioning of the legal aid system of the States.³²⁷

Practices in Cambodia have shown that it is very often that lawyers express their unwillingness to take up legal aid cases. Particularly, there has been a general resistance from lawyers of the BAKC with regards to this

³²⁵ DANIDA, *supra* note 203, pp. 12-13.

³²⁶ *Ibid.*

³²⁷ UN Principles and Guidelines on Access to Legal Aid, para. 10; UN HRC. *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, 15 March 2013, A/HRC/23/43, paras. 49-50.

suggestion.³²⁸ A main reason to their low interest in doing legal aid cases concerns the salary and income. It is provided that private law firms are more likely to provide them much higher income than the salary they can get from doing legal aid cases.³²⁹

Nevertheless, the benefits of pro-bono services in the Cambodian criminal justice system cannot be overlooked. For one thing, by promoting the pro-bono services, the lawyers working in the private law firms will engage more in the legal aid services.³³⁰ It means that the government could maximize the resources of the existing legal practitioners to support the delivery of free legal services throughout the countries, including the provinces. Furthermore, promoting the pro-bono services is considered as a low cost measure since it depends on the existing legal practitioners while what needed is just the additional case fees to be provided to the lawyers who represent the legal aid cases.³³¹ The promotion of pro-bono services thus is a sustainable alternative that support the legal aid work in Cambodia.

It is important to note that the BAKC does require the to-be-admitted lawyers to undertake at least one year of pro-bono work under the supervision of a lawyer before they are fully admitted into the BAKC.³³² Still such requirement does not set to apply as a “continuing obligation for the lawyer to maintain his legal aid activity.”³³³

Therefore, to maximize the resources of the existing legal practitioners in Cambodia to support the delivery of legal aid services in its criminal justice system, it is significant that the government of Cambodia sets out conditions to which all practicing lawyers are required to adhere. Examples can be drawn from the cases of Ethiopia and Uganda where both of them had made successful pro-bono practices. In particular, Ethiopia has set the requirement on a minimum number of hours per year that each lawyer is required to do for legal aid services.³³⁴ In Uganda, there is a requirement of paying a fee into the legal aid fund if lawyers want to forgo its obligation to provide the pro-bono services.³³⁵

³²⁸ DANIDA, *supra* note 203, p. 15.

³²⁹ Run, S. (April 2016), *supra* note 169, p. 11.

³³⁰ *Ibid*, p. 14.

³³¹ DANIDA, *supra* note 203, p. 15.

³³² Cambodian Law on the Bar. Arts. 35 & 36.

³³³ Prak, A. & P&A Asia. (May 2015). *Pro Bono in Cambodia*. Thomson Reuters Foundation. Retrieved from <http://news.trust.org/item/20150522110459-z1j6e/>.

³³⁴ Long, G. (September 2011). *Legal advice and information in three regions of Ethiopia: A Practical Guide*, p. 31.

³³⁵ Latham & Watkins LLP. (August 2012). *A Survey of Pro Bono Practices and Opportunities in 71 Jurisdictions*, pp. 334-335.

Once set up, the pro-bono scheme may face challenges of non-compliance from the members of the BAKC and low quality of the services provided. Experiences have shown that when dealing with clients in legal aid cases, lawyers did not provide the services with a desired quality by providing poor preparation of case defence strategies, no prior communication with the clients before the trials, and a poor study of the cases concerned. It is crucial to reiterate that these issues are correlated to the solutions discussed regarding the strict monitoring of the conducts of the legal professionals with sanctions and consequences for non-compliances and the continuous legal trainings for those legal aid providers as explained in this paper.³³⁶

c. Promoting the status and usage of paralegals

Another alternative serves as a supplementary measure for increasing human resources for legal aid is the use of paralegal services, provided by young law graduates and legal assistants. Undeniably, paralegals are not legally recognized professionals that have the authority to represent clients in the courts. However, paralegals can provide legal advices and contributing to the preparation of the case defence as permitted by law.

Pursuant to the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, various legal aid models can be employed so long as to guarantee the basic rights of individuals concerned, including the right to legal representation and to have access to justice within a properly functioning criminal justice system.³³⁷ It is recommended that States should recognize the roles of paralegals and similar actors in providing legal aid services for fulfilling the gap of performances by the lawyers where the accused have limited access to lawyers or no lawyer is available for them.³³⁸

As of present, the status of paralegals and legal assistants are not formalized and widely recognized in the formal criminal justice system of Cambodia.³³⁹ While those in need of legal aid services suffer the denial of the right to legal representation in the criminal justice system due to the limited number of lawyers available for delivering legal aid services, paralegals and similar services are not promoted and valued within the formal justice system of Cambodia.³⁴⁰

³³⁶ See sections 3.1.4 & 3.2.1 of this paper.

³³⁷ UN Principles and Guidelines on Access to Legal Aid, paras. 10-11; UN HRC. *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, 15 March 2013, A/HRC/23/43, paras. 49-50.

³³⁸ UN Principles and Guidelines on Access to Legal Aid. Guideline 14: Paralegals, paras. 67-68.

³³⁹ DANIDA, *supra* note 203, p. 3.

³⁴⁰ *Ibid.*

Nonetheless, it is commonly agreed that formalizing the use of paralegal services will bring about positive impacts on the delivery of legal aid services by expanding the capacity to provide appropriate legal services where the number of lawyers is limited in certain geographical reach.³⁴¹ Furthermore, this serves as a practical training ground for those paralegals to expose themselves to legal services in local communities. Specifically, the paralegal scheme will engage young law graduates, law teachers, legal assistants and similar actors in providing legal advices, filing complaints, communicating and working with witnesses on the ground.³⁴² This in turn contributes to building the human resources for the legal aid system in Cambodia.

The BAKC has expressed its interest in promoting the use of paralegals while noting with concerns over this suggestion, particularly on the quality and knowledge of those performing paralegal works.³⁴³ However, this concern can be addressed by ensuring that adequate and appropriate legal and human rights knowledge are provided through the continuous trainings and education not only at the RAJP and the LTC but also at relevant law universities. It is also important to note that specific legal knowledge and skills on children's issues should be put on a focus to ensure that the legal professionals possess knowledge, skills and professionalism in handling children cases as elaborated previously in the paper.³⁴⁴ To this end, the BAKC should amend its provisions to the extent that the roles of paralegals are formally recognized in the criminal justice system.

It is strongly believed that in the meantime, the use of paralegal services is a low-cost choice for the government of Cambodia to adopt in order to contribute to addressing the issues of the limited resources both in term of financial and human resources for the legal aid system in Cambodia.³⁴⁵

With greater resources supporting the legal aid system in Cambodia, in the long run as a consequence, children in criminal proceedings will be able to enjoy their right to legal representation at a desired standard as guaranteed under international law and the legal frameworks of Cambodia.

³⁴¹ *Ibid*, p. 8.

³⁴² CHRAC, *supra* note 204, pp. 15-16.

³⁴³ DANIDA, *supra* note 203, p. 8.

³⁴⁴ See section 3.1 of this paper.

³⁴⁵ DANIDA, *supra* note 203, pp. 14-15.

Chapter 4: Concluding Remarks

As previously noted, the right to legal representation, including the right to have access to justice, redress and legal assistance in the preparation of the defence has profound impacts on children who found themselves in the criminal justice system of Cambodia. It is a fundamental human rights and an essential aspect of the right to a fair trial and the access to justice within a society based on the rule of law. Having ratified relevant international human rights legal instruments and having children's rights protected under its national Constitution, legislations and legal reform plans and strategies, Cambodia has proven that the right to legal representation for children in criminal proceedings has been on its top agenda for reforms. The Cambodia's LJJ has also been recently adopted, making a welcoming progress for the implementation of the right to legal representation for children in criminal proceedings in Cambodia.

While it is compelling that Cambodia has paid attention on issues concerning the right to legal representation for children in criminal proceedings, major concerns persist with the enforcement and implementation of the existing legal frameworks and legislations on juvenile justice. The obstacles to the implementation of the right to legal representation for children in criminal proceedings in Cambodia cannot be solely solved just because the legal protection standards for children exist. As discussed in the paper, the Cambodian Constitution, the CPC, the Penal Code and other national strategic plans of Cambodia have guaranteed the legal procedural safeguards including the right to legal representation for children in criminal proceedings. Nonetheless, the legal standards and mechanism concerning children's rights exist in theory but are not adhered to in the practice of the Cambodian justice system. Therefore, a particular attention should be paid on the functioning of the key judicial actors and mechanism protecting the right to legal representation for children in criminal proceedings in Cambodia. Problems arising from the performances of their work need to be addressed in order to effectively implement the right concerned.

There is a pressing need to increase the capacity of the judicial professionals, including judicial police, prosecutors, judges and lawyers in order to ensure that they are well-trained with an appropriate knowledge, skills and professionalism in handling children's cases. While legal and human rights education is crucial for all legal professionals, the same applies to all Cambodian population. Only when the general public are aware of their entitlement to human rights that they can demand for the protection and respect of their rights. At the same time, strict monitoring on the conducts of the judicial professionals shall be enforced to serve as a deterrent to further

misconducts of any forms, such as bribery, corruption and other unethical acts. However, as evidenced in this paper, with the current corruption status quo of Cambodia, there exists the concern on the effectiveness in tackling judicial corruption and carrying out sanctions on those committed misconducts during their legal professions.

Legal aid serves as an equalizer for a just society where the poor and vulnerable groups have limited access to legal representation in the criminal justice system. The legal aid services delivered by the BAKC and the legal aid NGOs play exclusive roles in providing legal representation and legal assistance to children in criminal proceedings in Cambodia, including child defendants, victims and witnesses. Nevertheless, the existing legal aid system is fragmented and inadequate to effectively respond to the high and increasing demand for legal representation from children in the criminal justice system. Without a sufficient legal aid funding from the government as well as the international donors and an appropriate number of lawyers working on legal aid cases for children, the right to legal representation for children in criminal proceedings remains at risk of being denied.

From all these, we can see that the law, the knowledge of the law, financial resource, human resource, and the implementation of the law are genuinely interrelated and cannot be separated if one aims at effectively implementing the protection standards of the right to legal representation for children as set by laws. To achieve this end, all relevant stakeholders, such as the government, the civil society and the international community, should see one another as a cooperative partner rather than a threat to own survival or interests.

With the current situation of the abuse of rights, the corruption and the rising threats against civil society and human rights defenders by the government of Cambodia, it remains to be seen to what extent the full realization of the right to legal representation for children in criminal proceedings in Cambodia could take place. Nonetheless, there exist opportunities for Cambodian criminal justice system to properly implement and protect the right to legal representation for children in criminal proceedings. Given the strong and continuous commitment of the government of Cambodia to address the problem and relevant legal framework and enforcement mechanism in place, Cambodia will be able to overcome the current obstacles by fostering the effective implementation of the existing legal standards and incorporating those legal standards into the practice of the criminal justice.

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