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Deprivation of Liberty of Children Considered as Offenders in the Cambodian Child Justice System: Diversion and Alternatives to Pretrial Detention

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Summary

In Cambodia, the number of children considered as offenders in pretrial detention and processed by criminal proceedings remains high despite the fact that international child rights norms and standards require that prosecution and deprivation of liberty of the child comply with the principles of legality, non-arbitrariness, necessity and proportionality. According to the child rights-based approach, children considered as offenders should not be dealt with by criminal proceedings, but instead they should be diverted to community-based programs which are suitable for their specific individual needs for the purpose of rehabilitation and social reintegration. Where prosecution is strictly necessary, children considered as offenders should not be placed in pretrial detention. At all time, the child justice system must respect the best interests of the child, non-discrimination, the right to life, survival and development, the right to be heard, worth, and dignity of the child.

This research aims to examine the causes of the wide use of prosecution and pretrial detention rather than diversion and alternatives to pretrial detention of children considered as offenders in Cambodia and the extent to which Cambodian child justice system complies with the child rights-based approach. In this respect, the research examines the gaps in Cambodian law by comparing it with the international, and where appropriate regional, human rights norms and standards. This research also looks into practical factors that hinder the effectiveness of diversion and alternatives to pretrial detention. To achieve these purposes, this research applies both doctrinal legal research method and empirical legal research method.

This research shows that in law and in practice Cambodian child justice system does not fully comply with the child rights-based approach, with regard to diversion and alternatives to pretrial detention. Cambodian law contains certain provisions that violate the rights of children considered as offenders, and the law is also silent in many aspects, which make it unable to fully safeguard the rights of children considered as offenders. Practically, weakness of the child justice system and lack of effective diversion and alternatives to pretrial detention are the causes of the large number of children considered as offenders being placed in pretrial detention or processed by criminal proceedings rather than diverted to community-based diversion programs or released pending trial.

Cambodian law contains certain provisions that are not in compliance with the international, and including regional, human rights norms and standards. The law limits diversion to only a petty crime and misdemeanor, totally excluding a felony from diversion. In addition, the law extends the duration of police custody of the child up to 48 hours before he/she can be brought before a judge. The minimum age of deprivation of liberty is set by the law to only fourteen. Further, although the law authorizes the police to divert the child who has committed a petty crime, the police cannot terminate criminal proceedings against the child by themselves. Moreover, the law allows the use of public order and public security as reasons to deprive the child of his/her liberty without precisely defining these terms. Finally, Cambodian law limits the time for resubmission for release of the child from pretrial detention up to one month after the previous submission has been rejected

irrespective of whether the child has a good reason to resubmit for release before this one-month period has elapsed or not.

In addition, Cambodian law is silent on many aspects. These include the police's referral of the child with unclear age to the prosecutor and investigating judge, consent of the parents or guardian of the child to diversion, the extent to which information about diversion should be notified to the child and his/her parents or guardian, restorative justice, diversion of repeated offenders, contents of the police's warnings to the child, procedures the prosecutor must follow after obtaining diverted cases from the police, timeframe for submission of a social inquiry report, inclusion of the effects and consequences of diversion and monitoring mechanisms in the diversion plan, regular reports on progress of the child, frequency of the social agent's contact with the child, complaint mechanisms concerning violation of the child's rights, decisions not to divert the child, judicial review of decisions concerning diversion, the child's rights to request diversion, procedures to prioritize release of the child from police custody, an adversarial hearing for pretrial detention and judicial supervision, burden and standard of proof concerning pretrial detention and judicial supervision, examination of lawfulness of the child's arrest, how decisions on pretrial detention and judicial supervision should be reasoned, pretrial detention periodic review, judicial supervision monitoring mechanisms, examination of reasons of the child's breach of judicial supervision and possible sanctions for such a breach rather than automatic revocation of judicial supervision.

Practically, weakness of Cambodian child justice system results from lack of children's specialized courts, the child's limited access to legal assistance, corruption in the child justice system, lack of judicial independence and impartiality, and insufficient judicial reasoning of decisions on pretrial detention and judicial supervision. Additionally, ineffective diversion and alternatives to pretrial detention are caused by lack of community-based diversion programs, insufficient partnership and cooperation among relevant stakeholders in the child justice system, corruption and violation of the rights of the child at drug rehabilitation centers, insufficient awareness raising about diversion and alternatives to pretrial detention, and lack of financial and human resources.

To fully comply with the child rights-based approach, this thesis suggests that Cambodia amend the current law to make it consistent with international norms and standards. In addition, additional legal provisions should be enacted to fill the gaps in the current law to ensure that the rights of children considered as offenders are fully safeguarded, specifically with regard to diversion and alternatives to pretrial detention. In practice, Cambodia should establish specialized courts for children, develop sufficient human resources, ensure the child's prompt access to legal assistance, address corruption in the child justice system, strengthen judicial independence and impartiality through legal and judicial reform, set up sufficient community-based diversion programs, establish cooperation and partnership among relevant stakeholders in the child justice system, establish complaint mechanisms to address violation of the child's rights during the diversion process and judicial supervision, raise public awareness about diversion and alternatives to pretrial detention, and invest sufficient funds in diversion programs and alternative measures to pretrial detention.

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Abbreviations

ACHR	American Convention on Human Rights
ACHPR	African Charter on Human and People's Rights
AHRD	ASEAN Human Rights Declaration
ArCHR	Arab Charter on Human Rights
ASEAN	Association of Southeast Asian Nations
CRC	Convention on the Rights of the Child
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
IACHR	Inter-American Commission on Human Rights
ICCPR	International Covenant on Civil and Political Rights
NGO	Non-governmental organization
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDP	United Nations Development Programme
UNICEF	United Nations Children's Fund
UNODC	United Nations Office on Drugs and Crime
WHO	World Health Organization

Key Terms Used in This Thesis

Alternatives to pretrial detention: measures which a competent authority may impose on children considered as offenders in lieu of pretrial detention when they are not diverted from the criminal proceedings.¹

Child/Children: a person under eighteen years of age.²

Children considered as offenders: children recognized as, accused of, or alleged as having committed a criminal offense.³

Child justice system: mechanisms, procedures, provisions, norms, standards and legislations, including bodies and institutions, adopted or created to tackle criminal offenses committed by children.⁴ These bodies and institutions include the court, the prosecution, the police, legal professionals, detention facilities, probation offices, etc., which operate in close relation with other related bodies and institutions working in such areas as education, social welfare, and health, and organizations that provide supports to witnesses and victims of crime.⁵

Criminal justice system: procedures, legislations, institutions, authorities and professionals that deal with victims and witnesses of crime and persons recognized as, accused of, or alleged as committing a crime.⁶

¹ UNICEF, *'Diversion not Detention: A study on Diversion and Other Alternative Measures for Children in Conflict with the Law in East Asia and the Pacific'* 2017, p. x; See also UNICEF Toolkit on Diversion and Alternatives to Detention 2009: Glossary of Terms Relevant to Children in Conflict with the Law, 20 August 2010, available at https://sites.unicef.org/tdad/index_55673.html (last visited 12 May 2022) (UNICEF Toolkit, Glossary of Terms).

² Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3, Art. 1 (CRC).

³ See Committee on the Rights of the Child, General Comment No. 24, CRC/C/GC/24, 18 September 2019, para. 8 (CRC General Comment No. 24); Committee on the Rights of the Child, General Comment No. 10, CRC/C/GC/10, 25 April 2007, para. 1 (CRC General Comment No. 10).

⁴ CRC General Comment No. 24, para. 8.

⁵ Council of Europe, Recommendation Rec(2003)20 of the Committee of Ministers to Member States concerning New Ways of Dealing with Juvenile Delinquency and the Role of Juvenile Justice, 24 September 2003, definition.

⁶ UNICEF Toolkit, Glossary of Terms; See also UNODC and UNICEF, *Manual for the Measurement of Juvenile Justice Indicators* (UNODC, 2006), Appendix 1, p. 53; UNODC and United States Institute of Peace, *Criminal Justice Reform in Post-Conflict States: A Guide for Practitioners* (UNODC, 2011), pp. 9-13.

Deprivation of liberty: a situation in which a person is imprisoned, detained or placed in a private or public place or institution where he/she is not allowed to leave at his/her own will, by a decision of a public or administrative authority or the court.⁷

Detain/Detention: when a person is deprived of his/her liberty, which starts from when he/she is arrested and continues until when he/she is released.⁸

Divert/Diversión: a method tackling children considered as offenders without referring the case to criminal proceedings but instead taking them to other alternative activities, services or programs which are non-judicial and appropriate for them,⁹ but they are still held responsible for their acts.¹⁰

Liberty: when a person's body is free from any confinement.¹¹

Pretrial detention: the period starting from when a person is arrested and detained until a judgement is rendered by the first instance court.¹²

Restorative justice: the process whereby children considered as offenders, the victims and/or other members of the community who are impacted by the offense “actively” join together, assisted by an impartial and fair facilitator, to resolve the dispute resulting from the offense.¹³

⁷ United Nations Rules for the Protection of Juveniles Deprived of their Liberty, GA Resolution 45/113, 14 December 1990, para. 11(b) (Havana Rules); CRC General Comment No. 24, para. 8; See also Human Rights Committee, General Comment No. 35, CCPR/C/GC/35, 16 December 2014, para. 5 (HRC General Comment No. 35); Council of Europe, Recommendation CM/Rec(2008)11 of the Committee of Ministers to Member States on the European Rules for Juvenile Offenders Subject to Sanctions or Measures, 5 November 2008, Rule. 21.5 (CE CM/Rec(2008)11).

⁸ HRC General Comment No. 35, para. 13.

⁹ CRC General Comment No. 24, para. 15; United Nations Standard Minimum Rules for the Administration of Juvenile Justice, GA Resolution 40/33, 29 November 1985, Rule 11 and Commentary on Rule 11 (Beijing Rules); UNICEF (2017), p. x.

¹⁰ Charles and Associates, Inc., *Designing Effective Diversion Programmes: Initiatives from the Eastern Caribbean Area* December 2017, p. 8. Available at: <https://www.unicef.org/easterncaribbean/media/1206%20file/ECA-Diversion-Programme-Policy-Brief-2017.pdf> (Accessed 12 May 2022); UNODC and United States Institute of Peace (2011), p. 86.

¹¹ HRC General Comment No. 35, para. 3.

¹² CRC General Comment No. 24, paras. 8 and 85; HRC General Comment No. 35, para. 37; See also *Buzadji v. the Republic of Moldova* [GC], ECtHR, App. No. 23755/07, 5 July 2016, para. 85.

¹³ CRC General Comment No. 24, para. 8; Economic and Social Council, Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, ECOSOC Resolution 2002/12, 24 July 2002, paras. 2 and 5 (Basic Principles on the Use of Restorative Justice); Lima Declaration on Restorative Juvenile Justice, 4-7 November 2009, p. 3 (Lima Declaration); Council of Europe, Recommendation CM/Rec(2018)8 of the Committee of Ministers to member States concerning Restorative Justice in Criminal Matters, 3 October 2018, paras. 3-4 (CE CM/Rec(2018)8).

Chapter 1: Introduction

1.1 Background

Cambodia is officially named the Kingdom of Cambodia.¹⁴ The country is located in the Southeast Asia region of the world, with the land area of 181,035 km², neighboring Thailand, Lao and Vietnam.¹⁵ Administratively, the country is divided into one capital city and 24 provinces, which are further divided into districts and communes.¹⁶ The capital city is Phnom Penh.¹⁷

Cambodia gained independence from France in 1953¹⁸ and became a member of the United Nations (UN) in 1955¹⁹. After the independence, Cambodia was ruled by King Norodom Sihanouk until 18 March 1970, when he was overthrown by a military coup led by General Lon Nol.²⁰ Since then, Cambodia fell into a civil war until 1975.²¹ Between 1975 and 1978, the country was ruled by the Khmer Rouge.²² On 7 January 1979, 140,000 Vietnamese armed forces invaded Cambodia under the pretext of self-defense²³ and continued to occupy Cambodia for eleven years until September 1989.²⁴ The civil war and war against the foreign occupation continued until 23 October 1991, when all the parties agreed to enter into a peace agreement, whereby the first national election was carried out in May 1993.²⁵ However, after this national election, the war did not completely end

¹⁴ Constitution of Cambodia, 24 September 1993, Art. 1 (Constitution of Cambodia).

¹⁵ Margaret Slocomb, *An Economic History of Cambodia in the Twentieth Century* (NUS Press, 2010), p. 2; Jean-Christophe Diepart, 'The Fragmentation of Land Tenure Systems in Cambodia: Peasants and the Formalization of Land Rights' June 2015, pp. 3-4. Available at: https://www.foncier-developpement.fr/wp-content/uploads/Country-profile-6_Cambodia_VF.pdf (Accessed 12 May 2022).

¹⁶ National Institute of Statistics of Ministry of Planning, 'National Report on Final Census Results' October 2020, pp. ix-x. Available at: <https://cambodia.unfpa.org/en/publications/general-population-census-kingdom-cambodia-2019-0> (Accessed 12 May 2022).

¹⁷ Constitution of Cambodia, Art. 6.

¹⁸ Yuichi Kubota, *Armed Groups in Cambodian Civil War: Territorial Control, Rivalry, and Recruitment* (Palgrave Macmillan, 2013), p. 48.

¹⁹ United Nations Cambodia, 'The United Nations in Cambodia', available at: <https://cambodia.un.org/en/about/about-the-un> (last visited 24 January 2022).

²⁰ Kubota (2013), p. 49.

²¹ Greenberg Research, Inc., 'People on War: Country Report Cambodia' December 1999, p. ii. Available at <https://www.icrc.org/en/doc/assets/files/other/cambodia.pdf> (Accessed 12 May 2022).

²² Ibid.

²³ United Nations Security Council Official Records, 2108th Meeting, S/PV.2108, 11 January 1979, paras. 115, 116, 126 and 127.

²⁴ Greenberg Research, Inc. (1999), p. ii; Dolores A. Donovan article 'Cambodia: Building a Legal System from Scratch' (1993) 27 *International Lawyer (ABA)* 445-454, 446; Ronald J. Cima article 'Vietnam in 1989: Initiating the Post-Cambodia Period' (1990) 30 *Asian Survey* 88-95, 88.

²⁵ Agreement on a Comprehensive Political Settlement of the Cambodia Conflict, 23 October 1991, Arts. 1, 2, and 9-14 (Agreement on a Comprehensive Political Settlement of the Cambodia Conflict); United Nations

until 1998, when Pol Pot, the leader of the Khmer Rouge, died, bringing an end to the Khmer Rouge.²⁶ The Cambodian war, which lasted for nearly three decades, claimed the lives of Cambodian people 2.5 million.²⁷

After the first national election, the new Constitution of Cambodia (“Constitution”) was promulgated on 24 September 1993.²⁸ According to the Constitution, Cambodia upholds multi-party democracy, constitutional monarchy regime, and market economy.²⁹ The King is the head of State and the Prime Minister is the head of government, elected for every five years.³⁰ There are two levels of parliament: the National Assembly and the Senate.³¹ The Constitution guarantees the separation of powers between the legislative, the executive and the judiciary.³² On 30 April 1999, Cambodia became a member of the Association of Southeast Asian Nations (ASEAN).³³

In 2019, the population of Cambodia reached 15,552,211, among whom 34.8% were children and 51.31% were female.³⁴ In 2020, according to the World Bank, the gross domestic product (GDP) of Cambodia was 25,808.56 million United States Dollars (US\$),³⁵ and GDP per capita was 1,543.7 US\$.³⁶ Based on Human Development Index Ranking 2020, Cambodia ranked 144 out of 189 countries; life expectancy at birth 69.8 years, expected years of schooling 11.5, mean years of schooling 5.0, and gross national income per capita 4,246 US\$.³⁷ Based on the Rule of Law Index 2021, Cambodia ranked 138 out of 139 countries for overall factors and 135 out of 139 countries

Security Council Resolution, No. 745(1992), 28 February 1992 (UNSC Resolution No. 745(1992); Stephen P. Marks article ‘The New Cambodian Constitution: From Civil War to a Fragile Democracy’ (1994) 26 *Columbia Human Rights Law Review* 45-110, 59.

²⁶ Kubota (2013), pp. 49, 73 and 79.

²⁷ Greenberg Research, Inc. (1999), p. ii.

²⁸ Sang Bonn Soth, ‘Teaching Constitutional Law’, in *Cambodian Constitutional Law* (Konrad-Adenauer-Stiftung Cambodia, 2016) 87, at 92; Marks (1994), p 45.

²⁹ Constitution of Cambodia, Arts. 1, 5, 51, 53 and 56.

³⁰ *Ibid*, Arts. 7, 19, 78, 118 and 119.

³¹ *Ibid*, Arts. 76 and 99.

³² *Ibid*, Art. 51.

³³ Protocol for the Accession of the Kingdom of Cambodia to ASEAN Agreements, 30 April 1999, preamble.

³⁴ National Institute of Statistics of Ministry of Planning (2020), pp. x, 25 and 28.

³⁵ World Bank, ‘GDP (current US\$) – Cambodia’, available at: <https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=KH> (last visited 24 January 2022).

³⁶ *Ibid*.

³⁷ UNDP, ‘*Human Development Report 2020*’ 2020, p. 345. Available at: <https://hdr.undp.org/sites/default/files/hdr2020.pdf> (Accessed 12 May 2022).

for the criminal justice system factor.³⁸ For children's access to justice, Cambodia ranked 166 out of 197 countries according to Access to Justice for Children.³⁹

As a UN member, Cambodia has ratified and acceded to eight international human rights treaties. They include respectively International Convention on the Elimination of All Forms of Racial Discrimination, International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights, Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, Convention on the Elimination of All Forms of Discrimination against Women, Convention on the Rights of the Child (CRC), Convention on the Rights of Persons with Disabilities, and Convention for the Protection of All Persons from Enforced Disappearance.⁴⁰ Cambodia has also ratified Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, and Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.⁴¹

Under international law, by ratifying and acceding to international human rights treaties, Cambodia is generally obliged to comply with their provisions in good faith and may not rely on its domestic laws to justify its non-compliance.⁴² Specifically, Cambodia has an obligation to fulfill, respect and protect human rights⁴³ and progressively realize economic, social and cultural rights by using its available resources to the maximum extent possible.⁴⁴ With regard to the rights of the child, Cambodia needs to take all necessary actions to ensure effective implementation of CRC and that domestic laws are in full compliance with the convention, especially the principle of the best interests of the child, non-discrimination, the right to life, survival and development, and the right to be heard.⁴⁵

³⁸ World Justice Project, 'Rule of Law Index 2021' 2021, pp. 23 and 60. Available at: <https://worldjusticeproject.org/sites/default/files/documents/WJP-INDEX-2021.pdf> (Accessed 10 March 2022).

³⁹ Child Rights International Network, 'Access to Justice for Children: Global Ranking', available at: <https://archive.crin.org/en/access-justice-children-global-ranking.html> (last visited 25 January 2022).

⁴⁰ United Nations Human Rights Treaty Bodies, 'Ratification Status for Cambodia', available at: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=29&Lang=EN (last visited 25 January 2022).

⁴¹ Ibid.

⁴² See Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, Arts. 26-27.

⁴³ Human Rights Committee, General Comment No. 31, CCPR/C/21/Rev.1/Add. 13, 26 May 2004, paras. 3-8.

⁴⁴ Committee on Economic, Social and Cultural Rights, General Comment No. 3, E/1991/23, 14 December 1990, paras. 1-14; Committee on the Rights of the Child, General Comment No. 5, CRC/GC/2003/5, 27 November 2003, paras. 5, 7 and 8 (CRC General Comment No. 5).

⁴⁵ CRC General Comment No. 5, paras. 1, 12 and 22.

Children are considered as an essential resource for their countries, communities and families.⁴⁶ However, at this stage, their psychology and physical body are developing and immature, which makes them different from adults.⁴⁷ It is more difficult for them to exercise self-control and withstand influence from their peer, and at this stage, they are unable to fully comprehend interests of the public and those of other people as well.⁴⁸ Because of this reason, children are vulnerable⁴⁹ and need special care and protection.⁵⁰ When children are alleged to have committed a criminal offence, they must be treated with a special system different from that applicable to adult offenders.⁵¹ Exposing children to the criminal justice system is harmful to them and negatively impact their potential to become good adults.⁵²

According to the independent expert, Manfred Nowak, depriving children of their liberty is like withholding their love, opportunities, visibility, agency, rights and childhood.⁵³ Researches show that deprivation of liberty of children negatively affects their physical and mental health, future lives and development.⁵⁴ Detention condition which is not hygienic causes communicable and sexually transmitted diseases.⁵⁵ Because of deprivation of liberty, children's physical development is hindered, and children may encounter "post-traumatic stress disorders", depression, anxiety, delay in development, language regression, and early death.⁵⁶ In some instances, mental health

⁴⁶ Committee on the Rights of the Child, General Comment No. 20, CRC/C/GC/20, 6 December 2016, para. 2 (CRC General Comment No. 20).

⁴⁷ Declaration of the Rights of the Child, GA Resolution 1386 (XIV), 20 November 1959, preamble (DRC); CRC General Comment No. 24, para. 2.

⁴⁸ Nils Jareborg article 'Sweden Criminal Responsibility for Minors' (2004) 75 *International Review of Penal Law* 511-525, 518-519.

⁴⁹ CRC General Comment No. 20, para. 2.

⁵⁰ DRC, preamble; CRC, preamble.

⁵¹ CRC General Comment No. 24, para. 2.

⁵² *Ibid.*

⁵³ United Nations General Assembly, Report of the Independent Expert Leading the United Nations Global Study on Children Deprived of Liberty, A/74/136, 11 July 2019, paras. 2-3 (Report of the Independent Expert Leading the United Nations Global Study on Children Deprived of Liberty).

⁵⁴ Report of the Independent Expert Leading the United Nations Global Study on Children Deprived of Liberty, paras. 20 and 26; Human Rights Council, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Méndez, A/HRC/28/68, 5 March 2015, para. 33 (Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

⁵⁵ Report of the Independent Expert Leading the United Nations Global Study on Children Deprived of Liberty, para. 28.

⁵⁶ *Ibid.*, paras. 28-29; Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, paras. 16 and 33; UNODC, *Custodial and Non-Custodial Measures: Alternatives to Incarceration* (UNODC, 2006), p. 1.

problems of children deprived of liberty increases ten times more than normal children.⁵⁷ In addition, children in detention are more likely to experience “torture or cruel, inhuman or degrading treatment or punishment”, abuse and violence.⁵⁸ Deprivation of liberty also prevents children from obtaining education and, upon released, causes difficulty for them to resume schooling and find a job.⁵⁹ These all cause stigmatization and profoundly affect children’s sense of self-value and self-esteem.⁶⁰

In addition, it is demonstrated that deprivation of liberty of children is not more successful than alternatives.⁶¹ Incarceration usually fails to achieve some of its objectives and is detrimental to not only the inmates themselves but also the communities and their families, by failing to rehabilitate the inmates or further criminalizing them, causing them to reoffend after release.⁶² A study shows that when children are placed in pretrial detention, it is “more likely” for them to recidivate than those children who do not experience pretrial detention.⁶³ A study found that pretrial detention of children increases recidivism rates by 33% for felony and 11% for misdemeanor.⁶⁴ On the contrary, alternatives to deprivation of liberty, including diverting children from criminal justice system, are

⁵⁷ Report of the Independent Expert Leading the United Nations Global Study on Children Deprived of Liberty, para. 29.

⁵⁸ Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, para. 16.

⁵⁹ Open Society Foundation, *‘The Socioeconomic Impact of Pretrial Detention’* 2011, pp. 31-32. Available at: <https://www.justiceinitiative.org/uploads/84baf76d-0764-42db-9ddd-0106dbc5c400/socioeconomic-impact-pretrial-detention-02012011.pdf> (Accessed 12 May 2022).

⁶⁰ Office of the Special Representative of the Secretary-General on Violence against Children, *‘Promoting Restorative Justice for Children’*, 2013, p. 30. Available at: https://violenceagainstchildren.un.org/sites/violenceagainstchildren.un.org/files/documents/publications/7_promoting_restorative_justice.pdf (Accessed 12 May 2022).

⁶¹ Beijing Rules, Commentary on Rule 19.

⁶² UNODC, *Custodial and Non-Custodial Measures* (2006), p. 1.

⁶³ Open Society Foundation, *The Socioeconomic Impact of Pretrial Detention* (2011), pp. 19-20; Rebecca Rosefelt article ‘Children in Limbo: The Need for Maximum Limits for Juvenile Pretrial Detention’ (2019) 28 *Minnesota Journal of International Law* 239-280, 246.

⁶⁴ Sarah Cusworth Walker and Jerald R. Herting article ‘The Impact of Pretrial Juvenile Detention on 12-Month Recidivism: A Matched Comparison Study’ (2020) 66 *Crime and Delinquency* 1865-1887, 1865; See also Sarah Cusworth Walker and Asia Sarah Bishop article ‘Length of Stay, Therapeutic Change, and Recidivism for Incarcerated Juvenile Offenders’ (2016) 55 *Journal of Offender Rehabilitation* 355-376, 356 and 373.

proved to be less costly,⁶⁵ reducing overcrowding condition of detention centers, decreasing recidivism, and keeping good relation between children and their community and family.⁶⁶

Because of the negative effects of depriving children of their liberty and exposing children to the criminal justice system, CRC requires that deprivation of children's liberty be used only when it is necessary, allowed by law and not arbitrary.⁶⁷ Moreover, states must deal with children alleged to have committed a criminal offence by avoiding exposing them to the criminal justice system and instead should resort to alternative measures.⁶⁸ The UN expert,⁶⁹ Human Rights Committee,⁷⁰ Committee on the Rights of the Child,⁷¹ Inter-American Commission on Human Rights (IACHR),⁷² and other international⁷³ and regional⁷⁴ instruments also recommend alternatives to

⁶⁵ Michigan Council on Crime and Delinquency, *'Restoring Kids, Transforming Communities: Enhancing Michigan's Approach to Juvenile Diversion'* June 2017, p. 8. Available at: https://hd.ingham.org/Portals/HD/Home/Documents/hesj/Restoring_Kids.pdf (Accessed 12 May 2022); Jill Farrell and others, *'Best Practice in Youth Diversion: Literature Review for the Baltimore City Youth Diversion Committee'* 16 August 2018, p. 4. Available at: <https://theinstitute.umaryland.edu/media/ssw/institute/md-center-documents/Youth-Diversion-Literature-Review.pdf> (Accessed 12 May 2022).

⁶⁶ James Austin, Kelly Dedel Johnson, and Ronald Weitzer, *'Alternatives to the Secure Detention and Confinement of Juvenile Offenders'* September 2005, pp. 2-3. Available at: <https://www.ojp.gov/pdffiles1/ojdp/208804.pdf> (Accessed 12 May 2022); Office of the Special Representative of the Secretary-General on Violence against Children (2013), pp. 27-33; National Conference of State Legislatures, *Principles of Effective Juvenile Justice Policy*, January 2018, pp. 5-6. Available at https://www.ncsl.org/Portals/1/Documents/cj/JJ_Principles_122017_31901.pdf (Accessed 12 May 2022).

⁶⁷ CRC, Art. 37(b).

⁶⁸ Ibid, Art. 40(3)(b).

⁶⁹ Report of the Independent Expert Leading the United Nations Global Study on Children Deprived of Liberty, para. 20.

⁷⁰ HRC General Comment No. 35, paras. 37-38.

⁷¹ CRC General Comment No. 24, paras. 3, 13-19, 73 and 74; CRC General Comment No. 20, para. 88; Committee on the Rights of the Child, General Comment No. 13, CRC/C/GC/13, 18 April 2011, para. 47(d)(iii).

⁷² IACHR, *'Report on the Use of Pretrial Detention in the Americas'* 30 December 2013, p. 84; IACHR, *'Juvenile Justice and Human Rights in the Americas'* 13 July 2011, pp. 161-162.

⁷³ Beijing Rules, Rules 11 and 13; United Nations Guidelines for the Prevention of Juvenile Delinquency, GA Resolution 45/112, 14 December 1990, paras. 5, 54 and 58 (Riyadh Guidelines); United Nations Standard Minimum Rules for Non-custodial Measures, GA Resolution 45/110, 14 December 1990, Rules 1, 2, 5 and 6 (Tokyo Rules); Economic and Social Council, Guidelines for Action on Children in the Criminal Justice System, ECOSOC Resolution 1997/30, 21 July 1997, para. 15 (Guidelines for Action on Children in the Criminal Justice System).

⁷⁴ Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on Procedural Safeguards for Children Who Are Suspects or Accused Persons in Criminal Proceedings, Arts. 10-11 (Directive (EU) 2016/800); CE CM/Rec (2008)11, Rules 7, 10 and 12.

criminal proceedings and deprivation of liberty of children, including diversion and restorative justice⁷⁵.

In Cambodia, the number of children processed by the criminal justice system and placed in pretrial detention is very high. In December 2019, the number of children in pretrial detention was 1,868 and children detained after sentencing were 781.⁷⁶ In October 2020, the number of children in detention, including pretrial detention, was 1,582.⁷⁷ In April 2021, the number dropped to 1,406, among whom 640 were in pretrial detention and 766 were detained after trial, mostly for nonserious crimes.⁷⁸ Although there has been a drop of the number of children considered as offenders in detention in recent years, including pretrial detention, this drop was very small, and pretrial detention and prosecution against children remains largely used. This means that placing children considered as offenders in pretrial detention and lack of diversion of those children from the criminal justice system are still a big problem for Cambodia, which requires a proper solution.

1.2 Purposes and Research Questions

This research aims to look into the root causes of the wide use of prosecution and pretrial detention instead of diversion and alternatives to pretrial detention of children considered as offenders in Cambodia and also examine to what extent the child rights-based approach has been upheld in law and in practice by the country. In this regard, the research will examine the gaps in Cambodian law by comparing it with international and regional norms and standards regarding alternatives to deprivation of liberty of children considered as offenders by means of diversion and alternatives to pretrial detention and the factors that hinder the effectiveness of these measures in practice.

To achieve these purposes, the research asks three questions:

1. To what extent does Cambodia uphold the child rights-based approach in law and in practice with regard to diversion and alternatives to pretrial detention of children considered as offenders?
2. What are the gaps in Cambodian laws concerning diversion and alternatives to pretrial detention of children considered as offenders, compared with international and regional norms and standards?

⁷⁵ Basic Principles on the Use of Restorative Justice, para. 11; Lima Declaration.

⁷⁶ Committee on the Rights of the Child, Replies of Cambodia to the List of Issues in Relation to Its Combined Fourth to Sixth Reports, CRC/C/KHM/RQ/4-6, 22 October 2020, paras. 71-72 (CRC Replies of Cambodia).

⁷⁷ International Drug Policy Consortium, *Cambodia: Over-incarceration, Drug Policy and Its Specific Harms to Women and Children* March 2021, p. 5. Available at: http://fileserver.idpc.net/library/Cambodia_prisons_drugpol_women_children.pdf (Accessed 12 May 2022).

⁷⁸ Human Rights Council, Report of the Special Rapporteur on the Situation of Human Rights in Cambodia, A/HRC/48/79, 3 August 2021, para. 57 (Report of the Special Rapporteur on the Situation of Human Rights in Cambodia 2021).

3. What are the factors that hinder the effectiveness of diversion and alternatives to pretrial detention of children considered as offenders in Cambodia in practice?

1.3 Theoretical Perspectives

A child rights-based approach is an approach that is based on international child rights norms and standards, which benefit the child as the rights-holder and oblige the state as the duty-bearer in practice, policy and law.⁷⁹ A child justice system that applies a child rights-based approach avoids undue criminalization of children or exposing them to stigmatization as a consequence of their commission of a criminal offense but instead provides them with supports to resolve their problems and rehabilitate them by acknowledging and addressing their needs and at the same time taking into consideration the need to protect the public safety and recognizing the negative impacts caused by children's actions to the victim.⁸⁰ Based on the UN, the child rights-based approach of the child justice must be guided by the following international principles: the best interests of the child; the principle of non-discrimination; the child's right to be heard; protection of the child against violence, exploitation and abuse; compassion and dignity of the child; respect for international and national norms and standards related to the child rights; protecting the child from conflicting with the law; and depriving the child of his/her liberty only when necessary and for a period as short as possible.⁸¹

The concept of the best interests of the child has the purpose to ensure that children fully and effectively enjoy all the rights enshrined in CRC and guarantee their holistic development.⁸² According to the principle of best interests of the child, the child's interests must be primarily considered in all actions – decisions, acts, conducts, inaction, omissions, procedures, service,

⁷⁹ Children's and Young People's Centre for Justice, 'A Guide to Youth Justice in Scotland: policy, practice and legislation' June 2019, pp. 3-4. Available at <https://www.cycj.org.uk/wp-content/uploads/2019/06/2019-Section-1.pdf> (Accessed 12 May 2022); Terre des hommes, 'Restorative Juvenile Justice' 2014, p. 22. Available at: https://www.tdh.ch/sites/default/files/76f6fc2d-74b3-4076-82c6-bdd86e10bce5_tdh_pol-thema2014_jj_en_light_original_0.pdf (Accessed 12 May 2022); Yannick van den Brink article 'Young, Accused and Detained; Awful, But Lawful? Pre-Trial Detention and Children's Rights Protection in Contemporary Western Societies' (2019) 19 *Youth Justice* 238-261, 253; See also Shannon A. Moore and Richard C. Mitchell article 'Theorising Rights-based Restorative Justice: The Canadian Context' (2011) 19 *International Journal of Children's Rights* 81-105, 87.

⁸⁰ Children's and Young People's Centre for Justice (2019), p. 4; See also Thomas Hammarberg article 'A Juvenile Justice Approach Built on Human Rights Principles' (2008) 8 *Youth Justice* 193-196, 193-196.

⁸¹ UN Common Approach to Justice for Children, March 2008, pp. 5-6 (UN Common Approach to Justice for Children); United Nations, Guidance Note to the Secretary-General: UN Approach to Justice for Children, September 2008, p. 1.

⁸² Committee on the Rights of the Child, General Comment No. 14, CRC/C/GC/14, 29 May 2013, para. 4 (CRC General Comment No. 14).

proposals, and other measures⁸³ – directly or indirectly⁸⁴ pertaining to a child or children in general or as a group,⁸⁵ when such actions are carried out by private or public institutions, the legislative, the judiciary or administrative authorities.⁸⁶

Best interests of the child has three dimensions – as a substantive right, an interpretive legal principle, and a procedural rule.⁸⁷ The child’s best interests as a substantive right mean that children have the right to get their best interests primarily considered while other interests are also being considered with regard to a decision concerning them.⁸⁸ The child’s best interests as an interpretive legal principle mean that when a legal instrument is ambiguous, it must be interpreted in a way that most effectively serves best interests of the child.⁸⁹ As a procedural rule, the child’s best interests mean that when a decision will impact children, the process of decision making must involve an assessment of possible effects of such a decision on the children.⁹⁰

The child’s best interests are closely linked with the child’s right to non-discrimination, right to life, survival and development, and right to be heard, which are all regarded as general principles of CRC.⁹¹ To best serve interests of the child, states must respect, protect and fulfill all the rights of the child without discriminating against him/her based on any ground such as sex, nationality, ethnicity, color, race, religion, language, property, social status, opinion, belief, birth, disability, etc.,⁹² and ensure the child the right to life, survival and optimal and holistic development, namely social, psychological, mental, physical, moral and spiritual development of the child.⁹³ In addition, states must provide the child with opportunity to express his/her ideas freely, directly or indirectly through his/her representative, on all matters that may have direct or indirect effects on him/her and give his/her opinions “due weight” according to his/her maturity and age.⁹⁴

In the child justice system, the principle of best interests of the child recognizes the child as an autonomous person who is capable of reasoning but vulnerable.⁹⁵ In this regard, the child rights-

⁸³ Ibid, paras. 17-18.

⁸⁴ Ibid, para. 19.

⁸⁵ Ibid, para. 23.

⁸⁶ CRC, Art. 3(1); See also *Bakhtiyari v. Australia*, HRC, Communication No. 1069/2002, 29 October 2003, para. 9.7.

⁸⁷ CRC General Comment No. 14, para. 6.

⁸⁸ Ibid, para. 6(a).

⁸⁹ Ibid, para. 6(b).

⁹⁰ Ibid, para. 6(c).

⁹¹ CRC General Comment No. 5, para. 12; CRC General Comment No. 14, paras. 41-45; Committee on the Rights of the Child, General Comment No. 12, CRC/C/GC/12, 1 July 2009, para. 2 (CRC General Comment No. 12); See also Guidelines for Action on Children in the Criminal Justice System, para. 8(a).

⁹² CRC, Art. 2; CRC General Comment No. 5, para. 12; CRC General Comment No. 14, para. 41.

⁹³ CRC, Art. 6; CRC General Comment No. 5, para. 12; CRC General Comment No. 14, para. 42.

⁹⁴ CRC, Art. 12; CRC General Comment No. 12, paras. 15, 19-36; CRC General Comment No. 14, paras. 43-45.

⁹⁵ IACHR (2011), p. 7.

based approach requires that children considered as offenders be protected against any torture, cruelty, inhuman or degrading treatment or punishment, death penalty or life imprisonment without parole throughout the proceedings and thereafter.⁹⁶ They must also be treated with their dignity and worth as humans, and their interests, needs and privacy must be safeguarded.⁹⁷ Moreover, international and domestic human rights norms and standards must be respected throughout the proceedings.⁹⁸ The child justice policies should focus on prevention, reparation, socialization, rehabilitation and reintegration of the child into family, community and society.⁹⁹ In that regard, prosecution, trial and deprivation of liberty should be used only when strictly necessary, and instead other measures such as diversion, restorative justice and other alternatives to depriving children of their liberty should be prioritized.¹⁰⁰ The child case must be assessed based on its individual circumstances, and throughout the proceedings the child must be allowed to freely express his/her opinion, which must be properly heard and considered by the judge, prosecutor and police, taking into account the child's intellectual and emotional ability, maturity and age.¹⁰¹

According to Yannick van den Brink, the child rights-based approach governing pretrial detention and child justice contains five “assumptions”.¹⁰² First, children considered as offenders must be treated differently from adults; second, children are rights-holders and their rights to a fair trial and personal liberty must be respected; third, rehabilitation must be prioritized over retribution and rehabilitation must be carried out according to “effective public safety”; fourth, pretrial detention causes harmful effects on children and thus should be applied only as a measure of last resort and for a duration as short as possible; and fifth, alternatives to deprivation of liberty is aimed at reducing pretrial detention and should avoid widening the net^{103 104}.

⁹⁶ UN Common Approach to Justice for Children, p. 5; CRC General Comment No. 24, paras. 58, 74 and 81.

⁹⁷ UN Common Approach to Justice for Children, p. 5; CRC General Comment No. 24, para. 3.

⁹⁸ UN Common Approach to Justice for Children, p. 5.

⁹⁹ Ibid, p. 6; CRC General Comment No. 24, para. 76.

¹⁰⁰ UN Common Approach to Justice for Children, p. 6; CRC General Comment No. 24, paras. 12-13; IACHR (2011), p. 8.

¹⁰¹ CRC General Comment No. 12, paras. 57-60; *Adamkiewicz v. Poland*, para. 70; IACHR (2011), p. 8.

¹⁰² Brink (2019), p. 253.

¹⁰³ Widening the net or net widening is a situation in which the use of a program to take away children considered as offenders from the criminal justice system fails to reduce the number of the children in the system but instead unintentionally increase the number by adding up children who would never previously have taken part in the system; See Melissa R. Nadel and others article ‘Civil Citation: Diversion or Net Widening?’ (2018) 55 *Journal of Research in Crime and Delinquency* 278-315, 282-284; Models for Change Juvenile Diversion Workgroup, *Juvenile Diversion Guidebook* (Models for Change, 2011), p. 13.

¹⁰⁴ Brink (2019), p. 253; See also Hammarberg (2008), pp. 193-196.

1.4 Methodology and Research Materials

To answer the above research questions, this research applies both doctrinal legal research method and empirical legal research method. The doctrinal legal research method is a research method that involves a process of identifying, critically analyzing and creatively synthesizing “the content of law”, namely constitutions, court precedents, legislations, principles, rules, and scholar articles, which are all regarded as a coherent system.¹⁰⁵ As a result of the analysis and synthesis, “an arguably correct and complete statement of the law on the matter in hand” is made and the current law may be amended or removed and silence or gaps in the law are filled but in the manner that makes the system remain coherent.¹⁰⁶ On the other hand, the empirical legal research, also called non-doctrinal legal research, is a process of systematically collecting and analyzing data or information through such tools as interviews, surveys, questionnaires, observations, experiments, case studies, events, decisions, documents, audio, movies, pictures, and other resources available on the internet, which can be used either collectively or individually.¹⁰⁷ Empirical legal research is the study of the real practice or implementation of law in the real world and thus explains how the legal system works in practice; the success, failure or problem of the real practice of law; etc.¹⁰⁸

To answer the questions concerning the gaps in Cambodian law and the extent to which Cambodia upholds the child rights-based approach in law, the author applies the doctrinal legal research method. In this regard, the author reviews, analyzes and synthesizes Cambodian laws – the Constitution, Law on Child Justice (“Law on Child Justice”), Criminal Procedure Code (“Criminal Procedure Code”), Criminal Code (“Criminal Code”), Law on Drug Control (“Law on Drug Control”), Constitutional Council’s decision, other related laws, sub-decrees, ministerial prakas, guidelines issued by relevant Ministries, etc. – and international and regional norms and standards stipulated in such instruments as Universal Declaration of Human Rights (UDHR), Declaration of the Rights of the Child, ICCPR, CRC, General Comments of Human Rights Committee and Committee on the Rights of the Child, decisions of Human Rights Committee, UN Guidelines, Rules and Principles, reports of the UN Special Rapporteurs, European Convention on Human Rights (ECHR), American Convention on Human Rights (ACHR), African Charter on Human and People’s Rights (ACHPR), Arab Charter on Human Rights (ArCHR), ASEAN Human Rights Declaration (AHRD), decisions of European Court of Human Rights (ECtHR), reports of IACHR,

¹⁰⁵ Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* 2nd ed. (Routledge, 2018), pp. 13-15; P. Ishwara Bhat, *Idea and Methods of Legal Research* (Oxford University Press, 2020), pp. 145, 158-161 and 167; Terry Hutchinson and Nigel James Duncan article ‘Defining and Describing What We Do: Doctrinal Legal Research’ (2012) 17 *Deakin Law Review* 83-119, 110-113.

¹⁰⁶ Ibid.

¹⁰⁷ Bhat (2020), pp. 304, 305, 307 and 312; Frans L. Leeuw and Hans Schmeets, *Empirical Legal Research: A Guidance Book for Lawyers, Legislators and Regulators* (Edward Elgar Publishing, 2016), pp. 3, 4 and 137.

¹⁰⁸ Ibid.

some guidelines and recommendations applied in Europe, Model Law on Juvenile Justice, Model Code of Criminal Procedure, many other documents by the UN and articles by scholars.

To answer questions regarding practical factors hindering the effectiveness of diversion and alternatives to pretrial detention and the extent to which Cambodia uphold the child rights-based approach in practice, the author applies the empirical legal research method. Due to the time and resource consuming nature of the empirical legal research method, in this research the author does not directly collect data by field work, but instead the author totally relies on reports, documents and findings of previous empirical legal researches that have been conducted by international and local non-governmental organizations (NGO) working in the area of child justice in Cambodia as well as other institutions. In addition, the author uses reports of the Special Rapporteurs on the situation of human rights in Cambodia, documents concerning ICCPR periodic reports of Cambodia, Committee on the Rights of the Child's reports on Cambodia, reports of Cambodian government to Committee on the Rights of the Child and Human Rights Committee, other documents written by scholars, etc.

1.5 Delimitation

This thesis covers only alternatives to deprivation of liberty of children considered as offenders in the child justice system only by means of diversion and alternatives to pretrial detention. Alternatives to deprivation of liberty of children considered as offenders after trial or conviction, i.e. non-custodial sentence, are not covered by this thesis. Alternatives to deprivation of liberty of children in other areas such as immigration, asylum, street children or children accompanying their parents in prison are not covered.

Pretrial detention, especially the duration, speediness and condition of pretrial detention, are not the focus of this thesis. However, the thesis will discuss pretrial detention only to the extent necessary for the purpose of discussion of alternatives to pretrial detention.

1.6 Terminology

The terms juvenile, juvenile justice, juvenile justice system, and children in conflict with the law were used in General Comment No. 10 of Committee on the Rights of the Child, which has been replaced by General Comment No. 24 of Committee on the Rights of the Child ("General Comment No. 24"). In General Comment No. 24, the terms child, children, child justice, child justice system and children considered as offenders are used in lieu of the terms juvenile, juvenile justice, juvenile justice system, and children in conflict with the law.¹⁰⁹

Committee on the Rights of the Child recommends that language that causes stigmatization to the child recognized as, accused of, or alleged as having committed a criminal offense not be used, and instead "non-stigmatizing language" is encouraged.¹¹⁰ The International Bar Association also

¹⁰⁹ See CRC General Comment No. 24, paras. 1-8.

¹¹⁰ Ibid, para. 7.

recommends not using the term “child offender” as it is harmful or inappropriate.¹¹¹ Therefore, this research will use the terms child, children, child justice, child justice system, child considered as an offender, and children considered as offenders instead of the terms juvenile, juvenile justice, juvenile justice system, and children in conflict with the law. In this research, the term “children considered as offenders” is used instead of “children in conflict with the law” to refer to children recognized as, accused of, or alleged as having committed a criminal offense.¹¹²

1.7 Structure of the Thesis

This thesis is divided into six parts, including this introduction part. The second part presents the historical overview of the Cambodian criminal justice and child justice system for the purpose of allowing the readers to have some understanding about the system, which would make it easier for them to comprehend the other parts. The third part deals with international and regional norms and standards regulating alternatives to deprivation of liberty of children considered as offenders, namely diversion and alternatives to pretrial detention. This part presents the legality, non-arbitrariness, necessity and proportionality principles of deprivation of liberty and prosecution, the arrest, the right to challenge the legality of deprivation of liberty, diversion, and alternatives to pretrial detention of children considered as offenders. The fourth part analyzes Cambodian law regulating diversion and alternatives to pretrial detention of children considered as offenders, by comparing it with the international and regional norms and standards that have been discussed in part three. In part four, silence or gaps in Cambodian law are also identified and solutions are suggested. Part five discusses factors that hinder the effectiveness of diversion and alternatives to pretrial detention of children considered as offenders in Cambodia in practice, which includes weakness of the child justice system and lack of effective diversion and alternatives to pretrial detention. The author concludes part five by suggesting solutions to the identified problems of practical factors. The last part is the author’s final words.

¹¹¹ International Bar Association, ‘*The Role of the Universal Periodic Review in Advancing Children’s Rights in Juvenile Justice*’ May 2018, p. 67. Available at: <https://www.ibanet.org/MediaHandler?id=71a64bb5-2ecf-4d15-a993-73d1a443725b> (Accessed 12 May 2022).

¹¹² See CRC General Comment No. 24, para. 8; CRC General Comment No. 10, para. 1.

Chapter 2: Cambodian Criminal Justice and Child Justice System

This chapter presents the general overview of the criminal justice and child justice system of Cambodia, starting from the French colonization period. The criminal justice system will be illustrated first, followed by the child justice system.

2.1 Cambodian Criminal Justice System

Before 1993, Cambodian judicial and legal system had experienced several changes due to the changes of political regimes and conflicts. During the French colonization (1863-1953), the judicial and legal system of Cambodia was influenced by the French colonizer; this influence continued until 1975.¹¹³ During the Khmer Rouge regime (1975-1978), the judicial and legal system was totally destroyed; judges, lawyers, prosecutors, and other legal professionals were massacred, and there was no law school or court.¹¹⁴ After the Khmer Rouge regime collapsed, only between six and ten legal professionals survived.¹¹⁵ From 7 January 1979 to September 1989, during which Cambodia was occupied by Vietnam,¹¹⁶ Cambodian judicial and legal system was influenced by the Vietnamese occupier.¹¹⁷ During this foreign occupation, a number of laws were enacted; however, the judicial and legal system was perceived as insufficient to guarantee the respect for human rights and secure public order.¹¹⁸ From 1991 to 1993, the so-called transitional period during which Cambodia was administered by the United Nations Transitional Authority in Cambodia,¹¹⁹ a few criminal laws regulating the criminal justice were adopted: the Provisions relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia during the Transitional Period,¹²⁰ Law on the Organization and Functioning of the Courts of Cambodia,¹²¹ Law on Criminal Procedure,¹²² etc.¹²³

¹¹³ Pallack Kong, 'Overview of the Cambodian Legal and Judicial System and Recent Efforts at Legal and Judicial Reform,' in *Introduction to Cambodian Law* (Konrad-Adenauer-Stiftung, 2012) 5, at 7.

¹¹⁴ Ibid, pp. 7-8; Donovan (1993), p. 445;

¹¹⁵ Ibid.

¹¹⁶ Greenberg Research, Inc. (1999), p. ii; Cima (1990), p. 88.

¹¹⁷ Kong (2012), p. 8.

¹¹⁸ Provisions relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia during the Transitional Period, 10 September 1992, preamble; Donovan (1993), pp. 446-449.

¹¹⁹ See Agreement on a Comprehensive Political Settlement of the Cambodia Conflict, Art. 2; UNSC Resolution No. 745(1992).

¹²⁰ See Provisions relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia during the Transitional Period, 10 September 1992.

¹²¹ See Law on the Organization and Functioning of the Courts of Cambodia, 8 February 1993.

¹²² See Law on the Criminal Procedure, 8 March 1993.

¹²³ Kong (2012), p. 8.

After the promulgation of the Constitution in 1993, additional laws regulating Cambodian criminal justice were enacted. Those laws included Law on the Duration of Pretrial Detention,¹²⁴ Law on the Aggravating Circumstances of Felonies,¹²⁵ Law on the Amendment to Articles 36, 38, 90 and 91 of the Law on Criminal Procedure,¹²⁶ and Law on the Amendment to Article 63 of the Provisions relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia during the Transitional Period.¹²⁷ However, these laws were not sufficient. With supports of the French experts,¹²⁸ in 2007, the Criminal Procedure Code was adopted, and subsequently, in 2009, the Criminal Code was enacted as well, replacing all the above-mentioned laws and other criminal laws enacted before 1992.¹²⁹ In 2011, the Law on Prisons was enacted,¹³⁰ and in 2014, the other three main laws were also adopted: Law on the Organization of the Courts,¹³¹ Law on the Status of Judges and Prosecutors,¹³² and Law on the Organization and Functioning of the Supreme Council of Magistracies.¹³³

According to the Criminal Procedure Code, which is influenced by the French Criminal Procedure Code, there are three instances of courts: the court of first instance (located in each province and the capital city), the court of appeal (four regional courts of appeal) and the supreme court.¹³⁴ In each instance of court, there is a criminal division (a criminal court).¹³⁵ At each criminal court of first instance, there are investigating judges and trial judges (the trial court).¹³⁶ The investigating judges are in charge of the judicial investigation of criminal cases referred to them by the office of prosecutors; one case is investigated by one investigating judge.¹³⁷ During the judicial investigation, the investigating judge has the power to place the accused person in pretrial detention or under judicial supervision, i.e. conditional alternatives to pretrial detention.¹³⁸ After completing

¹²⁴ See Law on the Duration of Pre-trial Detention, 26 August 1999.

¹²⁵ See Law on the Aggravating Circumstances of Felonies, 7 January 2002.

¹²⁶ See Law on the Amendment to Articles 36, 38, 90 and 91 of the Law on Criminal Procedure, 10 January 2002.

¹²⁷ See Law on the Amendment to Article 63 of the Provisions relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia during the Transitional Period, 23 June 2006.

¹²⁸ See Remarks of the Minister of Justice, 5 November 2010, attached to the Criminal Procedure Code; Remarks of the Minister of Justice, 20 January 2010, attached to the Criminal Code.

¹²⁹ Criminal Procedure Code of Cambodia, 10 August 2007, Art. 611 (Criminal Procedure Code); Criminal Code of Cambodia, 30 November 2009, Art. 671 (Criminal Code).

¹³⁰ See Law on Prisons, 21 December 2011.

¹³¹ See Law on the Organization of the Courts, 16 July 2014 (Law on the Organization of the Courts).

¹³² See Law on the Status of Judges and Prosecutors, 16 July 2014.

¹³³ See Law on the Organization and Functioning of the Supreme Council of Magistracies, 16 July 2014.

¹³⁴ Criminal Procedure Code, Arts. 287, 289, 373 and 417; See also Law on the Organization of the Courts, Arts. 3, 4, 12, 14, 35, 37, 55, and 57

¹³⁵ Law on the Organization of the Courts, Arts. 14, 37 and 57.

¹³⁶ Criminal Procedure Code, Arts. 51-54, 287 and 288.

¹³⁷ Ibid, Arts. 122-124.

¹³⁸ Ibid, Arts. 203-230.

the judicial investigation, the investigating judge must refer the case to the trial court if there are sufficient grounds to believe that the accused person has committed a criminal offense; on the contrary, he/she must close the case without further action.¹³⁹ Under the Criminal Procedure Code, the office of prosecutors is required to refer all felony cases and flagrante delicto cases involving children considered as offenders to the investigating judge for judicial investigation; the office of prosecutors may refer the other cases directly to the trial court.¹⁴⁰

According to the Criminal Procedure Code, inquiries into criminal offenses are under the exclusive jurisdiction of the police and prosecutors.¹⁴¹ Such inquiries are divided into two types: an inquiry into a flagrant criminal offense and a preliminary inquiry.¹⁴² In all inquiries, the police are under supervision of the prosecutor.¹⁴³

2.2 Cambodian Child Justice System

The Constitution guarantees the rights of the child, including children considered as offenders. According to the Constitution, Cambodia has an obligation to respect, protect and fulfill the rights of the child as provided in CRC, UDHR, and other international human rights conventions to which Cambodia is a state party, in particular the right to education, the right to life, the right to health and welfare of the child.¹⁴⁴ The Constitutional Council of Cambodia is also of the opinion that judges, when deciding a case, have an obligation to apply not only domestic laws but also international conventions which Cambodia has ratified or acceded to, particularly CRC.¹⁴⁵

Before 2016, the laws that applied to the child justice system of Cambodia were Law on the Press,¹⁴⁶ Criminal Procedure Code, Criminal Code, Law on Prisons, Sub-Decree¹⁴⁷ on the Establishment of the National Center for Treatment and Rehabilitation of Drugs Addicts,¹⁴⁸ and Prakas of the Ministry of Justice on the Use of Screens in Courtroom and Courtroom Television-

¹³⁹ Ibid, Art. 247 (as amended on 9 June 2013).

¹⁴⁰ Ibid, Arts. 47 and 122.

¹⁴¹ Ibid, Arts. 4, 27, 36-39 and 56-59.

¹⁴² Ibid, Arts. 85-118.

¹⁴³ Ibid, Arts. 58, 59 and 89.

¹⁴⁴ Constitution of Cambodia, Arts. 31 and 48.

¹⁴⁵ Constitutional Council of Cambodia, Decision No. 092/003/2007, 10 July 2007, p. 2.

¹⁴⁶ See Law on the Press, 1 September 1995.

¹⁴⁷ In Cambodia, the hierarchy of laws is in the following order: the constitution on the top, laws/codes enacted by the parliament, royal decrees issued by the King, sub-decrees issued by the Prime Minister, prakas issued by the Minister of each ministry, and decisions and circulars issued by the Prime Minister and the Minister of each ministry. See Kong (2012), pp. 9-10.

¹⁴⁸ See Sub-Decree on the Establishment of the National Center for Treatment and Rehabilitation of Drugs Addicts, No. 162, 22 December 2010.

Linked Testimony from Vulnerable Children, Victims or Witnesses¹⁴⁹.¹⁵⁰ However, they are all *lex generalis*. There were no specific laws adopted to exclusively govern the child justice system. The laws mainly applying to inquiries by the police and prosecutors, investigation by the investigating judges, and trial of children considered as offenders were the Criminal Procedure Code and Criminal Code. However, only very few provisions of these two codes deal specifically with children considered as offenders, which are not sufficient to protect the rights of those children.¹⁵¹ There were no requirements of specialized courts for children or police, prosecutors, or judges trained or specialized in child rights or child justice.¹⁵² This led to children considered as offenders being treated in the same criminal procedure as adult offenders.¹⁵³ Because of that reason, the child justice system of Cambodia during that period was not satisfactory.¹⁵⁴

In July 2016, the Law on Child Justice was adopted; it entered into force in January 2017.¹⁵⁵ The Law on Child Justice is a *lex specialis*, more specific and detailed, and the Criminal Procedure Code and Criminal Code continue to apply only to the extent that their provisions are not in conflict with this law.¹⁵⁶ The purposes of the Law on Child Justice are to protect the rights and best interests of children considered as offenders, rehabilitate and reintegrate them into the community and society, and at the same time protect the interests of the community and society.¹⁵⁷ It concentrates on diverting the child from the criminal justice system rather than criminal sanctions.¹⁵⁸ It requires that children considered as offenders, if detention is absolutely necessary, be detained, separately from adult offenders, in a youth rehabilitation center, to be established in each province and the

¹⁴⁹ See Ministry of Justice, Prakas on the Use of Screens in Courtroom and Courtroom Television-Linked Testimony from Vulnerable Children, Victims or Witnesses, No. 62/08, 06 October 2008.

¹⁵⁰ Tina Verstraeten, 'The Status of Children in Conflict with the Law in Cambodia and Vietnam' 22 December 2016, p. 18.

¹⁵¹ See e.g. Criminal Procedure Code, Arts. 96, 100, 143, 212-214, 224 and 301; Criminal Code, Arts. 38-41 and 160-165.

¹⁵² Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties under Article 44 of the Convention, CRC/C/KHM/CO/2-3, 3 August 2011, para 76 (CRC Consideration of Reports Submitted by States Parties); See also Aekje Teeuwen article 'Juvenile Defendants' Right to be Tried within a Reasonable Time in Cambodia: An International Human Rights Analysis' (2019) 19 *Youth Justice* 42-62, 43.

¹⁵³ Human Rights Committee, Concluding Observations on the Second Periodic Report of Cambodia, CCPR/C/KHM/CO/2, 27 April 2015, para. 15 (HRC Concluding Observations on the Second Periodic Report of Cambodia); See also Teeuwen (2019), p. 43.

¹⁵⁴ Ministry of Social Affairs, Veterans and Youth Rehabilitation and Ministry of Justice, 'Juvenile Justice Law Strategic and Operational Plan 2018-2020' 26 March 2018, p. 12. Available at: https://www.unicef.org/cambodia/media/456/file/JJLSOP_Eng_0.PDF%20.pdf (Accessed 12 May 2022).

¹⁵⁵ Law on Child Justice, 14 July 2016, Art. 89 (Law on Child Justice).

¹⁵⁶ *Ibid*, Arts. 2-3.

¹⁵⁷ *Ibid*, Art. 1.

¹⁵⁸ *Ibid*, Arts. 5, 13, 28, 38, 52 and 60-71; Teeuwen (2019), p. 52.

capital city, for the purpose of rehabilitation and social reintegration.¹⁵⁹ The law applies child-friendly procedures¹⁶⁰ and requires that the social agents, police, prosecutors, investigating judges and trial judges who are in charge of criminal cases involving children considered as offenders have obtained trainings in child rights and child justice,¹⁶¹ but there is no specific requirement to establish separate children's courts.¹⁶² According to this law, the trial of children considered as offenders, at the court of first instance, must be conducted by a bench of three judges.¹⁶³

On 29 September 2017, Sub-Decree on the Organization and Functioning of the Youth Rehabilitation Center was adopted to further implement the Law on Child Justice.¹⁶⁴ According to this Sub-Decree, the duties of the youth rehabilitation center are, inter alia, to manage, take care of and protect children considered as offenders being detained in the center; classify the detained children based on gender and offenses; provide consultation, education, vocational trainings, and physical and mental health treatment; and reintegrate children considered as offenders into society and community after they have completed their sentences.¹⁶⁵ There is currently only one youth rehabilitation center located in Kandal province, inaugurated in late 2021, despite the fact that the law requires each province and the capital city have one youth rehabilitation center.¹⁶⁶

On 11 March 2019, Ministry of Social Affairs, Veterans and Youth Rehabilitation issued Prakas on the Appointment and Recognition of Social Agents, whereby two social agents have been appointed for each province and the capital city of Phnom Penh.¹⁶⁷ Based on the Law on Child Justice and this prakas, the duties of social agents include, among other things, meeting with and providing supports to children considered as offenders throughout the criminal proceedings starting from when they are arrested; collecting information related to children considered as offenders for the purpose of preparing a report to the prosecutor and judges; preparing diversion plans and

¹⁵⁹ Ibid, Arts. 76-77 and 79.

¹⁶⁰ Ibid, Arts. 4-5.

¹⁶¹ Ibid, Arts. 4, 12, 24, 31, 44 and 86.

¹⁶² Verstraeten (2016), p. 9.

¹⁶³ Law on Child Justice, Art. 44.

¹⁶⁴ Sub-Decree on the Organization and Functioning of the Youth Rehabilitation Center, No. 155, 29 September 2017, Arts. 1-2.

¹⁶⁵ Ibid, Art. 5.

¹⁶⁶ 'Cambodia Inaugurates New Youth Rehabilitation Center in Kandal', EAC News, 28 December 2021, available at: <https://eacnews.asia/home/details/7111> (last visited 5 March 2022); See also Justice With Children, '2021 World Congress on Justice with Children: Preparatory Meeting Report Cambodia' 22 April 2021, p. 7. Available at: <https://justicewithchildren.org/wp-content/uploads/2021/11/Cambodia-Preparatory-Meeting-Report-for-WCJWC-April-2021.pdf> (Accessed 12 May 2022).

¹⁶⁷ Ministry of Social Affairs, Veterans and Youth Rehabilitation, Prakas on the Appointment and Recognition of Social Agents, No. 101, 11 March 2019, Art. 1.

implementing them after they are approved by the prosecutor or judges; providing rehabilitation services to children considered as offenders and reintegrating them into the society, etc.¹⁶⁸

Further, in August 2021, Ministry of Interior,¹⁶⁹ Ministry of Justice,¹⁷⁰ and Ministry of Social Affairs, Veterans and Youth Rehabilitation¹⁷¹ jointly adopted three guidelines for the purpose of strengthening the effective implementation of the Law on Child Justice. They are Guideline on the Comparison between Procedures under the Law on Child Justice and the Criminal Procedure Code, Guideline on Child Justice System of Cambodia, and Guideline on Diversion of Children Considered as Offenders.

2.3 Concluding Remarks

Cambodian criminal justice system is regarded as a transitional and post-conflict criminal justice system.¹⁷² This system had been damaged by conflicts and has just been gradually restored after 1993 when the Constitution was adopted enshrining respect for human rights and democracy. Influence of the French civil law on the Kingdom's criminal justice has been reestablished by the adoption of the Criminal Procedure Code and Criminal Code in 2007 and 2009 respectively.

Before the adoption of the Law on Child Justice in 2016, children considered as offenders were treated in the same criminal justice system as adult offenders based mainly on the Criminal Procedure Code and Criminal Code. Based on this new law, children considered as offenders are treated in a justice system different from that applicable to adult offenders. This law protects the rights and best interest of the child and promotes rehabilitation and social reintegration through diversion and application of child-friendly procedures. Those working with children considered as offenders are required to have obtained trainings in the child rights and child justice.

¹⁶⁸ Ibid, Art. 2; Law on Child Justice, Arts. 10-11.

¹⁶⁹ Ministry of Interior, Decision No. 2011, 3 August 2021.

¹⁷⁰ Ministry of Justice, Decision No. 0928/21, 4 August 2021.

¹⁷¹ Ministry of Social Affairs, Veterans and Youth Rehabilitation, Decision No. 013, 11 August 2021.

¹⁷² See UNODC and United States Institute of Peace (2011), pp. iv and 9.

Chapter 3: International and Regional Norms and Standards concerning Alternatives to Deprivation of Liberty of Children Considered as Offenders

This chapter examines mainly international norms and standards regulating alternatives to deprivation of liberty of children considered as offenders by focusing on diversion and alternative measures to pretrial detention. Regional norms and standards, especially decisions of ECtHR, are also examined but for the purpose of providing support to and complete the gaps in the international norms and standards.

3.1 The Right to Liberty of the Child under International and Regional Human Rights Instruments

At the international level, children's right to liberty is safeguarded by UDHR, ICCPR and CRC. According to UDHR, a person must not be arbitrarily arrested or detained.¹⁷³ ICCPR protects liberty of children by providing that "[e]veryone has the right to liberty", and deprivation of liberty of a person must not be arbitrary or inconsistent with the reasons and procedures proscribed by law.¹⁷⁴ CRC, which is specifically designed for the purpose of safeguarding the rights of the child, stipulates that children must not be arbitrarily or unlawfully deprived of their liberty; they may be arrested, detained or imprisoned only when it is necessary, in accordance with the law, and for the shortest duration as possible.¹⁷⁵

Regional human rights instruments that also guarantee the right to liberty of the child include ECHR, ACHR, ACHPR, ArCHR, and AHRD. According to ECHR, every person is guaranteed the right to liberty; he/she may be deprived of his/her liberty only according to reasons and procedures stated in the law.¹⁷⁶ ACHR provides that a person must not be arbitrarily arrested or imprisoned; deprivation of liberty must be based on conditions and reasons stipulated in the law and the constitution.¹⁷⁷ Based on ACHPR, arrest and detention must not be arbitrary; a person's freedom may be deprived of only in accordance with the conditions and grounds provided in the law.¹⁷⁸ ArCHR states that search, arrest and detention must not be arbitrary; deprivation of liberty may be carried out only based on the reasons, conditions and procedures prescribed by law.¹⁷⁹

¹⁷³ Universal Declaration of Human Rights, GA Resolution 217A (III), 10 December 1948, Art. 9.

¹⁷⁴ International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, Art. 9 (ICCPR).

¹⁷⁵ CRC, Art. 37(b).

¹⁷⁶ European Convention on Human Rights, as amended by Protocols Nos. 11 and 14, 4 November 1950, Art. 5(1).

¹⁷⁷ American Convention on Human Rights, 22 November 1969, Art. 7(1)(2)(3).

¹⁷⁸ African Charter on Human and Peoples' Rights, 27 June 1981, Art. 6.

¹⁷⁹ Arab Charter on Human Rights, 2004, Art. 14(1)(2).

AHRD stipulates that any deprivation of liberty, including search, arrest, abduction and detention, must not be carried out arbitrarily.¹⁸⁰

In short, both international and regional human rights instruments guarantee the right to liberty of the child. Any deprivation of children's liberty must comply with the principles of lawfulness (or legality),¹⁸¹ non-arbitrariness, necessity and proportionality.

3.2 General Principles of Child Justice System, in particular Deprivation of Liberty

3.2.1 Age of Criminal Responsibility and Determination of the Child's Age

CRC defines a child as a person who is under eighteen years of age.¹⁸² According to Committee on the Rights of the Child, the common internationally recognized minimum age of criminal responsibility of children is fourteen.¹⁸³ If the child is alleged to have committed a criminal offense, he/she may be held criminally responsible only when at the time of the alleged commission of the crime, he/she is fourteen years of age or above.¹⁸⁴ If the child is alleged to have committed a criminal offense when he/she is between fourteen and below eighteen years of age, he/she must be charged and dealt with only in accordance with criminal proceedings designed for children, in conformity with CRC.¹⁸⁵

In principle, the child's age is determined by a birth certificate.¹⁸⁶ However, in the absence of a birth certificate, the age may be determined based on such documents as a birth notification, registry of birth, baptism certificate, school document, etc., and, in such a case, opinions of the parents, teachers, and leaders of the community and religion should be taken into consideration.¹⁸⁷ If these methods are not effective, experts or professionals may be allowed to assess psychological and physical development of the child for the purpose of determination of his/her age, but this method must be "least invasive" and carried out promptly, not causing any trauma and taking into account the gender, culture, rights and dignity of the child.¹⁸⁸

¹⁸⁰ ASEAN Human Rights Declaration, 18 November 2012, Art. 12.

¹⁸¹ According to Human Rights Committee, "lawfulness" means "legality"; See HRC General Comment No. 35, para. 22, footnote 64; See also *Clifford McLawrence v. Jamaica*, HRC, Communication No. 702/1996, 18 July 1997, para. 5.5.

¹⁸² CRC, Art. 1.

¹⁸³ CRC General Comment No. 24, para. 21.

¹⁸⁴ *Ibid*, para. 20.

¹⁸⁵ *Ibid*.

¹⁸⁶ *Ibid*, para. 33.

¹⁸⁷ *Ibid*.

¹⁸⁸ *Ibid*, para. 34; United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, A/HRC/30/37, 6 July 2015, para. 99 (UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court).

Any doubt about the child's age must benefit the child.¹⁸⁹ If it cannot be proved whether the child is above fourteen years of age or younger, he/she must be presumed to be younger than fourteen and as such must not be criminally liable for any alleged criminal offense.¹⁹⁰ When evidence cannot prove whether the child is below eighteen or older, he/she must be treated as younger than eighteen.¹⁹¹

3.2.2 Lawfulness and Non-Arbitrariness Principles

ICCPR and CRC provide that imprisonment, detention and arrest of the child must not be unlawful or arbitrary.¹⁹² According to Human Rights Committee, imprisonment, detention and arrest of children is unlawful when they are not based on the reasons and procedures prescribed by both domestic and international laws.¹⁹³ According to Committee on the Rights of the Child, the age limit for deprivation of liberty should be fixed by law at sixteen years of age or above.¹⁹⁴ Deprivation of liberty which is initially lawful will become unlawful if it is no longer justified by the circumstances.¹⁹⁵ Detention or imprisonment of children is arbitrary when it is carried out with no justification.¹⁹⁶ It is also arbitrary when liberty of children is deprived of contrary to the principles of lawfulness,¹⁹⁷ proportionality and necessity,¹⁹⁸ or it is inappropriate, unreasonable, or lacking "predictability and due process of law".¹⁹⁹ Pretrial detention of the child is justified if there exist

¹⁸⁹ Ibid.

¹⁹⁰ CRC General Comment No. 24, para. 24.

¹⁹¹ UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, para. 99; African Commission on Human and Peoples' Rights, Guidelines on the Conditions of Arrest, Police Custody and Pre-trial detention in Africa, 28 April - 12 May 2014, para. 31(a)(iii) (Luanda Guidelines).

¹⁹² ICCPR, Art. 9(1); CRC, Art. 37(b); CRC General Comment No. 24, para. 85.

¹⁹³ HRC General Comment No. 35, paras. 11 and 44; Human Rights Council, Report of the Working Group on Arbitrary Detention, A/HRC/30/37, 6 July 2015, para. 12 (Report of the Working Group on Arbitrary Detention); Human Rights Council, Human Rights of Migrants: Migration and the Human Rights of the Child, A/HRC/RES/12/6, 1 October 2009, para. 4; *Shams and Others v. Australia*, HRC, Communication Nos. 1255, 1256, 1259, 1260, 1266, 1268, 1270, 1288/2004, 20 July 2007, para. 7.3.

¹⁹⁴ CRC General Comment No. 24, para. 89.

¹⁹⁵ HRC General Comment No. 35, para. 43; Report of the Working Group on Arbitrary Detention, para. 12.

¹⁹⁶ *Bakhtiyari v. Australia*, paras. 9.2 and 9.3.

¹⁹⁷ According to Human Rights Committee, the prohibitions of unlawfulness and arbitrariness may overlap; See HRC General Comment No. 35, para. 11.

¹⁹⁸ Report of the Working Group on Arbitrary Detention, paras. 10-11.

¹⁹⁹ HRC General Comment No. 35, paras. 11-12; *Van Alphen v. the Netherlands*, HRC, 305/1988, 23 July 1990, para. 5.8. According to the Council of Europe, due process consists of such elements as "the principles of legality and proportionality, the presumption of innocence, the right to a fair trial, the right to legal advice, the right to access to courts and the right to appeal"; See Council of Europe, Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice, October 2011, p. 19.

“reasonable grounds to believe” that he/she has committed a criminal offense,²⁰⁰ and it is carried out for the purpose of preventing him/her from interfering with the investigation, recommitting the criminal offense, causing immediate harm to the victim or others, or escaping justice by flying or avoiding court appearance or there exist real concerns about public health or safety of the public.²⁰¹ This justification must be clearly and sufficiently prescribed by law, which must not contain expansive and vague language, e.g. “public security”, so as to prevent arbitrariness of application or interpretation.²⁰²

According to ECtHR, deprivation of liberty must not be unlawful, unjustified or arbitrary.²⁰³ Deprivation of liberty is unlawful when it is not in compliance with the grounds and procedures under domestic and international laws.²⁰⁴ Lawfulness requires that the grounds for which a person may be deprived of his/her liberty; the order, extension and duration of deprivation of liberty; and the right to challenge the legality of deprivation of liberty be clearly and sufficiently provided in the law so as to avoid arbitrary application.²⁰⁵ A pretrial detention is justified if it is carried out when there is “a reasonable suspicion” that a person has committed a criminal offense and if released, he/she would escape to avoid trial;²⁰⁶ collide with other people; pressure or threaten witnesses, other offenders, or victims;²⁰⁷ interfere with the evidence collection; recommit the crime; disturb the public order;²⁰⁸ or there is a need to protect that person.²⁰⁹ Deprivation of liberty is arbitrary when it is carried out in bad faith or deceptively, by incorrect application of the law due to negligence,²¹⁰ by not being based on a reasonable suspicion that a person has committed a

²⁰⁰ UNODC, *Handbook on Strategies to Reduce Overcrowding in Prisons* (UNODC, 2013), p. 95.

²⁰¹ CRC General Comment No. 24, paras. 87 and 89; HRC General Comment No. 35, para. 38; United Nations, *Commentary on the United Nations Standard Minimum Rules for Non-Custodial Measures*, 1993, *Commentary on Rule 6.1 (Commentary on the Tokyo Rules)*; See also UNODC, *Model Law on Juvenile Justice and Related Commentary* (UNODC, 2013), Art. 33(2) (Model Law on Juvenile Justice).

²⁰² CRC General Comment No. 24, para. 87; HRC General Comment No. 35, paras. 22 and 38; See also Human Rights Committee, *Concluding Observations: Bosnia and Herzegovina*, CCPR/C/BIH/CO/1, 22 November 2006, para. 18; UNODC (2013), p. 93.

²⁰³ *Buzadji v. the Republic of Moldova* [GC], para. 84; *S., V. and A. v. Denmark* [GC], ECtHR, App. Nos. 35553/12, 36678/12 and 36711/12, 22 October 2018, para. 73.

²⁰⁴ *Medvedyev and Others v. France* [GC], ECtHR, App. No. 3394/03, 29 March 2010, para. 79; *Khlaifia and Others v. Italy* [GC], ECtHR, App. No. 16483/12, 15 December 2016, para. 88.

²⁰⁵ *Khlaifia and Others v. Italy* [GC], para. 92; *J.N. v. the United Kingdom*, ECtHR, App. No. 37289/12, 19 May 2016, para. 77.

²⁰⁶ *Smirnova v. Russia*, ECtHR, App. No. 46133/99 and 48183/99, 24 July 2003, paras. 59-60.

²⁰⁷ *Štvrtecký v. Slovakia*, ECtHR, App. No. 55844/12, 5 June 2018, para. 61.

²⁰⁸ *Letellier v. France*, ECtHR, App. No. 12369/86, 26 June 1991, para. 51.

²⁰⁹ *Buzadji v. the Republic of Moldova* [GC], paras. 87-88; See also Luanda Guidelines, para. 11(a).

²¹⁰ *S., V. and A. v. Denmark* [GC], para. 76.

criminal offense to be proved by evidence satisfied by “an objective observer”,²¹¹ without proper rehabilitation or treatment, or with no respect for the principle of proportionality.²¹²

3.2.3 Necessity Principle

Under Guidelines on the Role of Prosecutors, prosecution against the child may be used only when it is “strictly necessary” and only after measures other than prosecution have been specially considered.²¹³ According to CRC, children may be arrested, detained or imprisoned only as “a measure of last resort”.²¹⁴ “Measure of last resort” means that deprivation of liberty of children should be applied only as “the last option” and as a rule should not be used.²¹⁵ ICCPR provides that pretrial detention may be used only as the exception.²¹⁶ According to Committee on the Rights of the Child, imprisonment, detention and arrest of children may be used only when it is necessary,²¹⁷ and pretrial detention of children may be applied only for cases that are most serious and after alternative measures such as diversion or other measures other than custody have been carefully examined.²¹⁸ According to Human Rights Committee, placing children in pretrial detention should not be used “to the fullest extent possible”.²¹⁹ Pretrial detention should be allowed only as the exception when it is necessary and reasonable.²²⁰ It should be ordered only based on circumstances of each individual person and each crime – but not based on a particular criminal offense or potential sentencing – and after alternative measures have been considered.²²¹ Based on United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”), children must be placed in pretrial detention only as “a measure of last resort”, and if possible alternative measures must be applied instead of pretrial detention.²²² Separation of

²¹¹ *O’Hara v. the United Kingdom*, ECtHR, App. No. 37555/97, 16 October 2001, paras. 34-35.

²¹² *James, Wells and Lee v. the United Kingdom*, ECtHR, App. Nos. 25119/09, 57715/09 and 57877/09, 18 September 2012, paras. 191-195.

²¹³ Guidelines on the Role of Prosecutors, 27 August - 7 September 1990, Guideline 19 (Guidelines on the Role of Prosecutors).

²¹⁴ CRC, Art. 37(b).

²¹⁵ Report of the Independent Expert Leading the United Nations Global Study on Children Deprived of Liberty, para. 19.

²¹⁶ ICCPR, Art. 9(3).

²¹⁷ CRC General Comment No. 24, paras. 84-85.

²¹⁸ *Ibid*, para. 86.

²¹⁹ HRC General Comment No. 35, paras. 37-38; Human Right Committee, General Comment No. 32, CCPR/C/GC/32, 23 August 2007, para. 42 (HRC General Comment No. 32).

²²⁰ HRC General Comment No. 35, para. 38; *Zhanna Kovsh v. Belarus*, HRC, Communication No. 1787/2008, 27 March 2013, para. 7.3.

²²¹ HRC General Comment No. 35, para. 38; *Smantser v. Belarus*, HRC, No. 1178/2003, 23 October 2008, para. 10.3.

²²² Beijing Rules, Rules 13.1-13.2; See also Tokyo Rules, Rules 6.1-6.2; Havana Rules, Rules 1, 2 and 17.

children from their parents and institutionalization of children may be used only when necessary.²²³ Depriving children of their liberty must be carefully considered and used only when the act adjudicated is a serious and violent crime committed against other people or it is a serious crime committed persistently and other alternative measures are not available.²²⁴

According to ECtHR, pretrial detention of children must be authorized only as “a measure of last resort” or when it is “strictly necessary”,²²⁵ and after all available alternative measures have been considered.²²⁶ Only when the alternative measures, which are less restrictive than detention, are inadequate or ineffective to protect the interests of the public or individuals, then it is necessary to detain the defendant.²²⁷ For example, pretrial detention is necessary when there is “a proper balance” between preventing a person from committing a crime and respecting his/her right to liberty; in this regard, pretrial detention is considered necessary when the crime to be prevented is immediate and serious, which may cause death and bodily harm to people or significantly cause damage to property.²²⁸ Expected long-term sentencing and existence of evidence of guilt are not alone the reasons to place the child in pretrial detention.²²⁹ Any decision by the court to place the child in pretrial detention must clearly explain the necessity for such detention, based on specific circumstances of the case.²³⁰

3.2.4 Proportionality Principle

Based on Guidelines on the Role of Prosecutors, when deciding whether to take a criminal action against the child, the prosecutor must take into account his/her background and personality, the need to protect society, and the seriousness and nature of the crime.²³¹ According to CRC, when children are alleged to have committed a criminal offense, all measures taken by the authorities must take into consideration their age, need for social reintegration, and “constructive role in society” and wherever possible avoid exposing them to the criminal proceedings.²³² Alternative measures to criminal proceedings – such as supervision orders, guidance and care; probation; foster care; counselling; vocational training and educational programs; and other non-institutionalized

²²³ Beijing Rules, Rules 18-19; Riyadh Guidelines, paras. 17 and 46; Guidelines for Action on Children in the Criminal Justice System, para. 18.

²²⁴ Beijing Rules, Rule 17.1(b)(c).

²²⁵ *Nart v. Turkey*, ECtHR, App. No. 20817/04, 6 May 2008, para. 31; *Korneykova v. Ukraine*, ECtHR, App. No. 39884/05, 19 January 2012, para. 44; See also Directive (EU) 2016/800, Art. 10(2).

²²⁶ *Guvec v. Turkey*, ECtHR, App. No. 70337/01, 20 January 2009, para. 108.

²²⁷ *S., V. and A. v. Denmark* [GC], paras. 77 and 161; *Saadi v. the United Kingdom*, ECtHR, App. No. 13229/03, 29 January 2008, para. 70.

²²⁸ *S., V. and A. v. Denmark* [GC], para.161.

²²⁹ *Selçuk v. Turkey*, ECtHR, App. No. 21768/02, 10 January 2006, para. 34; *Nart v. Turkey*, ECtHR, para. 32; *Kosti and Others v. Turkey*, App. No. 74321/01, 3 May 2007, para. 30.

²³⁰ *Korneykova v. Ukraine*, paras. 46 and 48.

²³¹ Guidelines on the Role of Prosecutors, Guideline 19.

²³² CRC, Art. 40(1) and (3).

alternatives – must be suitable for the child’s “well-being” and proportional to the criminal offense and his/her situations.²³³ ICCPR provides that measures taken in response to a criminal offense committed by the child must take into consideration his/her age and the need for his/her rehabilitation.²³⁴ Committee on the Rights of the Child is of the view that any response to a criminal offense committed by children should be proportional to the seriousness and circumstances of the crime; personal situation of the children, including their age, needs, mental health and culpability; the society’s “long-term needs”; the need for punishment and safety of the public; the child’s best interests and need for social reintegration.²³⁵ Based on the Beijing Rules, the proportionality principle limits the application of mere punishment for children.²³⁶ Under this principle, the response to a criminal offense committed by children must be proportional to the severity and situations of the crime, the needs and situations of the children – status of the children, circumstances of their family, other aspects, etc. – and the society’s needs.²³⁷

According to ECtHR, when dealing with children considered as offenders, measures taken in relation to those children must take into consideration their emotional and intellectual ability, maturity and age.²³⁸ Depriving children of their liberty must comply with the principle of proportionality.²³⁹ In this regard, any pretrial detention decision must balance the “arguments for and against release,”²⁴⁰ which must be based on evidence rather than the abstract opinion.²⁴¹ Pretrial detention is considered as proportional only if a less restrictive measure is not sufficient.²⁴²

3.2.5 Pretrial Detention Starts from an Arrest

Arrest is “the act of apprehending a person” for the allegation of committing a criminal offense.²⁴³ According to Committee on the Rights of the Child and Human Rights Committee, pretrial detention starts from when children are arrested and continues “throughout the trial” until a

²³³ Ibid, Art. 40(4); See also Model Law on Juvenile Justice, Art. 18(3).

²³⁴ ICCPR, Art. 14(4).

²³⁵ CRC General Comment No. 24, para. 76.

²³⁶ Beijing Rules, Rule 5 and Commentary on Rule 5.

²³⁷ Ibid, Rules 5 and 17(a) and Commentary on Rule 5.

²³⁸ *Adamkiewicz v. Poland*, ECtHR, App. No. 54729/00, 2 March 2010, para. 70.

²³⁹ *Korneykova v. Ukraine*, para. 43; *Ladent v. Poland*, ECtHR, App. No. 11036/03, 18 March 2008, paras. 55-56.

²⁴⁰ *Korneykova v. Ukraine*, para. 43.

²⁴¹ Ibid.

²⁴² *Ladent v. Poland*, paras. 55-56; See also *Agit Demir v. Turkey*, ECtHR, App. No. 36475/10, 27 February 2018, paras. 44- 45.

²⁴³ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, GA Resolution 43/173, 9 December 1988, Use of terms (Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment).

judgement is rendered by the first instance court.²⁴⁴ A person may be arrested only when there is a reasonable suspicion – based on quality and reliable information and evidence²⁴⁵ – that a criminal offense may have been committed by him/her.²⁴⁶

After being arrested, the child may be placed in police custody, but the custody should last only for “the shortest” time period, not exceeding 24 hours,²⁴⁷ during which the investigating authorities should consider, as a matter of priority, immediate release of the child to his/her family or a person chosen by him/her or appointed by the competent authorities.²⁴⁸ The investigating authorities may release the child by imposing an obligation that he/she return to the office of the investigating authorities or appear before a judge when summoned.²⁴⁹

3.2.6 The Right to Challenge Deprivation of Liberty

The right to get the legality or lawfulness of deprivation of liberty reviewed by a judicial authority aims to safeguard bodily integrity and personal liberty of a person from arbitrariness of arrest and detention.²⁵⁰ This judicial review has the purpose of placing detention of individuals under control of the judiciary, which prevents the government from arbitrarily interfering with the individuals’ liberty²⁵¹ and protects the individuals from power abuse and ill-treatment by the police.²⁵²

²⁴⁴ CRC General Comment No. 24, paras. 8 and 85; HRC General Comment No. 35, para. 37; See also *Buzadji v. the Republic of Moldova* [GC], para. 85.

²⁴⁵ Vivienne O’Connor and others, *Model Code of Criminal Procedure* (United States Institute of Peace, 2008), Art. 1(40) (Model Code of Criminal Procedure).

²⁴⁶ UNODC (2013), p. 93.

²⁴⁷ CRC General Comment No. 24, paras. 85 and 90; HRC General Comment No. 35, para. 33; Report of the Independent Expert Leading the United Nations Global Study on Children Deprived of Liberty, para. 111; Human Rights Council, Joint Report of the Office of the High Commissioner for Human Rights, the United Nations Office on Drugs and Crime and the Special Representative of the Secretary-General on Violence against Children on Prevention of and Responses to Violence against Children within the Juvenile Justice System, A/HRC/21/25, 27 June 2012, para. 75 (Joint Report of OHCHR, UNODC and the Special Representative on Violence against Children); See also European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, ‘*24th General Report of the CPT*’ January 2015, para. 99. Available at: https://www.refworld.org/publisher/COE/CPT/POL_54bf8fa64_0.html (Accessed 20 April 2022).

²⁴⁸ CRC General Comment No. 24, paras. 8 and 85; Beijing Rules, Rule 10.2.

²⁴⁹ Model Law on Juvenile Justice, Art. 33(1) and Commentary on Article 33(1).

²⁵⁰ Report of the Working Group on Arbitrary Detention, para. 2.

²⁵¹ HRC General Comment No. 35, para. 32; *Brogan and Others v. the United Kingdom*, ECtHR, App. Nos. 11209/84, 11234/84, 11266/84, and 11386/85, 29 November 1988, para. 58; *Pantea v. Romania*, ECtHR, App. No. 33343/96, 3 June 2003, para. 236.

²⁵² *Ladent v. Poland*, para. 72.

According to CRC, children whose liberty has been deprived of have the right to a prompt, impartial and independent judicial review of the lawfulness of their arrest and detention.²⁵³ ICCPR stipulates that a person who has been arrested and detained has the right to get the legality of his/her detention promptly reviewed by a court and if the court finds his/her detention unlawful, he/she must be released.²⁵⁴ According to Committee on the Rights of the Child, Human Rights Committee, etc., the child who has been arrested and detained, but not yet released, must have the right to challenge the legality of his/her detention to the impartial and independent judicial authorities within 24 hours after his/her arrest, but not after his/her arrival at the “place of detention”.²⁵⁵ In that regard, the child must be automatically and physically brought before a court without requirement of any request by him/her, so that the court can decide whether to release or continue to detain him/her to await trial if there are lawful grounds to do so.²⁵⁶ If the child is placed in pretrial detention instead of being released, there should be a regular judicial review, “*proprio motu*”, for the purpose of releasing him/her from pretrial detention,²⁵⁷ possibly “every two weeks”.²⁵⁸ During the review, the child’s physical presence before the judge is required.²⁵⁹

To decide whether the child should be placed in pretrial detention or released, the judge must conduct a closed²⁶⁰ adversarial hearing, attended by the child, the lawyer and guardian or parent of the child, and the prosecutor,²⁶¹ in full respect for the principle of equality of arms, and the child’s lawyer must have the rights to access evidence in the case file in order to challenge the lawfulness

²⁵³ CRC, Art. 37(d).

²⁵⁴ ICCPR, Art. 9(4).

²⁵⁵ CRC General Comment No. 24, paras. 89-90; HRC General Comment No. 35, paras. 32-33; *Zhanna Kovsh v. Belarus*, para. 7.3; Joint Report of OHCHR, UNODC and the Special Representative on Violence against Children, para. 75; See also Model Law on Juvenile Justice, Art. 33(3).

²⁵⁶ HRC General Comment No. 35, paras. 32, 34 and 36; *Zhanna Kovsh v. Belarus*, para. 7.3; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 37; See also *McKay v. the United Kingdom* [GC], ECtHR, App. No. 543/03, 3 October 2006, para. 34; *Aquilina v. Malta* [GC], ECtHR, App. No. 25642/94, 29 April 1999, para. 49.

²⁵⁷ CRC General Comment No. 24, para. 90; HRC General Comment No. 35, para. 38; UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, Guideline 7, para. 65; Directive (EU) 2016/800, Art. 10(2); See also Luanda Guidelines, para. 12(a).

²⁵⁸ Joint Report of OHCHR, UNODC and the Special Representative on Violence against Children, para. 75; Model Law on Juvenile Justice, Art. 37(1); IACHR (2013), p. 85; IACHR (2011), p. 78; Manfred Nowak, ‘*The United Nations Global Study on Children Deprived of Liberty*’ November 2019, p. 319. Available at: https://www.chr.up.ac.za/images/publications/UN_Global_Study/United%20Nations%20Global%20Study%20on%20Children%20Deprived%20of%20Liberty%202019.pdf (Accessed 12 May 2022).

²⁵⁹ Model Law on Juvenile Justice, Art. 37(2).

²⁶⁰ CRC General Comment No. 12, para. 61.

²⁶¹ Model Code of Criminal Procedure, Arts. 175, 333, and 334(2)(3); Beijing Rules, Rule 15.

of the child's detention.²⁶² The judge must examine whether deprivation of liberty of the child is unlawful and arbitrary and if the judge finds that such deprivation of liberty is unlawful or arbitrary, he/she must order release of the child, with the immediate effect.²⁶³ In this regard, the judge must examine whether the arrest is based on a reasonable suspicion that the child has committed a criminal offense and whether the arrest follows legal procedures and pursues a legitimate purpose, i.e. lawfulness of the arrest^{264, 265} However, if finding that there exists a reasonable suspicion of his/her commission of the crime – i.e. the arrest is lawful – the judge must also order release of the child with or without a condition, except that the judge finds it necessary to place him/her in detention to await trial based on reasons provided in the law.²⁶⁶ In the latter case, the judge must exhaustively analyze the case²⁶⁷ by considering all the evidence against and for the release of the child with “special diligence” and clearly and convincingly, not “general and abstract”, reason his/her decision in writing.²⁶⁸ In this regard, the “authorities responsible for detention”²⁶⁹ or the state,²⁷⁰ e.g. the investigating judge²⁷¹ or the prosecutor²⁷² who requests the use of pretrial detention, has the burden of proof of “substantial reasons to believe”²⁷³ that pretrial detention is necessary.

²⁶² IACHR, ‘*Measures to Reduce Pretrial Detention*’ 3 July 2017, p. 156; *Lebedev v. Russia*, ECtHR, App. No. 4493/04, 25 October 2007, para. 77; *Nikolova v. Bulgaria* [GC], ECtHR, App. No. 31195/96, 25 March 1999, para. 49; *Schiesser v. Switzerland*, ECtHR, App. No. 7710/76, 4 December 1979, para. 31.

²⁶³ HRC General Comment No. 35, paras. 34 and 39; UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, Principle 6, para. 9; Model Code of Criminal Procedure, Art. 175(7).

²⁶⁴ Model Code of Criminal Procedure, Art. 175(6).

²⁶⁵ IACHR (2017), pp. 113-114; IACHR (2013), p. 80; See also *McKay v. the United Kingdom* [GC], para. 40.

²⁶⁶ UNODC, *Handbook of Basic Principles and Promising Practices on Alternatives to Imprisonment* (UNODC, 2007), p. 18; Model Code of Criminal Procedure, Arts. 175(8) and 186; HCR General Comment No. 35, para. 34; CRC General Comment No. 24, paras. 85-86; See also *McKay v. the United Kingdom* [GC], paras. 41-42, 44-45 and 47; *Khudoyorov v. Russia*, ECtHR, App. No. 6847/02, 8 November 2005, para. 174.

²⁶⁷ IACHR (2017), p. 149.

²⁶⁸ *McKay v. the United Kingdom* [GC], paras. 43-44; *Boicenco v. Moldova*, ECtHR, App. No. 41088/05, 11 July 2006, para. 142; *Khudoyorov v. Russia*, para. 173; See also Luanda Guidelines, para. 11(c)(d); Directive (EU) 2016/800, Art. 10(2).

²⁶⁹ UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, Principle 13, para. 21 and Guideline 14, paras. 83-84.

²⁷⁰ *Aleksanyan v. Russia*, ECtHR, App. No. 46468/06, 22 December 2008, para. 179; *Merabishvili v. Georgia* [GC], ECtHR, App. No. 72508/13, 28 November 2017, para. 234; *Bykov v. Russia* [GC], ECtHR, App. No. 4378/02, 10 March 2009, para. 64; Luanda Guidelines, para. 11(g).

²⁷¹ CE Rec(2006)13, para. 8.

²⁷² Model Code of Criminal Procedure, Art. 186(2); IACHR (2017), pp. 73, 74 and 151.

²⁷³ UNODC (2007), p. 18; See also Model Code of Criminal Procedure, Art. 186(3).

3.3 Diversion of Children Considered as Offenders

3.3.1 Purposes of Diversion of Children Considered as Offenders

Diversion is a method to deal with children considered as offenders without processing them through the criminal proceedings but instead referring them to other alternative activities, services or programs which are non-judicial and appropriate for them,²⁷⁴ but they are still held responsible for their acts.²⁷⁵ The responsibility is not criminalization, but it may take such a form as reparation to the victim for the damage suffered, monitoring, community work, etc.²⁷⁶ The purposes of diversion are to protect children from being recorded as criminals and from being exposed to stigmatization and other negative impacts caused by the criminal justice system, and to encourage their social reintegration and “constructive role in society”.²⁷⁷

3.3.2 Conditions for Diversion of Children Considered as Offenders

Application of diversion of children considered as offenders must fulfill the following conditions. First, there must be “compelling evidence” that the criminal offense has been committed by the child.²⁷⁸ Second, the child voluntarily and freely accepts liability, and his/her acceptance of the liability must not be admitted as evidence to incriminate him/her in any later proceedings.²⁷⁹ Third, the child and the parents or guardian of the child or a person appointed by a court where applicable must voluntarily and freely agree on diversion after being provided with specific and sufficient information about the length, nature and content of diversion and after understanding the consequences of unsuccessful diversion.²⁸⁰ Fourth, the child must be able to get “legal or other appropriate assistance” in relation to the diversion.²⁸¹

If restorative justice is used as diversion, the child considered as an offender and the victims must voluntarily and freely consent to a diversion agreement, and throughout the process they are free

²⁷⁴ CRC General Comment No. 24, para. 15; Beijing Rules, Rule 11 and Commentary on Rule 11; UNICEF (2017), p. x.

²⁷⁵ Charles and Associates, Inc. (2017), p. 8; UNODC and United States Institute of Peace (2011), p. 86.

²⁷⁶ Hammarberg (2008), p. 194; Daniel P. Mears and others article ‘Juvenile Court and Contemporary Diversion: Helpful, Harmful, or Both?’ (2016) 15 *Criminology and Public Policy* 953-981, 963.

²⁷⁷ CRC General Comment No. 24, para. 15; Beijing Rules, Rule 11 and Commentary on Rule 11; Model Law on Juvenile Justice, Art. 15 and Commentary on Art. 15; Jill Farrell and others (2018), pp. 3-4.

²⁷⁸ CRC General Comment No. 24, para. 18(a); Model Law on Juvenile Justice, Art. 17(1)(a).

²⁷⁹ CRC General Comment No. 24, para. 18(a); Model Law on Juvenile Justice, Art. 17(1)(b); CE CM/Rec(2018)8, para. 30.

²⁸⁰ CRC General Comment No. 24, para. 18(b); Model Law on Juvenile Justice, Art. 17(2), (3) and (4)(a); Beijing Rules, Rule 11.3 and Commentary on Rule 11.3; Tokyo Rules, Rule 3.4; Commentary on the Tokyo Rules, Commentary on Rule 3.4; UNODC and WHO, *Treatment and Care for People with Drug Use Disorders in Contact with the Criminal Justice System: Alternatives to Conviction or Punishment* (UNODC and WHO, 2019), pp. 20-21.

²⁸¹ CRC General Comment No. 24, para. 18(d); Model Law on Juvenile Justice, Art. 17(4)(b).

to withhold their consent any time.²⁸² In addition, the victims, like the child considered as an offender, should have the right to obtain legal assistance, and translation service if necessary, and if they are also children, they must be assisted by their parents or guardian.²⁸³ Like the child considered as an offender, the victims must receive full information about the nature of the restorative justice, their rights, and consequences of their participation in the restorative justice.²⁸⁴ Differences in culture and power inequality between the child considered as an offender, the victims and others participating in the restorative justice should also be taken account of.²⁸⁵

3.3.3 Implementation of Diversion of Children Considered as Offenders

Diversion is applicable as soon as the child is alleged to have committed a criminal offense and throughout the criminal proceedings – during the investigation by the police and prosecutor and before the commencement of a trial.²⁸⁶ It applies to all criminal offenses, not just limited to petty crimes or first-time offenders but also including serious criminal offenses, depending on specific circumstances of each case.²⁸⁷ The authorities who have the power to order diversion of the child are the police, prosecutor and judge, depending on the stage where the criminal case is being handled. If the case is being investigated by the police and prosecutor, then the police and prosecutor have the power to order diversion of the child, but when the case has already been referred to the judge, the judge has the power to divert the child.²⁸⁸ When dealing with the child considered as an offender, the police, prosecutor, and judge have an obligation to consider diverting him/her from the criminal proceedings,²⁸⁹ and the child and the other parties may also have the right to request diversion.²⁹⁰ During the proceedings, the parents or guardian of the child, either the child considered as an offender or the child victim, must have the rights to fully participate, unless their participation conflicts with the best interests of the child.²⁹¹

²⁸² Basic Principles on the Use of Restorative Justice, para. 7; CE CM/Rec(2018)8, para. 16.

²⁸³ Basic Principles on the Use of Restorative Justice, para. 13(a).

²⁸⁴ Ibid, para. 13(b); CE CM/Rec(2018)8, para. 16.

²⁸⁵ Basic Principles on the Use of Restorative Justice, para. 9; CE CM/Rec(2018)8, para. 14.

²⁸⁶ CRC General Comment No. 24, paras. 8, 16 and 72; Lima Declaration, pp. 3-4.

²⁸⁷ CRC General Comment No. 24, paras. 8, 16 and 72; Beijing Rules, Commentary on Rule 11.4; Lima Declaration, pp. 3-4; CE CM/Rec(2018)8, para. 18.

²⁸⁸ CRC General Comment No. 24, para. 18(c); Beijing Rules, Rule 11.2; Model Law on Juvenile Justice, Arts. 16, 18(2) and 49; Lima Declaration, p. 4; Carolyn Hamilton, 'Guidance for Legislative Reform on Juvenile Justice' May 2011, pp. 56-58. Available at: https://www.un.org/ruleoflaw/files/Juvenile_justice_16052011_final.pdf (Accessed 13 May 2022).

²⁸⁹ Beijing Rules, Rule 11.1; Model Law on Juvenile Justice, Art. 13(4); Guidelines on the Role of Prosecutors, Guideline 19.

²⁹⁰ CE CM/Rec(2018)8, paras. 6 and 19.

²⁹¹ Ibid, para. 24; CRC General Comment No. 24, para. 56.

After the child has been arrested or alleged to have committed a criminal offense, a social inquiry report must be produced by the social agent “as soon as possible”²⁹² to assist decisions on disposition of the case – including decisions on diversion, pretrial detention and sentencing.²⁹³ The social agent must investigate and include in the report the past and present circumstances and backgrounds of the child, e.g. his/her family, job, education, health, strength, weakness, need for treatment, cares, rehabilitation and reintegration, as well as under what condition the child has committed the criminal offense.²⁹⁴

If the child is not diverted, there must be a written decision explaining the reasons why diversion is not used.²⁹⁵ In addition, decisions of the prosecutor, the police or other competent authorities to divert or not to divert the child must be subject to a speedy review by an independent body or a judicial review so as to limit their discretion against arbitrariness and promote due process.²⁹⁶ If the child is diverted, a written diversion plan or diversion agreement must be concluded. A diversion plan is used when diversion does not involve the victim, but on the other hand, a diversion agreement is used instead of a diversion plan when diversion is based on restorative justice, i.e. involvement of the victim.²⁹⁷ A diversion plan or diversion agreement must include necessary information such as diversionary measures with measurable objectives which the child must complete, obligations of the child’s parents or guardian, a mechanism to monitor the child’s compliance with diversionary measures, benefits of successful completion of diversionary measures, consequences for failure to complete diversionary measures, etc.²⁹⁸ When the child is diverted, criminal proceedings against the child must be suspended to await the outcome of the implementation of diversionary measures.²⁹⁹

Throughout the diversion process, the child must not be deprived of his/her liberty, and the legal guarantees and his/her human rights must be completely respected.³⁰⁰ According to the independent expert, Manfred Nowak, when children are diverted, they should not be institutionalized, and instead they should be placed in the family or, if it is not possible, in a community designed like a

²⁹² UNICEF (2017), p. 129.

²⁹³ Beijing Rules, Rule 16 and Commentary on Rule 16; UNICEF, *The Role of Social Work in Juvenile Justice*, 2013, p. 7; UNICEF Toolkit, Glossary of Terms; But See Model Law on Juvenile Justice, Art. 52.

²⁹⁴ Beijing Rules, Rule 16 and Commentary on Rule 16; UNICEF (2013), p. 7; UNICEF Toolkit, Glossary of Terms; UNICEF (2017), p. xi.

²⁹⁵ Model Law on Juvenile Justice, Commentary on Art. 16.

²⁹⁶ CRC General Comment No. 24, para. 18(c); Beijing Rules, Rule 11.3; Tokyo Rules, Rule 3.5; Commentary on the Tokyo Rules, Commentary on Rule 3.5; IACHR (2011), p. 60; UNICEF (2017), p. 128.

²⁹⁷ UNICEF (2017), p. 41.

²⁹⁸ Ibid, pp. 41 and 45; Charles and Associates, Inc. (2017), p. 24; UNODC, *Handbook on Restorative Justice Programmes* 2nd ed. (UNODC, 2020), p. 62.

²⁹⁹ CRC General Comment No. 24, para. 72.

³⁰⁰ Ibid, paras. 16, 18(e) and 72; See also Tokyo Rules, Rules. 3.8-3.9.

family.³⁰¹ Specifically, in addition to the right to consent and withdraw consent, the child undergoing drug addiction treatment as a diversionary measure must not be detained, punished, tortured, humiliated, degraded, or ill-treated; his/her dignity and human rights must be respected.³⁰²

When the child is diverted, there must also be a mechanism to continuously monitor the progress of and compliance by the child so as to ensure that diversionary measures are effectively implemented.³⁰³ The person who can be designated to monitor the child's progress and compliance with diversionary measures can be probation officers, the police, persons or institutions working with or providing services to the child, etc.³⁰⁴ In addition, there must be complaint procedures whereby the child participating in the diversion process can file a complaint regarding any violation of his/her rights to an independent or judicial authority so as to ensure that his/her rights are fully respected throughout the process.³⁰⁵

If the child can successfully complete diversionary measures, then the criminal proceedings against him/her must be terminated and the case must be finally and definitely closed; diversion records must be kept confidential and cannot be used as a criminal record or a conviction of the child.³⁰⁶ On the contrary, if the diversion is not successful, the police, prosecutor or judge, who has initially diverted the child, may resume the criminal proceedings; the child's confession of guilt in relation to the unsuccessful diversion must not be admitted as incriminating evidence or an aggravating factor in the resumed or any other criminal proceedings.³⁰⁷

³⁰¹ Report of the Independent Expert Leading the United Nations Global Study on Children Deprived of Liberty, para. 20.

³⁰² UNDP and Others, *International Guidelines on Human Rights and Drug Policy*, March 2019, pp. 8, 12, 13 and 16 (*International Guidelines on Human Rights and Drug Policy*); UNODC and WHO, *International Standards for the Treatment of Drug Use Disorders: Revised Edition Incorporating Results of Field-Testing* (UNODC and WHO, 2020), p. 9; UNODC, *From Coercion to Cohesion: Treating Drug Dependence Through Health Care, Not Punishment* (UNODC, 2010), pp. 5-6.

³⁰³ UNODC (2020), p. 63; Charles and Associates, Inc. (2017), pp. 11 and 24; UNODC, *Cross-Cutting Issues: Juvenile Justice* (UNODC, 2006), p. 10; UNICEF Toolkit on Diversion and Alternatives to Detention 2009, Systemic Approach to Diversion and Alternatives: Mapping and Planning Tool, 20 August 2010, p. 8, available at: https://sites.unicef.org/tdad/index_55673.html (last visited 12 May 2022) (UNICEF Toolkit, Systemic Approach).

³⁰⁴ UNODC (2020), p. 63.

³⁰⁵ Tokyo Rules, Rules 3.6-3.7; Commentary on the Tokyo Rules, Commentary on Rules 3.6-3.7; UNODC and WHO (2019), p. 22; UNICEF Toolkit, Systemic Approach, p. 8.

³⁰⁶ CRC General Comment No. 24, paras. 18(f) and 72; Model Law on Juvenile Justice, Art. 19; Basic Principles on the Use of Restorative Justice, para. 15; Tokyo Rules, Rules 3.11-3.12; Commentary on the Tokyo Rules, Commentary on Rules 3.11-3.12; CE CM/Rec(2018)8, para. 34.

³⁰⁷ Basic Principles on the Use of Restorative Justice, paras. 16-17; Model Law on Juvenile Justice, Art. 20; CE CM/Rec(2018)8, para. 35.

3.3.4 Diversionary Measures Applicable for Children Considered as Offenders

There are two types of diversions: unconditional and conditional diversions.³⁰⁸ Unconditional diversion is non-intervention.³⁰⁹ It applies to a situation where children commit a petty crime, but reaction of the school, family and society to the children's actions is constructive and appropriate, rendering criminal prosecution unnecessary.³¹⁰ In such a situation, the police, prosecutor and judge should discharge the case against the child without further proceeding.³¹¹ The police, prosecutor or judge may issue a written or verbal warning, without imposing any condition, on the child.³¹² Warning by the police should be issued to the child immediately after he/she is arrested or confesses the crime at the crime scene or at the police office when the guardian or parents of the child arrive.³¹³ An official warning may explain why the child is warned, the negative effects of the criminal offense on the child and the victims, the consequences if the child reoffends, and how the child can avoid reoffending.³¹⁴ An official warning by the prosecutor or judge may be issued to the child before commencement of the trial.³¹⁵

When unconditional diversion is inappropriate due to the circumstances and nature of the criminal offense, conditional diversion must be considered.³¹⁶ Under conditional diversion, the child is diverted from the criminal proceedings with certain conditions that provide him/her with a chance to demonstrate his/her qualities and abilities and encourage him/her to accept liability for his/her criminal actions for the purpose of social reintegration.³¹⁷ There are four conditions that can be included in a diversion plan or diversion agreement for the child: constructive diversion conditions, restrictive diversion conditions, residential diversion conditions, and restorative diversion conditions.³¹⁸ Constructive diversion conditions aim to prevent the child from recidivating by paying attention on rehabilitating and reintegrating the child and his/her "constructive role in society", which may include vocational training; programs aiming to develop the child's ability, communication, problem-solving skills and life skills; management of anger; attending school or religious ceremonies on a regular basis; counselling; and essay writing on the impacts of criminal

³⁰⁸ UNICEF (2017), p. xvii; Nowak (2019), pp. 310-311.

³⁰⁹ Beijing Rules, Commentary on Rule 11; Nowak (2019), p. 310.

³¹⁰ Ibid; Hamilton (2011), p. 52.

³¹¹ Tokyo Rules, Rule 5.1; Beijing Rules, Rule 11.2; Hamilton (2011), p. 52; See also Model Law on Juvenile Justice, Art. 49.

³¹² Nowak (2019), p. 310; UNICEF, *Justice for Children: Manual* June 2010, pp. 46-47. Available at: https://www.unicef.org/northmacedonia/media/2881/file/MK_JusticeChildrenManual_2010_EN.pdf (Accessed 13 May 2022); See also Model Law on Juvenile Justice, Art. 18(1).

³¹³ UNICEF (2017), p. 37; Nowak (2019), p. 310.

³¹⁴ UNICEF (2017), p. 37.

³¹⁵ Ibid.

³¹⁶ Nowak (2019), p. 311.

³¹⁷ UNICEF (2017), p. 41.

³¹⁸ Ibid, pp. 41-42.

activities.³¹⁹ Restrictive diversion conditions aim to restrict the child’s freedom of movement – such as a curfew or prohibition of visiting a particular place – or freedom to contact a particular person such as the victim or friends.³²⁰ Residential diversion conditions place the child in a semi-open or open institution for treatment, care, education and reintegration, which must be utilized only when strictly necessary and for a period as short as possible.³²¹ Finally, under restorative diversion conditions,³²² the child must restore the damage resulting from his/her criminal offense to the community, family, and victims, which may include a written or verbal apology; work performed for the victims and the child’s family; restitution or compensation to the victims or the child’s family; carrying out work for the benefit of the community; and attending “a victim empathy course”.³²³

Restorative justice may also be used as diversion to divert children from the criminal proceedings before commencement of a trial.³²⁴ Restorative justice may consist of several processes such as victim-offender mediation or conciliation, family group conferencing, community reparative boards, sentencing circles, and victim impact panels.³²⁵ The purpose of the process is to voluntarily and freely reach an agreement – among the child considered as an offender, the victim, and others affected where applicable – based on consensus,³²⁶ which contains “responses and programmes” namely community service, reparation, and restitution that aim to meet the parties’ responsibilities and needs of the individuals and the group and to reintegrate the child and the victim into society.³²⁷ The agreement reached must contain obligations that are proportional and reasonable to the child and should be supervised by the court.³²⁸ Restorative justice effectively holds the child responsible for his/her actions by making reparation to the community and the victim, shows empathy with the victim, teaches the child knowledge and skills that he/she needs, meaningfully repairs the harm and

³¹⁹ Ibid, p. 41.

³²⁰ Ibid, p. 42.

³²¹ Ibid; Hamilton (2011), p. 53.

³²² Restorative diversion conditions are different from restorative justice processes; See UNICEF (2017), p. 125.

³²³ UNICEF (2017), p. 42.

³²⁴ Nowak (2019), p. 323; CE CM/Rec(2018)8, para. 6; Office of the Special Representative of the Secretary-General on Violence against Children (2013), p. v; UNODC (2020), p. 41.

³²⁵ Basic Principles on the Use of Restorative Justice, para. 2; Lima Declaration, p. 3; Nowak (2019), p. 323; CE CM/Rec(2018)8, para. 5; Office of the Special Representative of the Secretary-General on Violence against Children (2013), pp. 7-16; UNODC (2020), pp. 23-40.

³²⁶ CE CM/Rec(2018)8, paras. 14 and 16.

³²⁷ Basic Principles on the Use of Restorative Justice, paras. 3 and 7; Lima Declaration, pp. 3-4.

³²⁸ Basic Principles on the Use of Restorative Justice, paras. 7 and 15; CE CM/Rec(2018)8, paras. 7 and 50.

engages the victim.³²⁹ It heals not only the child considered as an offender but also the community and the victim.³³⁰

3.4 Alternatives to Pretrial Detention of Children Considered as Offenders

3.4.1 When Alternatives to Pretrial Detention Applies

Alternatives to pretrial detention should start as soon as possible³³¹ when diversion of the child from criminal proceedings does not apply or is not successful.³³² Judges have an obligation to consider alternative measures to pretrial detention when deciding whether to detain or release a person from pretrial detention, so as to make sure that he/she will attend the court proceedings, not avoid judgment execution, or not commit any act that may interfere with proceedings of the court.³³³ There are two types of alternatives to pretrial detention: unconditional and conditional alternatives.³³⁴ Judges must reasonably use alternatives to pretrial detention, taking into consideration the effectiveness and purpose of each alternative and special circumstances of the individual case, and comply strictly with the proportionality, necessity and legality principles.³³⁵ Judges must apply only the alternative that can achieve its purpose with the least restriction on liberty of the child, taking into account the child's best interests.³³⁶ In this regard, to achieve the effectiveness of the alternative to pretrial detention, judges must "carefully" consider the negative and positive effects of each alternative so as to apply only the most suitable one to the child.³³⁷

3.4.2 Unconditional Alternatives to Pretrial Detention

Under unconditional alternatives, which are also called personal recognizance or unconditional bail, the detained person is released without any condition.³³⁸ However, he/she must promise to comply with the law and summons issued by the court.³³⁹ Release without a condition should be

³²⁹ Annie E. Casey Foundation, 'Transforming Juvenile Probation: A Vision for Getting It Right' 2018, p. 20. Available at: <https://assets.aecf.org/m/resourcedoc/aecf-transformingjuvenileprobation-2018.pdf> (Accessed 13 May 2022); Sandra Pavelka and Douglas Thomas article 'The Evolution of Balanced and Restorative Justice' (2019) 70 *Juvenile and Family Court Journal* 37-58, 42.

³³⁰ Basic Principles on the Use of Restorative Justice, para. 3; Lima Declaration, Preamble.

³³¹ Tokyo Rules, Rule 6.2; UNODC (2007), p. 18; IACHR (2017), pp. 73 and 151.

³³² Nowak (2019), p. 316; UNICEF (2017), pp. 48-49; Hamilton (2011), p. 62.

³³³ HRC General Comment No. 35, para. 38; *Aleksanyan v. Russia*, para. 180; *Sulaoja v. Estonia*, ECtHR, App. No. 55939/00, 15 February 2005, para. 64; UNODC (2007), p. 19.

³³⁴ HRC General Comment No. 35, para. 41; UN Basic Principles and Guidelines on Remedies and Procedures on the Right of Persons Deprived of Their Liberty to Bring Proceedings Before a Court, para. 26; UNICEF (2017), p. 49.

³³⁵ IACHR (2017), pp. 73 and 151.

³³⁶ *Ibid.*, p. 73. UNODC (2007), p. 19;

³³⁷ UNODC (2007), p. 20.

³³⁸ *Ibid.*; UNODC (2013), pp. 97-98.

³³⁹ *Ibid.*

used when the criminal offense allegedly committed by the person is not serious, and he/she just commits it the first time and has an occupation, a clear residence in the community, and a family who can help or take care of him/her when he/she is released.³⁴⁰ The court may unconditionally release the child into the care of his/her guardian, family members, parents, responsible adults, community leaders, NGOs or civil society organizations.³⁴¹

3.4.3 Conditional Alternatives to Pretrial Detention

Before conditional alternatives to pretrial detention are ordered, there must be a hearing.³⁴² The court may order these alternative measures only when the condition to be imposed on the detained person is necessary based on “a probable cause” – supported by specific circumstances and facts³⁴³ – to ensure that he/she, if released, would not avoid the hearing, interfere with the investigation, or commit any act that may affect safety of the witnesses, victims, or people involved in the court proceedings.³⁴⁴ If the court decides to use conditional alternative measures to pretrial detention, it must issue a reasoned written decision.³⁴⁵ The burden of proof is on the prosecutor if he/she requests the court to use conditional alternatives to pretrial detention.³⁴⁶

If necessary, the court may order one or more of the following conditions if the child is to be released from pretrial detention: a bail; prohibition from meeting with a particular person or going to a specific place; a curfew that obliges the child not to leave home during a particular time; school attendance; direct or close community supervision by an agency appointed by the court; electronic monitoring; surrendering of passports and other identification documents; regular report to a reporting center, probation office, or police office; and custody and care of a diagnostic or observation center, foster family, open care institution, or group home.³⁴⁷ A monetary bail should not be used as a requirement for release from pretrial detention for children from a marginalized and poor background or family, as they do not have sufficient means to pay it and it is discriminatory against them.³⁴⁸ A foster family, open care institution, or group home should be

³⁴⁰ Ibid.

³⁴¹ Ibid, p. 49.

³⁴² Model Code of Criminal Procedure, Art. 186(4).

³⁴³ Ibid, Art. 1(36).

³⁴⁴ Ibid, Arts. 184(4) and 186(4)(e).

³⁴⁵ Ibid, Art. 186(7); Council of Europe, Recommendation Rec(2006)13 of the Committee of Ministers to Member States on the Use of Remand in Custody, the Conditions in Which It Takes Place and the Provision of Safeguards against Abuse, 27 September 2006, para. 21 (CE Rec(2006)13).

³⁴⁶ Model Code of Criminal Procedure, Art. 186(2).

³⁴⁷ UNICEF (2017), p. 49; Model Law on Juvenile Justice, Art. 34(3) and Commentary on Art. 34(3); Nowak (2019), pp. 316-317; UNODC (2007), pp. 20-22.

³⁴⁸ UNICEF (2017), p. 49; CRC General Comment No. 24, para. 88; Hamilton (2011), p. 62; See also Model Law on Juvenile Justice, Art. 34(2) and Commentary on Art. 34(2).

used when the child does not have a family or parent to take care of his/her or his/her family conditions are not suitable.³⁴⁹

When a person is conditionally released pending trial, there must be a supervising and monitoring mechanism to check the effectiveness of the alternative measures and whether the released person has complied with the conditions imposed on him/her.³⁵⁰ In this regard, there must be good cooperation, established by law, among those working in the criminal justice, education providers, social welfare service, civil society organizations and other agencies that provide support to the alternative measures.³⁵¹ Where the imposed alternative measures are found to have been breached, such a breach should not automatically result in revocation of the alternative measures and placing the child in pretrial detention.³⁵² In fact, there should be an investigation into the reasons why there is such a breach, taking into account the reasons provided by the child and those supervising the execution of the alternative measures, and, if possible, a sanction rather than detention should be applied.³⁵³

3.5 Concluding Remarks

International, and including regional, norms and standards protect the right to liberty of the child. The child may be deprived of his/her liberty only when such deprivation of liberty complies with the principles of legality or lawfulness, non-arbitrariness, necessity and proportionality.

When the child has committed a criminal offense, exposing him/her to the criminal justice system should be avoided due to its negative effects on the child. Whenever possible, the child should be diverted from the criminal proceedings, depending on circumstances of the child and seriousness of the crime. To facilitate decisions on diversion, the social agent must conclude a social inquiry report as fast as possible. Any decision concerning diversion must be subject to a speedy and independent or judicial review so as to safeguard against arbitrariness and to promote respect for due process. When diversion is applied, there must be a mechanism to monitor the child's progress and compliance, and the rights of the child and his/her parents or guardian and the victim must also be safeguarded throughout the process. In this regard, there must be procedures in place for the child to complain to an independent or judicial body about any violation of his/her rights during the diversion process.

When diversion is inapplicable or unsuccessful and criminal proceedings are carried out against the child, he/she should not be placed in pretrial detention. The child has the right to challenge the legality of deprivation of his/her liberty before an independent and impartial judge. For this reason,

³⁴⁹ UNICEF (2017), p. 49; Nowak (2019), p. 317.

³⁵⁰ UNODC (2007), p. 23; IACHR (2017), pp. 78, 79 and 152.

³⁵¹ Joint Report of OHCHR, UNODC and the Special Representative on Violence against Children, paras. 74 and 96; IACHR (2017), p. 80.

³⁵² IACHR (2017), pp. 80, 81 and 152; CE Rec(2006)13, para. 12.

³⁵³ Ibid; Tokyo Rules, Rules 14.2-14.3.

the child must be automatically brought before the judge no longer than 24 hours after his/her arrest. To decide whether to detain the child or release him/her pending trial, a closed adversarial hearing must be conducted with full respect for the principle of equality of arms. If the child is detained, a decision not to release him/her must be clearly and convincingly reasoned based on a thorough analysis of the facts and evidence arguing against and for release. If the child is conditionally released pending trial, conditions imposed on him/her must be necessary and proportional. Effective conditional alternative measures to pretrial detention require a mechanism in place to monitor the child's compliance with the measures. When the child is found to have breached the alternative measures to pretrial detention, a sanction rather than an automatic resort to detention should be used.

Chapter 4: Legal Analysis of Cambodian Norms and Standards concerning Alternatives to Deprivation of Liberty of Children Considered as Offenders

This chapter looks into Cambodian norms and standards governing alternatives to deprivation of liberty of children considered as offenders – diversion and alternatives to pretrial detention – by identifying gaps in Cambodian law compared with the international and regional norms and standards as discussed in the above chapter. The chapter is concluded with suggested solutions to the problems identified.

4.1 Age of Criminal Responsibility and Determination of the Child's Age

Under Cambodian law, a child is defined as a person aged below eighteen years.³⁵⁴ The minimum age of criminal responsibility is fourteen years at the time of committing a criminal offense.³⁵⁵ The age of the child is determined by a birth certificate or, where the birth certificate is not available, other documents which can prove the birth of the child.³⁵⁶ Where the documents proving the age of the child are not available, the authenticity of the documents is in doubt, or the age of the child is not clear, the age of the child can be proved by any means which the court considers trustworthy.³⁵⁷ Throughout the criminal proceedings, the competent authority has an obligation to take all necessary actions to seek evidence to prove the age of the child as soon as possible.³⁵⁸ Any doubt about the child's age must benefit the child.³⁵⁹

Although the definition of the child and minimum age of criminal responsibility under Cambodian law is in compliance with the international norms and standards, Cambodian law fails to mention whether in determining the age of the child, absent a birth certificate, the court and other competent authorities should take into account opinions of the parents, guardians, teachers, leaders of the community, etc. or not. The law also fails to state the determination of the age of the child by examination of his/her psychological and physical development by experts or professionals. The law does not specify the manner in which this method is to be applied so as not to cause any trauma or violation of the rights or dignity of the child and whether it should be used only as a measure of last resort. Failing to prescribe this method in the law may lead to its misapplication in violation of the rights and dignity of the child in practice.

³⁵⁴ Law on Child Justice, Art. 4(3).

³⁵⁵ Ibid, Arts. 7 and 9(1).

³⁵⁶ Ibid, Art. 9(2).

³⁵⁷ Ibid.

³⁵⁸ Ibid, Art. 9(3).

³⁵⁹ Ibid, Art. 9(4).

Another problem is that Cambodian law requires the police to refer the case to the prosecutor for investigation if the age of the child is in doubt.³⁶⁰ If the prosecutor is still unable to determine the age of the child, the law requires that the prosecutor refer the case to the investigating judge for further investigation.³⁶¹ Nevertheless, the law fails to stipulate whether the police should physically refer the child whose age is unclear whether it is below or above the minimum age of criminal responsibility, together with the case file, to the prosecutor and whether the prosecutor should further physically refer that child to the investigating judge. Article 39 of the Law on Child Justice can be interpreted that the investigating judge can place the child whose age is unclear in pretrial detention, but if the child is later found to be under the minimum age of criminal responsibility, the investigating judge or trial judges must release him/her.³⁶² This situation violates the rights of the child especially the principle that any doubt about the child's age must benefit the child. In fact, this situation has already happened in reality as the child who is under the minimum age of criminal responsibility, i.e. fourteen, has been processed by the Cambodian criminal justice system, even placed in detention, and doubt about the child's age has not been interpreted for the benefit of the child.³⁶³

4.2 Diversion of Children Considered as Offenders

4.2.1 Conditions for Diversion of Children Considered as Offenders

Under Cambodian law, diversion of children considered as offenders is applicable when five minimum conditions are fulfilled. First, there is sufficient evidence to bring a charge of a criminal offense against the child or sufficient evidence to prove his/her guilt.³⁶⁴ Second, the child has voluntarily and freely admitted to have committed the criminal offense, without any pressure or coercion, and has apologized the victim.³⁶⁵ Third, the child's admission of guilt must not be admitted as evidence against him/her in any subsequent proceedings.³⁶⁶ Fourth, the criminal offense committed by the child is a petty crime or misdemeanor.³⁶⁷ Fifth, the child has agreed to diversion after having consulted the social agent or his/her lawyer and having considered the effects and consequences of implementation of the diversionary measures.³⁶⁸

³⁶⁰ Ibid, Arts. 14(5) and 25(2).

³⁶¹ Ibid, Art. 25(3).

³⁶² Ibid, Arts. 39(3) and 49(1).

³⁶³ Child Rights Coalition Cambodia and Legal Aid of Cambodia, '*JLSOP Implementation Mapping*' August 2020, p. 3; Human Rights Council, Report of the Special Rapporteur on the Situation of Human Rights in Cambodia, A/HRC/39/73, 15 August 2018, para. 27 (Report of the Special Rapporteur on the Situation of Human Rights in Cambodia 2018).

³⁶⁴ Law on Child Justice, Art. 63(a).

³⁶⁵ Ibid, Art. 63(b).

³⁶⁶ Ibid, Arts. 53(2) and 60.

³⁶⁷ Ibid, Art. 63(c).

³⁶⁸ Ibid, Art. 63(d).

There are three significant conditions which are necessary to protect the rights and interests of the child but Cambodian law fails to mention. First, the law just requires the child's consent to diversion, without mentioning whether consent of the child's parents or guardian is needed. This differs from international norms and standards which require consent of both the child and his/her parents or guardian to participate in diversion, unless participation of the parents or guardian conflicts with the best interest of the child.³⁶⁹ Without any specification about consent of the child's parents or guardian, it may be interpreted that as long as the child consents to diversion, consent of his/her parents or guardian is irrelevant.

Second, although Cambodian law requires the child to have obtained consultation with the social agent or his/her lawyer before consenting to diversion, it does not specify to what extent the social agent or the lawyer must provide the child with information related to diversion before the child's consent is said to be valid. The law is also silent on whether the social agent, lawyer, prosecutor or judge needs to provide the child's parents or guardian with specific and sufficient information about diversion. As elaborated in the previous part, under international norms and standards, the information must be provided to both the child and his/her parents or guardian, and such information must be specific and sufficient and contain the length, content and nature of diversion, including any consequence the child may face if he/she cannot successfully complete diversionary measures.³⁷⁰ Any failure by the social agent, lawyer, prosecutor or judge to provide the child and his/her parents or guardian with such adequate and specific information about diversion may lead to uninformed consent of the child and his/her parents or guardian and thus this may result in unsuccessful implementation of the diversionary measures.

Third, Cambodian law limits diversion only to a petty crime and misdemeanor³⁷¹ and fails to specify whether repeated offenders are also eligible for diversion. This is different from the opinion of Committee on the Rights of the Child, the Beijing Rules and Lima Declaration on Restorative Juvenile Justice, according to which diversion can also apply to a serious criminal offense and repeated offenders, depending on specific circumstances of each case.³⁷² Limiting diversion to only a petty crime and misdemeanor by excluding a felony without taking into consideration the circumstances under which a felony is committed, seriousness of such a felony and personal circumstances of the child and the failure to stipulate whether repeated offenders are eligible for diversion are a failure by Cambodian law to take into account the best interests of the child and the

³⁶⁹ See Model Law on Juvenile Justice, Art. 17(2), (3) and (4)(a); Beijing Rules, Rule 11.3 and Commentary on Rule 11.3; CRC General Comment No. 24, para. 18(b); Tokyo Rules, Rule 3.4; Commentary on the Tokyo Rules, Commentary on Rule 3.4.

³⁷⁰ Ibid.

³⁷¹ Under Cambodian law, a misdemeanor is a crime for which the punishment is between seven days and the maximum of five years imprisonment, and a petty crime is a crime for which the punishment is less than seven days imprisonment and/or a fine; See Criminal Code, Arts. 47-48.

³⁷² See CRC General Comment No. 24, paras. 8, 16 and 72; Beijing Rules, Commentary on Rule 11.4; Lima Declaration, pp. 3-4.

principles of necessity and proportionality. In Indonesia, for example, diversion also applies to a felony for which the punishment is up to seven years imprisonment.³⁷³

4.2.2 Implementation of Diversion of Children Considered as Offenders

Under Cambodian law, diversion is applicable from the moment the child is alleged to have committed a criminal offense, throughout inquiries by the police and prosecutors and investigation by the investigating judge until the commencement of a trial at the court of first instance and the appeal court.³⁷⁴ The authorities who have the competence to order diversion of the child are the police,³⁷⁵ prosecutors,³⁷⁶ investigating judges,³⁷⁷ trial judges of the court of first instance,³⁷⁸ and trial judges of the appeal court³⁷⁹ depending on the stage at which the case is being handled.³⁸⁰

The police have the competence to divert the child considered as an offender, only when he/she has committed a petty crime.³⁸¹ In this case, the police must issue a written or oral warning to the child and immediately return him/her to his/her legal representative³⁸².³⁸³ Where the petty crime has involved a victim, the police may conduct a mediation between the child, who has confessed to the crime, and the victim for the purpose of resolving the dispute.³⁸⁴ The law uses the word “may”, which means that mediation conducted by the police between the child and the victim is not obligatory. In all diverted cases, the police must report and refer the case files to the prosecutor so that the prosecutor can take further action in accordance with the law.³⁸⁵

Under the law, the prosecutor, investigating judge and trial judges have an obligation to primarily consider diverting the child if the criminal offense committed by him/her is a petty crime or misdemeanor.³⁸⁶ Where the prosecutor, investigating judge, or trial judges have decided to divert the child, they must suspend the criminal proceedings, release the child from detention, and return the child to his/her legal representative or provincial/municipal department of social work for temporary care while the child is awaiting the preparation of a diversion plan.³⁸⁷ In this case, the

³⁷³ Office of the Special Representative of the Secretary-General on Violence against Children (2013), pp. 4 and 22.

³⁷⁴ Law on Child Justice, Arts. 13, 28, 38, 52, 58, 59, and 61.

³⁷⁵ *Ibid*, Art. 13.

³⁷⁶ *Ibid*, Art. 28.

³⁷⁷ *Ibid*, Art. 38.

³⁷⁸ *Ibid*, Art. 52.

³⁷⁹ *Ibid*, Arts. 58-59.

³⁸⁰ *Ibid*, Art. 61.

³⁸¹ *Ibid*, Art. 13(1).

³⁸² A legal representative of the child is his/her parent or guardian; See Law on Child Justice, Art. 4(5).

³⁸³ Law on Child Justice, Art. 13(1).

³⁸⁴ *Ibid*, Art. 13(2).

³⁸⁵ *Ibid*, Art. 13(3).

³⁸⁶ *Ibid*, Arts. 28(1), 38(1) and 52(1).

³⁸⁷ *Ibid*, Arts. 28(2)(3), 38(1), 52(2)(4)(5) and 58.

victim may file a civil action to a civil court to recover any damage caused by the criminal offense,³⁸⁸ or the trial judges may render a civil judgment ordering the child to pay damages to the victim if it is so requested by the victim.³⁸⁹

When deciding to divert the child, the prosecutor, investigating judge or trial judges may order one or more diversionary measures. Those measures include attending vocational trainings, spending specific time with family, regular school attendance, joining community programs or any center aimed at preventing recidivism, performing community work, restitution to the victim, not changing the home address without permission, not going to a particular place, not going beyond a determined territorial boundary, responding to any summon issued by the competent authorities, regularly reporting to the police station, paying a monetary bail depending on the financial means of the child, depositing any identification document, not meeting with a particular person, not carrying or possessing any weapon, not driving any vehicle, receiving medical treatment, and any other measures which serve the purpose of diversion.³⁹⁰

The social agent has an obligation to prepare a diversion plan within one month after diversion has been ordered.³⁹¹ The diversion plan must be specific to the child and take into consideration the followings: opinions of the child, his/her legal representative and the victim; appropriateness of the diversion plan; background, language, religion and culture of the child; family circumstances, intellect and education of the child; proportionality of diversionary measures, seriousness of the criminal offense, the child's circumstances and interests of the society; and development needs and age of the child.³⁹² In addition, the diversion plan must benefit the child, make the child understand the negative effects of his/her actions, retribute the damage to the victim, be implemented at the place appropriate for the child, avoid exploitation or causing any harm to the child, not deprive the child of his/her liberty, and not affect the child's education if he/she is a student.³⁹³ The diversion plan must be approved by the relevant prosecutor, investigating judge, or trial judges before it can be implemented.³⁹⁴

Throughout the implementation of the diversion plan, the social agent and person in charge of implementing the diversion plan have an obligation to manage and monitor the child.³⁹⁵ The person in charge of implementing the diversion plan must report the success, failure or any problem to the social agent who must further, together with his/her personal opinion, report to the prosecutor, investigating judge or trial judges who have ordered the diversion.³⁹⁶ To serve the best interest of

³⁸⁸ Ibid, Arts. 28(4) and 38(2).

³⁸⁹ Ibid, Arts. 52(3) and 58.

³⁹⁰ Ibid, Art. 65; Criminal Procedure Code, Art. 223.

³⁹¹ Law on Child Justice, Art. 66(1).

³⁹² Ibid, Art. 66(2).

³⁹³ Ibid, Art. 66(3).

³⁹⁴ Ibid, Art. 68.

³⁹⁵ Ibid, Art. 69(1).

³⁹⁶ Ibid, Art. 69(2).

the child, the prosecutor, investigating judge or trial judges may order alteration of the diversion plan *proprio motu* or upon a submission by the social agent.³⁹⁷ If the child has successfully completed the diversion plan, the prosecutor, investigating judge or trial judges must terminate the criminal proceedings against the child.³⁹⁸ On the contrary, if the diversion is not successful, the prosecutor or the judge may consider rediverting the child, taking into consideration the reasons why the diversion is unsuccessful and opinions of the social agent, the person in charge of implementing the diversion plan, the child, the child's legal representative and lawyer or otherwise resume the criminal proceedings.³⁹⁹

Some legal issues can be identified in Cambodian law regarding implementation of diversion. First, with regard to diversion by the police, although Cambodian law obliges the police to issue a warning to the child, the law fails to specify contents of the warning, e.g. the reason why the child is warned, impacts of the child's actions on the victims and the child him/herself, consequences of reoffending, and how the child can avoid reoffending. Moreover, although the law requires the police to divert the child in cases involving a petty offense, the law does not allow the police to terminate criminal proceedings against the child by themselves, but in all petty crime cases in which the police have diverted the child, they must report and refer the case files to the prosecutor. The law does not provide specifically what further steps, and how immediate it is, the prosecutor must take after receiving reports and case files from the police, rather than just stating that "for the prosecutor to take further action in accordance with the law". This situation may lead to increased unnecessary caseloads at the prosecutor's office and criminal proceedings against the child not immediately terminated despite the fact that the child has already been warned or diverted. Further, it may be possibly interpreted that the prosecutor has the power to review the police's decision to divert the child and where the prosecutor is not satisfied, he/she may revoke the police's decision.

Second, although Cambodian law requires the investigating judge and trial judges to take into consideration a social inquiry report,⁴⁰⁰ the law does not set a clear timeframe for submission of such a report by the social agent. In fact, the law requires that before deciding whether to divert or not to divert the child, the prosecutor, investigating judge and trial judges must take into consideration, *inter alia*, personal circumstances of the child such as his/her maturity, age, knowledge and personal attitude, and influence of the child's family and surrounding environment on the child's commission of the crime.⁴⁰¹ However, without a clear timeframe set by the law for the social agent to submit the social inquiry report before decisions on diversion is made, the prosecutor, investigating judge or trial judges may not have sufficient information to make a proper decision. If they decide not to divert the child due to lack of information resulting from the absence of the social inquiry report, this decision would negatively affect the rights of the child.

³⁹⁷ Ibid, Art. 70.

³⁹⁸ Ibid, Arts. 28(5), 38(3), 52(8) and 58.

³⁹⁹ Ibid, Arts. 28(6), 38(4), 52(9), 58 and 71.

⁴⁰⁰ Ibid, Arts. 4(8), 39(2) and 46.

⁴⁰¹ Ibid, Art. 64.

Third, diversion under Cambodian law is not based on restorative justice. Although the law obliges the police to divert the child who has committed a petty crime, conducting a mediation between the victim and the child is dependent on discretion of the police. The law does not impose any obligation on the police to conduct or attempt to conduct a mediation. Although the law requires the child's apology to the victim as a pre-condition for diversion and the child may be ordered to retribute damage to the victim, there is no requirement that the prosecutor, judge, or social agent mediate or attempt to mediate the child and the victim. However, the law just requires that the prosecutor and the judge take into account any harm caused to the victim when deciding whether to divert the child, and the social agent take into account opinions of the victim when preparing a diversion plan. There is no specification about the victim's active role in the diversion process particularly in the preparation of the diversion plan, legal assistance or any other appropriate support to the victim especially when he/she is a child, specific and sufficient notification to the victim about the purposes, effects and consequences of diversion, and whether the victim must consent to the diversion plan.⁴⁰² This seems that Cambodian law prioritizes children considered as offenders over the victim by leaving the interests and rights of the victim behind. By not deeply involving those affected by the action of the child, including members of the community, in the diversion process, diversion may lose support of the community and the victim and thus may become unsuccessful, as research shows that diversion based on restorative justice is more effective, i.e. effective diversion must involve the victim and members of the communities.⁴⁰³

Fourth, although the written diversion plan is required to include information as stipulated in Article 67 of the Law on Child Justice, some important information is missing. For example, there is no clear requirement to include in the diversion plan the benefits that the child will receive if he/she can achieve the objectives and expectations of diversionary measures, i.e. termination of the criminal proceedings against him/her, consequences for not being able to complete those objectives and expectations, or monitoring mechanisms, e.g. "minimal monitoring", "as-needed reporting", progress reporting, or "referral monitoring",⁴⁰⁴ including monitoring methods such as office or home visits, contacts by phone, etc.⁴⁰⁵ Including this missing information in the diversion plan would make the plan more informative for the child, the child's legal representative, the social

⁴⁰² Ibid, Art. 67.

⁴⁰³ Jennifer S. Wong and others article 'Can At-Risk Youth Be Diverted from Crime?: A Meta-Analysis of Restorative Diversion Programs' (2016) 43 *Criminal Justice and Behavior* 1310-1329, 1324; Michigan Council on Crime and Delinquency (2017), p. 25; Juvenile Justice and Welfare Council of the Philippines, 'Study on Diversion and Alternative Measures to Detention: A Documentation of Good Practices' 2019, pp. 3 and 22. Available at: <https://www.jjwc.gov.ph/wp-content/uploads/2020/08/Study-on-Diversion-and-Alternative-Measures-to-Detention-A-Documentation-of-Good-Practices.pdf> (Accessed 13 May 2022).

⁴⁰⁴ See e.g. Models for Change Juvenile Diversion Workgroup (2011), p. 51.

⁴⁰⁵ See e.g. Models for Change, 'Guide to Developing Pre-Adjudication Diversion Policy and Practice in Pennsylvania' September 2010, pp. 9-10. Available at: https://www.pccd.pa.gov/Juvenile-Justice/Documents/Pre-Adjudication_Diversion_Policy_Guide.pdf (Accessed 12 May 2022).

agent, those in charge of implementing the diversion plan, and other related people or institutions, which can contribute to the success of implementation of the diversion plan.

Fifth, although Cambodian law requires the social agent and person in charge of implementing the diversion plan to manage and monitor the child and report to the prosecutor or the judge on the success, failure and problems of implementing the diversion plan, the law fails to specify how often or regularly such a report should be made. Without specification about how often or regularly the report should be produced, it may be interpreted that the social agent and person in charge of implementing the diversion plan just have an obligation to report only the success, failure or problems, and there is no requirement to regularly report the progress of the child. In addition, the law does not specify how often the social agent needs to contact or meet with the child. The lack of frequent meetings with the child may hinder the effectiveness of the diversion plan, as effective diversion requires intensive contacts with the child and ongoing monitoring.⁴⁰⁶

Sixth, Cambodian law is silent on the procedures whereby the child can file a complaint regarding any violation of his/her rights during the implementation of the diversionary measures. When there is no such mechanism in place for the child to complain about any violation of his/her rights to an independent authority, e.g. a court, while he/she is participating in the diversion process, any violation of the rights of the child might be taken for granted and thus his/her rights might not be fully safeguarded.

Finally, although Cambodian law imposes an obligation on the police to divert the child and the prosecutor and judge to primarily consider diversion, the law fails to specify whether they must render a written reasoned decision if they decide not to divert the child. In addition, the law does not provide whether decisions of the police, prosecutor or judge to divert or not to divert the child should be subject to a judicial review. Further, the law fails to stipulate whether the child or his/her legal representative or lawyer can request the prosecutor or judge to consider diversion. Absent any provision in this respect, the rights of the child would not be safeguarded if the police, prosecutor or judge is negligent or his/her decision concerning diversion is arbitrary and violates the rights of the child.

4.3 Pretrial Detention of Children Considered as Offenders

4.3.1 Arrest and Police Custody of Children Considered as Offenders

Under Cambodian law, in principle, arrest and police custody of the child are measures of last resort.⁴⁰⁷ The police can arrest the child aged between fourteen and below eighteen only when he/she commits a flagrant misdemeanor or felony.⁴⁰⁸ That is, the child may be arrested while he/she is committing or has just committed a criminal offense, or he/she is being chased immediately after

⁴⁰⁶ See James Austin and others (2005), p. 21.

⁴⁰⁷ Law on Child Justice, Arts. 5 and 17.

⁴⁰⁸ Ibid, Art. 15(1).

having committed a criminal offense.⁴⁰⁹ The child may also be arrested if immediately after committing a criminal offense, he/she is found possessing articles or there are clues or traces on him/her, which indicate that he/she has committed a criminal offense.⁴¹⁰ After arresting the child, the police may place him/her in custody if the police believe that he/she has committed a criminal offense⁴¹¹ and, if released, he/she would cause danger to the victim, witnesses, or public security; destroy evidence; or abscond, or the police custody is necessary to protect the child's safety.⁴¹²

There are three problems concerning police arrest and custody of the child that can be identified in Cambodian law. First, although Cambodian law allows the police to place the child in custody based on the reason of public security, the term, public security, is not defined in the law. According to Human Rights Committee, general terms such as "public security" should not be used as a ground to restrict liberty of a person.⁴¹³ The use of such a general term in the law may lead to arbitrary application or interpretation of the law, which may result in violation of the right to liberty of the child. Second, the law allows the police to arrest and place in custody the child as young as fourteen years of age.⁴¹⁴ This is contrary to opinions of Committee on the Rights of the Child, according to which the minimum age of deprivation of liberty should be sixteen.⁴¹⁵ Finally, Cambodian law does not prioritize immediate release of the child while he/she is in police custody. Although the law requires the police to conclude the investigation as soon as possible,⁴¹⁶ there is no legal provision requiring the police or prosecutor to prioritize immediate release of the child to his/her legal representative, e.g. by imposing obligations on him/her to return to the police office, the office of prosecutors or the court.

4.3.2 The Right to Challenge Deprivation of Liberty of Children Considered as Offenders

Cambodian law allows the police to place the child in custody up to 48 hours, counting from when he/she arrives at the police station, but not when he/she is arrested, and excluding time for transportation.⁴¹⁷ After this time period expires, the prosecutor may order the police to release the child or transport him/her to the prosecutor's office.⁴¹⁸ The prosecutor may request the investigating judge to place the child in pretrial detention by physically referring the child to the investigating judge.⁴¹⁹

⁴⁰⁹ Criminal Procedure Code, Art. 86.

⁴¹⁰ Ibid.

⁴¹¹ Ibid, Art. 96(1).

⁴¹² Law on Child Justice, Art. 17(1).

⁴¹³ HRC General Comment No. 35, paras. 22 and 38.

⁴¹⁴ Criminal Procedure Code, Art. 96.

⁴¹⁵ CRC General Comment No. 24, para. 89.

⁴¹⁶ Law on Child Justice, Art. 17(2).

⁴¹⁷ Criminal Procedure Code, Art. 96.

⁴¹⁸ Ibid, Art. 103.

⁴¹⁹ Ibid, Art. 206(1).

Under the law, the investigating judge has the power to order pretrial detention of the child if he/she has been accused of committing a criminal offense punishable by at least one-year imprisonment and the detention is necessary.⁴²⁰ The judge may order pretrial detention if it is necessary to prevent any danger to the victim and witnesses or collision between the child and the other perpetrators, to end the criminal offense or prevent it from reoccurring, to protect the child's safety, to ensure the child's appearance before the court, to protect any evidence from being destroyed, and to protect the public order.⁴²¹ Before deciding on pretrial detention, the investigating judge must consider the social inquiry report, if it has been submitted by the social agent,⁴²² inform the child and his/her lawyer and allow them to express their opinions and submit defensive measures.⁴²³ A copy of the arrest and police custody record must be provided to the lawyer upon his/her request.⁴²⁴ The lawyer also has the right to request other documents in the case file.⁴²⁵ If the investigating judge decides to place the child in pretrial detention, he/she must issue a reasoned written decision.⁴²⁶

After placing the child in pretrial detention, the investigating judge has the power to release him/her any time.⁴²⁷ He/she may order release of the child *proprio motu* or following a submission by the prosecutor, the child, or the child's legal representative or lawyer.⁴²⁸ If a submission for release by the child or his/her representative has been rejected by the investigating judge, a resubmission can be filed only after one month has lapsed following the rejection of the previous submission.⁴²⁹ The investigating judge's decision not to release the child must be reasoned.⁴³⁰

With regard to the right to challenge deprivation of liberty of children considered as offenders, Cambodian law contains six problems. First, although in principle Cambodian law requires that the police custody of the child be as short as possible,⁴³¹ the law allows the police to place the child in custody up to 48 hours counting from the time of the child's arrival at the police station but not the time of his/her arrest and excluding time for transportation. This means that in reality, deprivation of the child's liberty by the police may be longer than 48 hours before the child can be brought before the investigating judge to decide on the legality of his/her deprivation of liberty. This time

⁴²⁰ Law on Child Justice, Art. 39; Criminal Procedure Code, Arts. 203-206

⁴²¹ Ibid.

⁴²² Law on Child Justice, Arts. 4(8) and 39(2).

⁴²³ Criminal Procedure Code, Art. 206(1).

⁴²⁴ Law on Child Justice, Art. 20.

⁴²⁵ Criminal Procedure Code, Art. 149(4).

⁴²⁶ Ibid, Art. 206(2).

⁴²⁷ Law on Child Justice, Art. 41; Criminal Procedure Code, Art. 215.

⁴²⁸ Law on Child Justice, Art. 41; Criminal Procedure Code, Arts. 215-217.

⁴²⁹ Criminal Procedure Code, Art. 217(2).

⁴³⁰ Ibid, Arts. 216(3) and 217(3).

⁴³¹ Law on Child Justice, Art. 5.

period is twice longer than that recommended by the international norms and standards.⁴³² In fact, the time period of 48 hours is the standard time applicable for adults rather than the child.⁴³³

Second, although Cambodian law requires the investigating judge to take into consideration the social inquiry report before deciding on pretrial detention, the law does not specify a clear timeframe for submission of such a report, as the investigating judge is obliged to consider the report only when there is one submitted by the social agent. Absent any obligation imposed on the social agent to prepare and submit the social inquiry report to the investigating judge before a decision on pretrial detention of the child is made, the investigating judge would not have sufficient information to make a proper decision. If the investigating judge decides to place the child in pretrial detention due to lack of information about the child's welfare, circumstances, etc., this would lead to violation of the rights of the child, especially his/her best interests.

Third, although Cambodian law obliges the investigating judge to allow the child and his/her lawyer to express their opinions and submit defensive measures before the investigating judge decides on pretrial detention, the law does not specify whether the investigating judge must conduct a closed adversarial hearing attended by the prosecutor, the child and his/her legal representative and lawyer. The law is also silent on whether the prosecutor has the burden of proof if he/she submits for pretrial detention of the child. Absent an adversarial pretrial detention hearing attended by all the parties concerned and burden of proof placed on the prosecutor when he/she requests pretrial detention, the principle of equality of arms is violated and thus the rights of the child would not be safeguarded.

Fourth, although Cambodian law requires a decision to place the child in pretrial detention to be written and reasoned, it does not specify whether the investigating judge must examine if the arrest of the child is based on a reasonable suspicion that the child has committed a criminal offense, follows legal procedures and pursues a legitimate purpose, i.e. lawfulness of the arrest. In addition, the law does not provide whether the investigating judge must exhaustively analyze the case and clearly and convincingly reason his/her decision by arguing, with support of evidence, that a less restrictive measure is insufficient or ineffective. The law also fails to mention the standard of proof, whether the investigating judge must reason his/her decision to place the child in pretrial detention based on substantial reasons to believe that, if released, the child would harm the victim and witnesses, collide with the other perpetrators, destroy evidence, recommit the crime, abscond or post a threat to public order, or his/her safety would be threatened.

Fifth, although Cambodian law allows the use of public order as a reason for placing the child in pretrial detention, it fails to define what constitutes public order. The term, public order, is regarded

⁴³² See CRC General Comment No. 24, para. 90; HRC General Comment No. 35, para. 33.

⁴³³ See HRC General Comment No. 35, para. 33.

as a vague ground for pretrial detention, which allows the court “excessive discretion”.⁴³⁴ As indicated by Human Rights Committee, the use of a vague reason to justify pretrial detention may lead to arbitrary application or interpretation of the law, which may result in violation of the rights of the child.⁴³⁵

Finally, although Cambodian law allows the investigating judge the power to release the child *proprio motu* or upon a submission by the prosecutor, the child or the child’s representative, there is no obligation imposed on the investigating judge to periodically or regularly, e.g. every two weeks, review the child’s detention for the purpose of releasing him/her. Further, like the initial decision on pretrial detention, there is no specification in the law whether there must be an adversarial hearing when there is a submission for release of the child or the investigating judge, on his/her own motion, review pretrial detention of the child. In addition, although the law requires that a decision not to release the child be reasoned, like the initial pretrial detention decision, the law does not specify how the judge would reason his/her decision not to release the child. Also, although the law allows the child or his/her representative to resubmit for release of the child from pretrial detention after his/her previous submission has been rejected, the law restricts the time for resubmission up to one month after the investigating judge’s rejection of the previous submission. This means that despite the fact that the child has a good reason to resubmit for his/her release from pretrial detention, he/she must unnecessarily wait until this time limit has passed.

4.4 Alternatives to Pretrial Detention of Children Considered as Offenders

Under Cambodian law, when the investigating judge decides not to place the child in pretrial detention or not to continue to detain the child, he/she may conditionally or unconditionally release the child.⁴³⁶ If the investigating judge decides to conditionally release the child, he/she must place the child under judicial supervision by imposing on the child one or more conditions, which consist of the followings: direct supervision by the guardian, parent, caretaker, or any family appropriate; care and supervision by any state center or center of NGOs capable of providing care and support to the child; not consuming alcohol; not going out beyond a particular time limit; not changing the home address without permission; not going beyond a determined territorial boundary; regularly reporting to the police station; not going to a particular place; responding to any summon issued by any person authorized by the instigating judge; paying a monetary bail depending on the financial means of the child; depositing any identification document; not meeting with a particular person; not driving any vehicle; not carrying or possessing any weapon; receiving medical treatment; and any other measures considered as appropriate by the investigating judge.⁴³⁷

⁴³⁴ See Adriano Martufi and Christina Peristeridou article ‘The Purposes of Pre-Trial Detention and the Quest for Alternatives’ (2020) 28 *European Journal of Crime, Criminal Law and Criminal Justice* 153-174, 165.

⁴³⁵ See HRC General Comment No. 35, para. 22.

⁴³⁶ Law on Child Justice, Art. 40; Criminal Procedure Code, Arts. 218(3) and 223.

⁴³⁷ Law on Child Justice, Art. 40; Criminal Procedure Code, Art. 223.

The judicial supervision may be ordered by the investigating judge on his/her own motion or upon a submission by the prosecutor.⁴³⁸ When the investigating judge places the child under judicial supervision, he/she must render a ruling stating the obligation(s) to be imposed on the child.⁴³⁹ Under the law, after placing the child under judicial supervision, the investigating judge has the power to add, change or cancel the obligation(s) or terminate the judicial supervision any time, on his/her own motion or upon a submission by the prosecutor, the child or the child's representative.⁴⁴⁰ If the child, while being under judicial supervision, intentionally breaches the obligation(s) imposed on him/her, the investigating judge may revoke the judicial supervision and place the child in pretrial detention.⁴⁴¹

There are four legal issues under Cambodian law regarding alternatives to pretrial detention or judicial supervision. First, like the case of pretrial detention decisions, Cambodian law does not provide whether to order judicial supervision of the child, the investigating judge must conduct an adversarial hearing attended by all the parties – the prosecutor, the child, and the child's legal representative and lawyer. The law also fails to stipulate whether the prosecutor has the burden of proof to prove based on “a probable cause” if he/she submits for judicial supervision of the child. Without such an adversarial hearing and burden of proof placed on the prosecutor, the principle of equality of arms would be violated and thus the rights of the child would not be safeguarded.

Second, Cambodian law does not state whether judicial supervision should be ordered only when it is necessary. In addition, the law does not specify whether the investigating judge must carefully consider the negative and positive effects of each obligation when imposing it on the child, so as to impose only the one that is most appropriate, with the least restriction on liberty. Because of this reason, the Ministry of Justice, in 2009, issued a circular, requiring the investigating judge to impose at least two obligations – to regularly report to the police station and to respond to all summons issued by the person authorized by the investigating judge – on the accused person, if the investigating judge decides not to order pretrial detention or decides to release the accused person from pretrial detention.⁴⁴² In 2014, the Ministry of Justice issued another circular requiring the investigating judge to carefully take into consideration circumstances of the crime or personality of the accused person and situation of the society before deciding not to detain the accused person but place him/her under judicial supervision.⁴⁴³ These circulars, in addition to the fact that they may interfere with the independence of the judiciary, have a strong presumption in favor of restricting liberty of the accused person, including the child, which is contrary to the principles of necessity and proportionality, according to which restriction on liberty of a person must be applied only when it is necessary and proportionate.

⁴³⁸ Criminal Procedure Code, Art. 226.

⁴³⁹ Ibid, Art. 226.

⁴⁴⁰ Ibid, Arts. 227-229.

⁴⁴¹ Ibid, Art. 230.

⁴⁴² Ministry of Justice, Circular, No. 1361, 19 August 2009, p. 2.

⁴⁴³ Ministry of Justice, Circular, No. 01/14, 22 January 2014, p. 1.

Third, Cambodian law does not stipulate supervising and monitoring mechanisms for judicial supervision. Although in 2014, the Ministry of Justice issued a circular to prosecutors and investigating judges throughout the country, outlining the mechanism to supervise and monitor the accused person placed under judicial supervision, this circular covers only the obligation to regularly report to the police station.⁴⁴⁴ Nevertheless, legally speaking, this circular does not have any binding effect as it is not a law, and it may lack constitutionality as it is an instruction of the executive to the judiciary. Beside this circular, there are no legal provisions regulating mechanisms to supervise or monitor the other obligations of judicial supervision. Because of the lack of supervising and monitoring mechanisms stipulated in the law, Cambodia cannot, in practice, ensure the child's appearance before trial unless the child is placed in pretrial detention.⁴⁴⁵

Finally, Cambodian law empowers the investigating judge to revoke judicial supervision and place the child in pretrial detention if the child intentionally breaches the obligations of judicial supervision. However, the law fails to stipulate whether the investigating judge should first investigate into the reasons of the breach by taking into consideration the reasons provided by the child and those monitoring the implementation of the child's judicial supervision. The law also fails to state whether a sanction should be applied instead of an automatic resort to pretrial detention when the child is found to have intentionally breached the judicial supervision. This failure of the law may result in the investigating judge automatically revoking judicial supervision of the child and placing him/her in pretrial detention without first investigating into the reason why the imposed obligations are breached.

4.5 Concluding Remarks and Suggested Solutions to the Legal Problems Identified

4.5.1 Concluding Remarks

Cambodian law mostly complies with the international, and including regional, norms and standards. However, the law still contains certain provisions that violate the rights of children considered as offenders and lacks some provisions needed to completely safeguard the rights of the child with regard to diversion and alternatives to pretrial detention.

With regard to determination of the age of the child, Cambodian law does not specify whether, absent a birth certificate to prove the age of the child, opinions of the parents or guardian of the child, teachers or community leaders should be taken into consideration. It also fails to stipulate the examination of psychological and physical development of the child by professionals or experts for the purpose of determination of the child's age. Another problem is that when the child's age is not clear, the law requires the police to refer the case file to the prosecutor, but it fails to state whether the child, with undetermined age, should be physically referred to the prosecutor as well or not. The law is also unclear whether the prosecutor should physically refer the child whose age

⁴⁴⁴ Ibid, pp. 1-2.

⁴⁴⁵ Human Rights Committee, Replies of Cambodia to the List of Issues in Relation to Its Third Periodic Report, CCPR/C/KHM/RQ/3, 16 April 2021, para. 89 (HRC Replies of Cambodia).

cannot be determined to the investigating judge. Article 39 of the Law on Child Justice is subject to interpretation that the investigating judge can detain the child pending trial, although his/her age is undetermined.

Concerning conditions for diversion, Cambodian law does not state clearly whether consent of the child's parents or guardian is needed for diversion. Although consent of the child is required, the law fails to stipulate to what extent information about diversion should be provided to the child before he/she consents to diversion. In addition, the law limits diversion only to a petty crime and misdemeanor, automatically rejecting a felony from diversion, and fails to state whether repeated offenders are eligible for diversion.

Implementation of diversion also contains some legal issues. First, although Cambodian law allows the police to divert the child by issuing a warning, it fails to stipulate contents of the warning. In addition, the law does not allow the police to terminate criminal proceedings against the child by themselves but requires them to refer all diverted cases to the prosecutor, failing to specify what further steps the prosecutor must take after receiving the cases. Second, the law does not set a clear timeframe for the social agent to submit a social inquiry report to the judge. Third, diversion under Cambodian law is not based on restorative justice. Fourth, the diversion plan does not include benefits of compliance with diversionary measures, consequences for failure to complete diversion, and monitoring mechanisms. Fifth, the law does not require the social agent and the person in charge of implementing the diversion plan to make regular progress reports to the prosecutor or judges and fails to state how often the social agent should meet with or contact the child. Sixth, the law does not stipulate procedures whereby the child can file complaints about violation of his/her rights while he/she is participating in a diversion process. Finally, the law does not specify whether the police, prosecutor or judge must render a written reasoned decision if he/she decides not to divert the child and whether his/her decisions concerning diversion should be subject to an independent or judicial review. The law also fails to mention whether the child or his/her parents, guardian or lawyer can make a request for diversion.

Regarding the arrest and police custody of the child, Cambodian law allows the police to place the child in custody based on public security, which is a general term not defined in the law. Further, under the law the child as young as fourteen can be arrested and placed in detention, which is contrary to international norms and standards, which determine the minimum age of deprivation of liberty as sixteen. Finally, although the law requires the police to complete their investigation as soon as possible, there is no procedure or specification in the law that prioritizes immediate release of the child from the police custody.

The right to challenge the legality of deprivation of the child's liberty is not fully safeguarded. First, Cambodian law authorizes the police to place the child in custody up to 48 hours before he/she is brought before the investigating judge. Second, although the law obliges the investigating judge to consider a social inquiry report when he/she decides on pretrial detention, there is no clear timeframe for submission of such a report by the social agent. Third, the law fails to prescribe whether to decide on pretrial detention, the investigating judge must conduct an adversarial hearing

attended by the child, his/her parents or guardian, lawyer and the prosecutor. The law further fails to specify whether the prosecutor has the burden of proof if he/she submits for pretrial detention. Fourth, the law does not state whether the investigating judge must examine the lawfulness of the arrest of the child when deciding on pretrial detention and how a decision to place the child in pretrial detention should be reasoned. Fifth, the law allows the investigating judge to order pretrial detention based on the reason of public order, but the term is not defined. Further, there is no obligation imposed on the investigating judge to periodically review pretrial detention of the child for the purpose of releasing him/her. Moreover, there is no specification whether an adversarial hearing must be conducted when there is a submission for release of the child and how a decision not to release the child should be reasoned. Finally, the law limits the period to resubmit for release from pretrial detention up to one month after the previous submission has been rejected, irrespective of whether or not the child has a good reason to resubmit for release before the one-month period has elapsed.

With regard to alternatives to pretrial detention, Cambodian law does not state whether an adversarial hearing participated by all the parties must be conducted when the investigating judge decides on alternatives to pretrial detention of the child. The law is also silent if the prosecutor has the burden of proof if he/she requests conditional alternative measures. In addition, the law does not state whether conditional alternative measures to pretrial detention must be ordered only based on necessity and proportionality principles. Further, the law contains no provision regulating the supervising and monitoring mechanisms to ensure that conditions imposed on the child are complied with. Finally, when the child intentionally breaches the obligations imposed on him/her, the law allows the investigating judge to revoke the measures, without specifying whether the judge should first investigate into the reasons of the breach and whether a sanction rather than an automatic detention should be applied to the child.

4.5.2 Suggested Solutions to the Legal Problems Identified

With regard to determination of the age of the child, Cambodian law should contain provisions that require the police, prosecutor and judge to take into account opinions of the child's parents or guardian, teachers and community leaders when there is no birth certificate to prove the age of the child. In addition, when the prosecutor or judge allows professionals or experts to examine the psychological and physical development of the child in order to determine his/her age, the law should require that such examination be applied only as a measure of last resort and in the way that does not cause any trauma or violation of the rights, worth and dignity of the child. Further, the law should have a clear provision that when the age of the child is not clear whether he/she is below or above the minimum age of criminal responsibility, the child should not be deprived of his/her liberty; that is, police custody, referral or transportation of the child to the prosecutor, and pretrial detention should not be applied to him/her.

Regarding conditions for diversion, Cambodian law should clearly include consent of the child's parents or guardian as a condition for diversion, in addition to consent of the child, except only

when such a consent is contrary to the best interests of the child. In addition, the law should clearly require the social agent, prosecutor, judge, or the child's lawyer to provide the child and his/her parents or guardian with sufficient and specific information about the length, nature, and content, including effects and consequences, of diversion before seeking consent from them. Further, the law should not limit diversion only to a petty crime and misdemeanor, but it should also include a felony as eligible for diversion, by taking into consideration circumstances and seriousness of the felony itself and circumstances of the child, rather than automatically excluding a felony from diversion. The law should also precisely prescribe that children considered as offenders who repeatedly commit criminal offenses are also suitable for diversion, depending upon their circumstances and severity and circumstances of the crime.

Concerning implementation of diversion, Cambodian law should clearly stipulate contents of the warning that the police would issue to the child when the police divert the child who has committed a petty crime. The contents of such a warning should include, for example, the reason why the child is warned, impacts of the child's actions on the victim, society and the child him/herself, consequences of reoffending, and how the child can avoid reoffending. Moreover, the law should allow the police to terminate criminal proceedings against the diverted child by themselves without requiring them to refer diverted cases to the prosecutor, but the police should safely keep those diverted case files in the police station for regular inspection by the prosecutor.⁴⁴⁶ Where the law requires the police to refer diverted cases to the prosecutor, the law should clearly prescribe procedures that the prosecutor must follow, e.g. by requiring the prosecutor to immediately examine the cases and terminate criminal proceedings against the child if he/she finds that the police's diversion of the child follows the conditions and procedures prescribed by law. On the contrary, if the prosecutor finds that the police's decision to divert the child is based on arbitrary use or abuse of discretion, he/she must consider rediverting the child if conditions for diversion are fulfilled.

In addition, Cambodian law should set a clear timeframe for the social agent to submit a social inquiry report to the prosecutor, investigating judge and trial judges to assist them in deciding on diversion and alternatives to pretrial detention. Such a report should be submitted before decisions on diversion and pretrial detention are made.

Diversion, in Cambodian law, should be based on restorative justice by involving the victim in the diversion process whenever the criminal offense committed by the child affects any person as the victim. In this regard, the law should ensure that the child and the victim freely and voluntarily reach a diversion agreement based on consensus after they have been provided with sufficient and specific information about the length, nature, content, purpose, effects and consequences of diversion. When the victim is also a child, legal and other appropriate assistance should also be provided to him/her, and his/her parents or guardian should also be allowed to participate in the

⁴⁴⁶ Under Cambodian law, the prosecutor has the authority to inspect police stations; See Criminal Procedure Code, Arts. 35 and 37.

process and sufficiently and specifically be informed of the diversion. Only when mediation or attempted mediation between the child and the victim fails, then diversion of the child may proceed without consent of the victim.

Moreover, Cambodian law should require to include in a diversion plan, in addition to the existing contents stated in the current law, benefits that the child will receive when he/she successfully completes diversionary measures, consequences if he/she fails to complete those measures, and mechanisms, including methods, to monitor the child's progress and compliance. Where the diversion is based on restorative justice, the diversion agreement should also include free and informed consent of the victim and his/her contributions to the agreement.

Concerning diversion monitoring mechanisms, Cambodian law should clearly require the social agent and the person in charge of implementing the diversion plan or diversion agreement to regularly report the progress of the child, in addition to reports on the success, failure and problems, to the prosecutor or judge who has ordered the child's diversion. Additionally, the law should oblige the social agent to be closely involved with the child during the diversion process through regular and frequent meetings and contacts with the child.

To ensure that the child's rights are fully safeguarded during the diversion process, Cambodian law should stipulate procedures whereby the child can file complaints about any violation of his/her rights while he/she is participating in the process to an independent or judicial authority. The law should further ensure that any such complaint by the child should be immediately examined and when violation of the rights of the child is well-founded, an effective remedy must be provided to the child.

To safeguard against abuse by the police, prosecutors and judges, as well as to promote due process, Cambodian law should require decisions not to divert the child to be in writing and clearly and sufficiently reasoned. Moreover, decisions on diversion, whether to divert or not to divert the child, should be subject to a speedy independent judicial review. To fully guarantee the rights of the child, the law should allow the child, his/her parent or guardian or lawyer to request diversion to the prosecutor, investigating judge and trial judges, and where his/her request is rejected, such rejection should be written and clearly and sufficiently reasoned and subject to a speedy independent judicial review.

With regard to the arrest and police custody of the child, the use of the reason of public security to place the child in police custody should be removed from the law, or otherwise it should be clearly defined based on international human rights norms and standards so as to avoid arbitrary application or interpretation. Further, Cambodian law should increase the minimum age of deprivation of the child's liberty from fourteen to sixteen. Finally, when the child is arrested and placed in police custody, the law should contain procedures that prioritize immediate release of the child to his/her parents or guardian or any responsible person where appropriate by instead obliging the child to return to the police office, the prosecutor's office or the court.

Pertaining to the right to challenge the legality of deprivation of the child's liberty, Cambodian law should reduce the duration of police custody from 48 to 24 hours, counting from when the child is arrested. Also, the law should guarantee that the investigating judge orders pretrial detention only after an adversarial hearing is conducted and attended by the child, his/her parents or guardian, lawyer and the prosecutor in respect for the principle of equality of arms. The law should clearly impose burden of proof on the prosecutor if he/she submits for pretrial detention. Moreover, the law should ensure that, when deciding on pretrial detention, the investigating judge examines the lawfulness and arbitrariness of the arrest of the child and if it is found that the arrest does not follow the grounds and procedures and pursue a legitimate purpose as stated in the law, the child should be immediately released. Although the arrest is found to be lawful or non-arbitrary, the child should also be released pending trial, unless the investigating judge finds it strictly necessary to detain him/her after conducting a thorough analysis arguing against and fore release based on substantial reasons to believe that less restrictive measures are ineffective. The ground of public order to place the child in pretrial detention should be erased from the law, or else it should be clearly defined based on international norms and standards. Further, the law should require the investigating judge to regularly review pretrial detention of the child, possibly every two weeks, for the purpose of releasing him/her. Pretrial detention review should require an adversarial hearing in compliance with the principle of equality of arms, and a decision not to release the child should be clearly reasoned in the same manner as a decision to detain the child. Finally, the time to resubmit for release of the child from pretrial detention should not be restricted.

Regarding alternatives to pretrial detention, Cambodian law should require a closed adversarial hearing attended by all the parties to be conducted in compliance with the principle of equality of arms before judicial supervision of the child is ordered by the investigating judge. Where the prosecutor submits for judicial supervision, the law should require him/her to prove based on a probable cause that an unconditional alternative to pretrial detention is not sufficient and it is necessary that conditional alternatives be ordered. The law should further oblige the investigating judge to carefully examine the positive and negative effects of each conditional measure before imposing it on the child to ensure that it is ordered in conformity with the necessity and proportionality principles by imposing only the most appropriate measure with the least restriction on the child's liberty. In addition, the law should clearly prescribe mechanisms for supervising and monitoring the child's compliance with the obligations imposed on him/her so as to ensure that judicial supervision is effectively applied. Finally, the law should also require the investigating judge not to automatically revoke judicial supervision when the child intentionally breaches the obligation(s) imposed on him/her. Instead the law should oblige the investigating judge to first examine the reasons why the child has caused such a breach by taking into consideration arguments submitted by the child and the person responsible for supervising or monitoring the child. The law should contain sanctions to be applied to the child, in case of an intentional breach of judicial supervision, rather than an automatic resort to pretrial detention.

Chapter 5: Analysis of Practical Factors Hindering the Effectiveness of Diversion and Alternatives to Pretrial Detention of Children Considered as Offenders in Cambodia

Despite the fact that the Law on Child Justice has entered into force since 2017, implementation of the law is still “limited”.⁴⁴⁷ Although the Law on Child Justice and international norms and standards require that depriving children of their liberty be used only when strictly necessary, in practice, pretrial detention of children considered as offenders in Cambodia is a rule rather than an exception.⁴⁴⁸ Specifically, in practice, weakness of the child justice system and lack of effective diversion and alternatives to pretrial detention are the factors rendering children considered as offenders being placed in pretrial detention rather than diverted from the criminal proceedings or released pending trial.

5.1 Weak Child Justice System

There are five factors that weaken the Cambodian child justice system. Those factors include lack of children’s specialized courts, limited access to a legal assistance, corrupt criminal justice, lack of judicial independence and impartiality, and insufficient legal reasoning of judicial decisions.

⁴⁴⁷ Human Rights Committee, Concluding Observations on the Third Periodic Report of Cambodia, CCPR/C/KHM/CO/3, 30 March 2022, para. 40 (HRC Concluding Observations on the Third Periodic Report of Cambodia); Report of the Special Rapporteur on the Situation of Human Rights in Cambodia 2021, para. 57.

⁴⁴⁸ HRC Concluding Observations on the Third Periodic Report of Cambodia, paras. 40-41; Cambodian League for the Promotion and Defense of Human Rights and Amnesty International, *‘Arbitrary Detention Related to Drug Policies in Cambodia’* June 2020, p. 20. Available at <https://www.amnesty.org/en/wp-content/uploads/2021/05/ASA2325062020ENGLISH.pdf> (Accessed 12 May 2022); Cambodian Center for Human Rights, *‘Fair Trial Rights in Cambodia Monitoring at the Court of Appeal Annual Report (1 November 2019 - 31 December 2020)’* November 2021, p. 50. Available at: <https://cchrcambodia.org/admin/media/report/report/english/FTR-Annual-Report-English-2019-2020.pdf> (Accessed 12 May 2022); Cambodian Center for Human Rights, *‘Fair Trial Rights in Cambodia Monitoring at the Court of Appeal Annual Report (1 November 2018 - 31 October 2019)’* October 2020, p. 42. Available at: [https://www.cchrcambodia.org/admin/media/report/report/english/FTR%20Annual%20Report_ENG%20\(2018-2019\).pdf](https://www.cchrcambodia.org/admin/media/report/report/english/FTR%20Annual%20Report_ENG%20(2018-2019).pdf) (Accessed 12 May 2022); See also Report of the Special Rapporteur on the Situation of Human Rights in Cambodia 2018, para. 13(f); Human Rights Council, Report of the Special Rapporteur on the Situation of Human Rights in Cambodia, A/HRC/36/61, 27 July 2017, para. 20.

Cambodia currently does not have specialized courts for children. According to the specialization principle, which requires the establishment of children's specialized courts,⁴⁴⁹ those working in the child justice such as judges, prosecutors, lawyers, police, social workers, community service providers, probation officers, and other related people must have obtained sufficient trainings and continuously receive trainings on the child justice, child rights, diversion, non-custodial measures, child development, psychology, criminology, non-discrimination, gender, culture, etc.⁴⁵⁰ This specialization helps preventing abuse of powers and guarantees that any action taken concerning the child is consistent, necessary, proportionate, efficient, appropriate, coordinated, and protecting, respecting and fulfilling the rights of the child.⁴⁵¹ Proper training and education ensure not only the competency of those who work in the child justice system but also their impartiality and independence.⁴⁵² Under Cambodian law, although there is no specific provision requiring the establishment of separate specialized courts for children,⁴⁵³ the social agents, police, prosecutors and judges who deal with children considered as offenders are required to have obtained trainings on the child rights and child justice.⁴⁵⁴ However, in practice, there have not yet been specialized police, social agents, lawyers, prosecutors, or judges in the Cambodian child justice system.⁴⁵⁵ Although the Law on Child Justice has been incorporated into the police training curriculum,⁴⁵⁶ there are still insufficient trained police officers specialized in child rights and child justice.⁴⁵⁷ In addition, the Law on Child Justice has not yet been incorporated into the training curriculums for judges, prosecutors or lawyers or law school curriculums.⁴⁵⁸ In 2018, the government implemented three-year Juvenile Justice Law Strategic and Operational Plan, aiming, among other things, to

⁴⁴⁹ CRC General Comment No. 24, paras. 105-107; IACHR (2011), p. 23.

⁴⁵⁰ CRC, Art. 40(3); Beijing Rules, Rules 6.3 and 22 and Commentary on Rule 22; Riyadh Guidelines, para. 58; CRC General Comment No. 24, paras. 52 and 112; Guidelines for Action on Children in the Criminal Justice System, para. 24; CE CM/Rec(2018)8, paras. 42-45; UNODC (2020), pp. 59 and 61; Joint Report of OHCHR, UNODC and the Special Representative on Violence against Children, paras. 73, 91-92.

⁴⁵¹ Beijing Rules, Rule 6.3; Human Rights Council, Report of the Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul, A/HRC/29/26, 1 April 2015, paras. 58 and 86 (Report of the Special Rapporteur on the Independence of Judges and Lawyers 2015); IACHR (2011), p. 23; International Bar Association (2018), pp. 27-28.

⁴⁵² Report of the Special Rapporteur on the Independence of Judges and Lawyers 2015, para. 87.

⁴⁵³ Verstraeten (2016), p. 9.

⁴⁵⁴ Law on Child Justice, Arts. 4(9), 12, 24, 31, 44 and 86.

⁴⁵⁵ Report of the Special Rapporteur on the Situation of Human Rights in Cambodia 2021, para. 57; Justice With Children (2021), p. 7; Child Rights Coalition Cambodia and Legal Aid of Cambodia (2020), p. 4.

⁴⁵⁶ HRC Replies of Cambodia, para. 87; CRC Replies of Cambodia, para. 44(a).

⁴⁵⁷ Child Rights Coalition Cambodia and Legal Aid of Cambodia (2020), p. 2.

⁴⁵⁸ Ibid, p. 4; Justice With Children (2021), p. 7; See also HRC Replies of Cambodia, para. 87.

build capacity of those working in the child justice system;⁴⁵⁹ however, this plan ended in 2020 without “meaningful progress”.⁴⁶⁰

Children considered as offenders are routinely denied access to legal assistance. Under international norms and standards, children considered as offenders must be promptly provided with legal assistance free of charge when they are deprived of their liberty,⁴⁶¹ starting from the time of their arrest.⁴⁶² The absence of prompt access to assistance of a lawyer at the time of the arrest and pretrial detention violates the right to a fair trial of the child, especially subjecting the child to arbitrary arrest and pretrial detention.⁴⁶³ Prompt access to a lawyer, on the contrary, can help facilitate the use of diversion of the child from criminal proceedings or avoid unnecessary pretrial detention.⁴⁶⁴ According to the Law on Child Justice, legal assistance must be provided, free of charge, to the child as soon as he/she arrives at the police station, although it is not required immediately after his/her arrest.⁴⁶⁵ However, in reality, children considered as offenders in Cambodia are routinely not provided with assistance of a lawyer when they are arrested as well as while in pretrial detention.⁴⁶⁶ Although it is claimed by the government that children considered as offenders are provided with legal assistance, free of charge, as soon as they are deprived of their liberty and throughout the criminal proceedings,⁴⁶⁷ legal aid provided to defendants, including children considered as offenders, are still significantly insufficient,⁴⁶⁸ due to lack of pro bono

⁴⁵⁹ Ministry of Social Affairs, Veterans and Youth Rehabilitation and Ministry of Justice (2018), pp. 41, 121, 133-141.

⁴⁶⁰ International Federation for Human Rights, ‘*Shadow Report for the Review of Cambodia’s Third Periodic Report*’ 31 January 2022, para. 24. Available at: https://www.fidh.org/IMG/pdf/20220131_cambodia_ccpr134_fidh_en-2.pdf (Accessed 15 March 2022).

⁴⁶¹ CRC, Art. 37(d); Beijing Rules, Rule 15.1; Havana Rules, Rule 18(a); Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 17; HRC General Comment No. 32, para. 34.

⁴⁶² United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, GA Resolution A/RES/67/187, 20 December 2012, paras. 20, 27, 29, and 43; *Rostislav Borisenko v. Hungary*, HRC, Communication No. 852/1999, 14 October 2002, paras. 3.4 and 7.5; *Pagdayawon Rolando v. Philippines*, HRC, Communication No. 1110/2002, 3 November 2004, paras. 2.1, 2.2 and 5.6.

⁴⁶³ UNODC and UNDP, *Early Access to Legal Aid in Criminal Justice Processes: A Handbook for Policymakers and Practitioners* (UNODC and UNDP, 2014), pp. 13-16.

⁴⁶⁴ *Ibid*, pp. 21-24; Nowak (2019), p. 319; Judith B. Jones, ‘*Access to Counsel*’ June 2004, p. 4. Available at: https://isc.idaho.gov/juvenile/pdfs/OJJDP_Juvenile_Justice_Bulletin_Access_to_Counsel.pdf (Accessed 13 May 2022); Ton Liefwaard article ‘*Access to Justice for Children: Towards a Specific Research and Implementation Agenda*’ (2019) 27 *International Journal of Children’s Rights* 195-227, 209.

⁴⁶⁵ Law on Child Justice, Art. 18(4)(5).

⁴⁶⁶ International Federation for Human Rights (2022), para. 24.

⁴⁶⁷ CRC Replies of Cambodia, para. 44(b).

⁴⁶⁸ Report of the Special Rapporteur on the Situation of Human Rights in Cambodia 2021, para. 48; Child Rights Coalition Cambodia and Legal Aid of Cambodia (2020), p. 3; See also Aekje Teeuwen article

lawyers and the government's unclear legal aid policy, insufficient budget, and much reliance on legal aid provided by NGOs.⁴⁶⁹

Corruption is another factor that contributes to the high use of pretrial detention of the child as well as the child not being diverted from the criminal proceedings.⁴⁷⁰ The judiciary that is corrupt lacks impartiality and independence and is unable to protect human rights of the individuals.⁴⁷¹ Corrupt judiciary is incapable of safeguarding the right to a fair trial, tends to place people in pretrial detention, victimizes the poor, and renders the administration of justice ineffective and inefficient.⁴⁷² Corruption induces judges, prosecutors and police to arrest a person, place him/her in pretrial detention and release him/her based on bribes, resulting in an arrest and detention that are arbitrary and unnecessary.⁴⁷³ Based on Corruption Perceptions Index 2021, Cambodia is one of the most corrupt countries, ranking 157 out of 180 countries and territories.⁴⁷⁴ According to the Rule of Law Index 2021, corruption in Cambodian criminal justice was very high, scoring 0.16/1 for no corruption.⁴⁷⁵ Throughout the criminal proceedings, starting from the arrest to imprisonment, corruption is common among Cambodian police, lawyers, prosecutors and judges.⁴⁷⁶ Reports of

'Procedural Rights Supporting Expeditious Trials for Juveniles Effective Remedies and Legal Representation' (2021) 22 *Asia-Pacific Journal on Human Rights and the Law* 150-185, 182.

⁴⁶⁹ This Life, 'No Place for A Child: Alternatives to Imprisoning Children in Cambodia' February 2021, p. 27. Available at: https://issuu.com/this-life-ngo/docs/booklet_eng-issuu?fr=sODExNjI5MDgxNDI (Accessed 22 March 2022); Cambodian Center for Human Rights, Destination Justice, and Cambodian Human Rights and Development Association, 'Joint Submission to the Human Rights Council of the United Nations Third Universal Periodic Review of the Kingdom of Cambodia: Access to Justice in Cambodia' 12 July 2018, paras. 9-25. Available at: <https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=6005&file=EnglishTranslation> (Accessed 12 April 2022); See also HRC Replies of Cambodia, para. 46.

⁴⁷⁰ See Justice With Children (2021), p. 5.

⁴⁷¹ United Nations General Assembly, Report of the Special Rapporteur on the Independence of Judges and Lawyers, A/67/305, 13 August 2012, paras. 108-109 (Report of the Special Rapporteur on the Independence of Judges and Lawyers 2012); Due Process of Law Foundation, 'Evaluation of Judicial Corruption in Central America and Panama and the Mechanisms to Combat It: Executive Summary & Regional Comparative Study' 2007, p. 1. Available at: https://www.dplf.org/sites/default/files/1196715002_0.pdf (Accessed 13 April 2022).

⁴⁷² Report of the Special Rapporteur on the Independence of Judges and Lawyers 2012, paras. 33-35 and 109.

⁴⁷³ Open Society Justice Initiative, 'Fact Sheet: Pretrial Detention and Corruption' February 2013. Available at: <https://www.justiceinitiative.org/publications/fact-sheet-pretrial-detention-and-corruption> (Accessed 13 April 2022).

⁴⁷⁴ Transparency International, 'Corruption Perceptions Index 2021', available at: <https://www.transparency.org/en/cpi/2021> (last visited 13 April 2022).

⁴⁷⁵ World Justice Project (2021), pp. 23 and 60.

⁴⁷⁶ Amnesty International, 'Substance Abuses: The Human Cost of Cambodia's Anti-Drug Campaign', 12 May 2020, p. 46. Available at: <https://www.amnesty.org/en/documents/asa23/2220/2020/en/> (Accessed 13 April 2022).

NGOs show that children, alleged to have used drugs or committed drug-related offenses, are arrested, prosecuted, and placed in pretrial detention rather than diverted, released pending trial, or referred to a drug rehabilitation center, because they do not have money to pay bribes.⁴⁷⁷

The judiciary lacks independence and impartiality. The impartiality and independence of judges and prosecutors from any influence, concerning decisions to submit for and to order pretrial detention, are necessary for the effective use of alternative measures to pretrial detention.⁴⁷⁸ Judicial independence is crucial for efficient justice, non-discrimination, and protection against abuse.⁴⁷⁹ In Cambodia, the government's influence on the judiciary is high. Based on the Rule of Law Index 2021, no improper government influence on the judiciary scored very low, 0.14/1.⁴⁸⁰ According to Freedom House, Cambodia's judicial independence scored 0/4.⁴⁸¹ The lack of judicial independence and impartiality in Cambodia has also been a concern of Human Rights Committee and the UN Special Rapporteur.⁴⁸² This lack of impartiality and independence of the judiciary has resulted in the right to a fair trial in Cambodia being routinely violated⁴⁸³ and the accused persons most often being placed in pretrial detention.⁴⁸⁴ The lack of judicial impartiality and independence, influenced by the war-on-drug campaign of the government, has led to many people, including

⁴⁷⁷ Ibid, pp. 46-47; This Life (2021), p. 35; See also Amnesty International, '*Cambodia: Abusive "war on drugs", rife with torture and corruption, must be overhauled*' 13 May 2020. Available at: <https://www.amnesty.org/en/latest/news/2020/05/cambodia-abusive-war-drugs-torture-corruption-must-overhauled/> (Accessed 18 March 2022); Human Rights Council, Report of the Special Rapporteur on the Situation of Human Rights in Cambodia, A/HRC/42/60, 27 August 2019, para. 45 (Report of the Special Rapporteur on the Situation of Human Rights in Cambodia 2019).

⁴⁷⁸ IACHR (2017), p. 150; IACHR, Practical Guide to Reduce Pretrial Detention, OEA/Ser.L/V/II.163 Doc. 107, p. 15 (IACHR Practical Guide to Reduce Pretrial Detention).

⁴⁷⁹ Human Rights Council, Report of the Special Rapporteur on the Independence of Judges and Lawyers, A/HRC/14/26, 9 April 2010, para. 93 (Report of the Special Rapporteur on the Independence of Judges and Lawyers 2010); Report of the Special Rapporteur on the Independence of Judges and Lawyers 2012, para. 42.

⁴⁸⁰ World Justice Project (2021), pp. 23 and 60.

⁴⁸¹ Freedom House, '*Freedom in the World 2021*'. Available at: <https://freedomhouse.org/country/cambodia/freedom-world/2021> (Accessed 18 March 2022).

⁴⁸² HRC Concluding Observations on the Second Periodic Report of Cambodia, para. 20; HRC Concluding Observations on the Third Periodic Report of Cambodia, paras. 32-33; Report of the Special Rapporteur on the Situation of Human Rights in Cambodia 2019, para. 58; Report of the Special Rapporteur on the Situation of Human Rights in Cambodia 2021, para. 48.

⁴⁸³ International Federation for Human Rights (2022), para. 13; See also Cambodian Center for Human Rights, '*List of Issues Submission for the Human Rights Committee's Third Review of the Kingdom of Cambodia*' May 2020, p. 12.

⁴⁸⁴ International Federation for Human Rights, '*Submission for the Adoption of the List of Issues: Cambodia*' 5 May 2020, p. 4. Available at: https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/KHM/INT_CCPR_ICO_KHM_42105_E.pdf (Accessed 17 March 2022).

children aged even fourteen, alleged to be involved with drugs even only drug use, being arrested and placed in pretrial and post-trial detention.⁴⁸⁵

Pretrial detention decisions are usually not sufficiently reasoned. Because Cambodian law does not clearly prescribe how the investigating judge should reason his/her pretrial detention decisions, in 2014 the Ministry of Justice, with support of the Office of the High Commissioner for Human Rights in Cambodia, introduced a new form of decision, obliging the investigating judge to reason their pretrial detention decisions.⁴⁸⁶ The purpose of this initiative is to promote accountability and transparency of the judicial decision, especially to prevent arbitrariness of pretrial detention.⁴⁸⁷ Trainings on reasoning for pretrial detention decisions were also conducted.⁴⁸⁸ However, in practice, the investigating judge's pretrial detention decisions are still not sufficiently reasoned based on evidence or a thorough analysis and fail to take into consideration the age, background, and welfare of the child and whether non-custodial measures should be applied instead of detention.⁴⁸⁹

5.2 Lack of Effective Diversion and Alternatives to Pretrial Detention

There are four factors that make diversion and alternatives to pretrial detention of children considered as offenders ineffective in practice. They include lack of community-based diversion programs, discrimination and lack of child-friendly practice at drug rehabilitation centers, lack of

⁴⁸⁵ See Cambodian League for the Promotion and Defense of Human Rights and Amnesty International (2020), pp. 19-21; Amnesty International, *'Substance Abuses'* (2020), pp. 13, 55-57; International Drug Policy Consortium and Asian Network of People Who Use Drugs, *'Universal Periodic Review (3rd Cycle) – Cambodia – Drug Policy – Joint NGO Submission'*, p. 2. Available at: <https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=6236&file=EnglishTranslation> (Accessed 18 March 2022); Amnesty International, *'Cambodia: Abusive "war on drugs"'* (2020); See also Ministry of Social Affairs, Veterans and Youth Rehabilitation and Ministry of Justice (2018), p. 13.

⁴⁸⁶ Office of the High Commissioner for Human Rights in Cambodia, *'Reforming the Pre-trial Detention Process to Prevent Arbitrary Detention'* March 2014, pp. 1-2. Available at: <https://cambodia.ohchr.org/~cambodiaohchr/sites/default/files/2-RLU-SS.pdf> (Accessed 18 March 2022); See also Human Rights Council, Role and Achievements of the Office of the United Nations High Commissioner for Human Rights in Assisting the Government and People of Cambodia in the Promotion and Protection of Human Rights, A/HRC/36/32, 17 August 2017, para. 31.

⁴⁸⁷ Ibid.

⁴⁸⁸ Report of the Special Rapporteur on the Situation of Human Rights in Cambodia 2018, para. 14(d).

⁴⁸⁹ Cambodian Center for Human Rights, Destination Justice, and Cambodian Human Rights and Development Association (2018), paras. 39 and 41; See also Cambodian League for the Promotion and Defense of Human Rights, *'Time for Bail: Ending Needles Mass Detention'* October 2018, p. 6. Available at: <https://www.licadho-cambodia.org/reports.php?perm=227> (Accessed 12 May 2022); Report of the Special Rapporteur on the Situation of Human Rights in Cambodia 2018, para. 13(f); This Life (2021), p. 28.

awareness raising about diversion and alternatives to pretrial detention, and insufficient human and financial resources.

Currently Cambodia has yet to have community-based diversion programs in place. Based on experience, effective diversion needs a large variety of available “support services and community resources”, to which the child can be referred, to meet the specific needs of each individual child, such as job support, “recovery support programmes”, alcohol and drug addiction treatment, spiritual or religious support, treatment of mental health problems, etc.⁴⁹⁰ so as to avoid using a “one-size-fits-all” method.⁴⁹¹ Where those community service providers are already available, there must be a strong partnership and cooperation among those service providers, members of the community, education providers, local authorities, the police, prosecutors, courts and other related agencies.⁴⁹² This cooperation must be clearly regulated by law, policy and mechanism so that responsibilities of each actor are clearly determined.⁴⁹³ In Cambodia, although diversion programs are provided in the law since 2016, in practice diversion programs are still being studied by the government;⁴⁹⁴ there is no yet implementation of diversion.⁴⁹⁵ According to NGOs working in the child justice area in Cambodia, there is currently no focus on child rehabilitation or social reintegration and no established cooperation and partnership among all stakeholders – the police, social agents, prosecutors, the court, the government, communities, educational institutions, civil society organizations, and families – and responsibilities and mandates of the relevant stakeholders have not yet been clearly determined.⁴⁹⁶

⁴⁹⁰ UNODC (2020), p. 64; Jill Farrell and others (2018), p. 12; Joseph J Coccozza and others article ‘Diversion from the Juvenile Justice System: The Miami-Dade Juvenile Assessment Center Post-Arrest Diversion Program’ (2005) 40 *Substance Use and Misuse* 935-951, 939; See also Riyadh Guidelines, paras. 32-33.

⁴⁹¹ Juvenile Justice Policy and Data Board, ‘*Massachusetts Youth Diversion Program: Model Program Guide*’ March 2021, pp. 13-14 and 20. Available at: <https://www.mass.gov/doc/diversion-model-program-guide/download> (Accessed 18 March 2022); Michigan Council on Crime and Delinquency (2017), pp. 22-23.

⁴⁹² CRC General Comment No. 24, para. 108; Guidelines for Action on Children in the Criminal Justice System, paras. 41-42; Charles and Associates, Inc. (2017), p. 24; UNODC, *Introducing the United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice: A New Tool for Policymakers, Criminal Justice Officials and Practitioners* (UNODC, 2015), p. 15; Jill and others (2018), p. 13.

⁴⁹³ Joint Report of OHCHR, UNODC and the Special Representative on Violence against Children, paras. 74 and 96.

⁴⁹⁴ CRC Replies of Cambodia, paras. 44(b) and 72.

⁴⁹⁵ See Report of the Special Rapporteur on the Situation of Human Rights in Cambodia 2021, para. 57.

⁴⁹⁶ Child Rights Coalition Cambodia and Legal Aid of Cambodia (2020), pp. 3-4; Justice With Children (2021), pp. 5-6; See also This Life (2021), p. 37; UN Global Study on Children Deprived of Liberty, ‘*National Launch of the UN Global Study on Children Deprived of Liberty in Cambodia*’ 22 April 2021, p. 15. Available at: [https://www.unicef.org/cambodia/media/4461/file/Outcome%20Report%20for%20the%](https://www.unicef.org/cambodia/media/4461/file/Outcome%20Report%20for%20the%20)

Further, although there are drug rehabilitation centers in the Kingdom to provide treatment to children suffered from drug addiction, drug rehabilitation or treatment is not child-friendly or non-discriminatory. According to the Law on Drug Control⁴⁹⁷ and government's claim,⁴⁹⁸ drug rehabilitation is voluntary and free of deprivation of liberty. However, in reality drug rehabilitation centers, which are operated by Ministry of Social Affairs, Veterans and Youth Rehabilitation and the police, are reportedly using violence, "harsh treatment and abuse" against children including compulsory detention, despite the fact that international norms and standards,⁴⁹⁹ including the Law on Child Justice,⁵⁰⁰ require treatment and rehabilitation of the child to respect the worth, dignity, liberty and rights of the child.⁵⁰¹ In addition, although based on domestic law⁵⁰² and international norms and standards⁵⁰³ drug addiction treatment is free of charge and it has also been claimed so by the government, in practice, it has been reported that referral of the child to drug rehabilitation centers has involved corruption or children need to make payments to get treatment services.⁵⁰⁴ It has been reported by NGOs that poor children accused of using drugs are not referred to a drug rehabilitation center for treatment but instead they are prosecuted and referred to the court because they do not have money to pay bribes.⁵⁰⁵ Requiring the child to pay bribes for an exchange for being diverted to a drug rehabilitation center or to make payments for drug treatment services is discriminatory against the poor and contrary to both domestic and international norms and standards.

There is also lack of awareness raising about diversion and alternatives to pretrial detention at the community level or among the public. Effective diversion or alternative measures to pretrial detention need support from community members and the public who most often view diversion

[20National%20Launch%20of%20the%20UN%20Global%20Study%20on%20Children%20Deprived%20of%20Liberty%20in%20Cam.pdf](#) (Accessed 27 March 2022).

⁴⁹⁷ See Law on Drug Control, 02 January 2012, Art. 101 (Law on Drug Control).

⁴⁹⁸ HRC Replies of Cambodia, para. 47.

⁴⁹⁹ See International Guidelines on Human Rights and Drug Policy, pp. 8, 12-13 and 16; UNODC and WHO (2020), p. 9; UNODC (2010), pp. 5-6.

⁵⁰⁰ Law on Child Justice, Arts. 5 and 66(3).

⁵⁰¹ Amnesty International, '*Substance Abuses*' (2020), pp. 14, 55 and 57; See also Report of the Special Rapporteur on the Situation of Human Rights in Cambodia 2019, para. 47; International Drug Policy Consortium and Asian Network of People Who Use Drugs, '*Universal Periodic Review (3rd Cycle) – Cambodia – Drug Policy – Joint NGO Submission*', pp. 3-4; Dara Mech, 'Man Beaten to Death at Drug Rehabilitation Center', VOD, 21 January 2021, available at: <https://vodenglish.news/man-beaten-to-death-at-drug-rehabilitation-center/> (last visited 27 March 2022).

⁵⁰² See Law on Drug Control, Art. 100.

⁵⁰³ UNODC and WHO (2020), pp. 16 and 63; UNODC (2010), p. 6.

⁵⁰⁴ See Dara Voun, 'Government issues report on drug crimes, treatment', The Phnom Penh Post, 23 September 2019, available at: <https://www.phnompenhpost.com/national/government-issues-report-drug-crimes-treatment> (last visited 31 March 2022); See also Cambodian League for the Promotion and Defense of Human Rights and Amnesty International (2020), p. 8.

⁵⁰⁵ Amnesty International, '*Substance Abuses*' (2020), pp. 46-47; This Life (2021), p. 35.

as ineffective or too lenient to effectively prevent crimes in the community or misunderstand alternatives to pretrial detention as there is no punishment.⁵⁰⁶ For this reason, community members as well as the general public must be educated – e.g. through the media, NGOs and members of the parliament – about diversion and alternatives to pretrial detention and the important role they play in successful application of diversion and alternative measures to pretrial detention.⁵⁰⁷ In Cambodia, however, according to NGOs working in the child justice area, awareness raising about diversion (and alternatives to pretrial detention) is still weak among families and communities.⁵⁰⁸

Finally, another factor that affects the effectiveness of diversion and alternatives to pretrial detention of children considered as offenders is lack of human and financial resources. Effective community-based alternative measures to pretrial detention⁵⁰⁹ and diversion⁵¹⁰ need sufficient financial and human resources.⁵¹¹ In Cambodia, in addition to the lack of children’s specialized courts, the number of social agents needed for the proper administration of diversion and alternatives to pretrial detention is not sufficient. Although two social agents have been appointed for each province and the capital city so far,⁵¹² this number is not enough.⁵¹³ There is no social agent in each commune and district.⁵¹⁴ According to the UN Special Rapporteur and organizations working in the child justice sector, there ought to be “at least” one social agent in one commune⁵¹⁵ and a group of social agents in the district office to provide support to the social agents in the commune.⁵¹⁶ In addition, there are no financial resources provided by the government to support diversion programs.⁵¹⁷ The government financially relies too much on development partners.⁵¹⁸

⁵⁰⁶ CRC General Comment No. 24, para. 111; UNODC (2020), pp. 64-65; UNODC (2007), p. 22.

⁵⁰⁷ Ibid; IACHR (2017), p. 154.

⁵⁰⁸ Child Rights Coalition Cambodia and Legal Aid of Cambodia (2020), p. 3.

⁵⁰⁹ IACHR (2017), p. 152; IACHR Practical Guide to Reduce Pretrial Detention, p. 22.

⁵¹⁰ IACHR (2011), p. 61; Charles and Associates, Inc. (2017), pp. 11, 19 and 25; Michigan Council on Crime and Delinquency (2017), p. 19.

⁵¹¹ UNODC, Custodial and Non-Custodial Measures (2006), p. 2; Report of the Independent Expert Leading the United Nations Global Study on Children Deprived of Liberty, paras. 41 and 46.

⁵¹² HRC Replies of Cambodia, para. 87; CRC Replies of Cambodia, para. 44(a).

⁵¹³ This Life (2021), p. 37; Child Rights Coalition Cambodia and Legal Aid of Cambodia (2020), p. 3.

⁵¹⁴ Report of the Special Rapporteur on the Situation of Human Rights in Cambodia 2018, para. 21; See also Cambodian National Council for Children, *‘National Policy on Child Protection System 2019-2029’* 29 May 2020, p. 12.

⁵¹⁵ Child Rights Coalition Cambodia and Legal Aid of Cambodia (2020), p. 3.

⁵¹⁶ Report of the Special Rapporteur on the Situation of Human Rights in Cambodia 2018, para. 25.

⁵¹⁷ Child Rights Coalition Cambodia and Legal Aid of Cambodia (2020), p. 3; This Life (2021), pp. 37 and 44.

⁵¹⁸ Child Rights Coalition Cambodia and Legal Aid of Cambodia (2020), p. 3.

Programs such as life skill and vocational trainings are generally financed by NGOs, but their resources are limited.⁵¹⁹

5.3 Concluding Remarks and Suggested Solutions to the Practical Problems Identified

5.3.1 Concluding Remarks

Although the Law on Child Justice has already entered into force for five years, diversion and alternatives to pretrial detention of children considered as offenders as stipulated in the law have not yet been implemented. Children considered as offenders have been still processed through the criminal proceedings rather than diverted or released pending trial because of the weakness of Cambodian child justice system and the lack of effective diversion and alternatives to pretrial detention.

The weakness of Cambodian child justice system is caused by five factors. First, Cambodia does not have children's courts. Judges, prosecutors, police, lawyers and social agents do not have sufficient knowledge on the child rights and child justice needed to effectively perform their functions. Second, children considered as offenders are routinely denied access to a lawyer due to the lack of pro bono lawyers, the government's lack of clear policy on legal aid, insufficient budget, and reliance on legal aid provided by NGOs. Third, Cambodian child justice system is weakened by corruption. Corruption in Cambodian criminal justice system is reportedly high and common among the police, lawyers, prosecutors and judges. Fourth, the judiciary reportedly lacks independence and impartiality, which makes the judiciary's decisions on pretrial detention or diversion influenced by the executive's campaign or policy, which results in more children being prosecuted or placed in pretrial detention than it is necessary. Finally, pretrial detention decisions generally lack sufficient reasonings, not based on evidence or thorough analysis or not sufficiently taking into consideration the situation, age and welfare of the child.

The lack of effective diversion and alternatives to pretrial detention is due to four reasons. First, Cambodia does not have in place community-based diversion programs which the child can be referred to. In addition, there is lack of cooperation or partnership among the court, prosecutors, police, social agents, the government, educational institutions, civil society organizations, communities and families. Second, existing drug rehabilitation centers, where the child can be referred to for drug addiction treatment, have reportedly used harsh treatment and violence against the child, including compulsory detention, and children are reportedly required to pay bribes for referral to treatment as well as to make payments for treatment services. Third, there is lack of awareness raising about diversion and alternatives to pretrial detention at the community level or among the public. Finally, there is lack of human and financial resources. There are currently only two social agents at the provincial level, but there is none at the commune and district levels.

⁵¹⁹ Ibid; See also Dara Voun, 'Ministry, NGO Join Hands to Divert Children Away from Jails', The Phnom Penh Post, 24 November 2021, available at: <https://www.phnompenhpost.com/national/ministry-ngo-join-hands-divert-children-away-jails> (last visited 23 March 2022).

Moreover, the government does not have money to support diversion programs and usually relies on development partners and NGOs whose resources are also limited.

5.3.2 Suggested Solutions to the Practical Problems Identified

Cambodia should strengthen the child justice system. In this regard, Cambodian government should establish a child specialized court at each provincial court of first instance and a child specialized chamber at each regional appeal court and the supreme court.⁵²⁰ In addition, the persons working in the child justice system, namely judges, prosecutors,⁵²¹ judicial police, social agents, staff at drug rehabilitation centers, etc. should have obtained sufficient trainings on the child rights, child justice, criminology, diversion, alternatives to detention, child's development and psychology, culture, non-discrimination, gender, etc. Such trainings should be provided before they start their job and continuously throughout their career. In addition to being incorporated into the police training curriculum, the Law on Child Justice and international child rights norms and standards should be incorporated into the curriculums of law schools, the judicial training school, and the lawyer training school.⁵²²

In addition, Cambodian government should ensure that in practice children considered as offenders are promptly provided with quality legal assistance free of charge starting from the time of their arrest, but not from the time of their arrival at the police station, and throughout the criminal proceedings. In this regard, the government should have a clear policy on legal aid⁵²³ and provide sufficient budget for legal aid. The Bar Association of the Kingdom of Cambodia should also have clear mechanisms in place to encourage lawyers to provide quality legal assistance free of charge to children considered as offenders.

Further, Cambodian government should have clear mechanisms, in law and in practice, to fight against judicial corruption and promote judicial independence and impartiality. In this regard, the government should increase salary of prosecutors and judges to ensure that they have sufficient means to support their lives and family without forcing themselves to engage in corruption. The salary of judges and prosecutors should be increased from currently around 1,000 US\$ to 2,000 US\$ per month and the code of ethics for judges and prosecutors should be strictly enforced.⁵²⁴ In addition, the government should improve accountability and capacity of judges and prosecutors,

⁵²⁰ See CRC Consideration of Reports Submitted by States Parties, para. 77(a).

⁵²¹ See Cambodian Center for Human Rights (2021), p. 64; Cambodian Center for Human Rights, *'Fair Trial Rights in Cambodia Monitoring at the Court of Appeal Annual Report'* (2020), p. 56.

⁵²² See e.g. Report of the Special Rapporteur on the Independence of Judges and Lawyers 2010, para. 99(f).

⁵²³ See Report of the Special Rapporteur on the Situation of Human Rights in Cambodia 2019, para. 74(u); HRC Concluding Observations on the Third Periodic Report of Cambodia, para. 27.

⁵²⁴ See Chheng Niem, 'Gov't issues judge, prosecutor wage increase, critics label it 'insufficient'', The Phnom Penh Post, 29 May 2019, available at: <https://www.phnompenhpost.com/national/govt-issues-judge-prosecutor-wage-increase-critics-label-it-insufficient> (last visited 24 April 2022).

e.g. through human rights education,⁵²⁵ and make reforms of the judicial system.⁵²⁶ It is also necessary that the government respect the principle of separation of powers⁵²⁷ and make amendments to the Law on the Organization of the Courts, the Law on the Status of Judges and Prosecutors, and the Law on the Organization and Functioning of the Supreme Council of Magistracies as recommended by Human Rights Committee so as to ensure that the appointment, selection, sanction, suspension and dismissal of prosecutors and judges are in full alignment with international norms and standards.⁵²⁸

How to reason judicial decisions should be taught at the judicial training school to ensure that trainee judges well understand how to reason judicial decisions including decisions on pretrial detention and judicial supervision before they start their judicial career. In this respect, a clear guideline and template on judicial reasoning should also be developed and distributed to judges, and sufficient trainings should be conducted to all judges throughout the country. The form of pretrial detention decisions developed in 2014 by the Ministry of Justice and the Office of the High Commissioner for Human Rights in Cambodia should be followed by judges.

Cambodian government should set up a large variety of community-based diversion services or programs which the child can be referred to free of charge to meet his/her specific individual needs. Those services or programs may include, for example, life skill and vocational trainings; job support; recovery support; treatment of alcohol, drug addiction and mental health problems; religious programs, etc. The government should also strengthen existing programs such as treatment for drug addiction. It is also crucial that the government establish good cooperation and partnership among diversion service or program providers, educational institutions, the court, prosecutors, police, social agents, families, community members, local authorities, and civil society organizations by enacting a law, sub-decree or inter-ministerial prakas to clearly govern their relation and responsibilities with regard to diversion and alternatives to pretrial detention of the child.

Cambodian government should ensure that there is no payment for bribes in exchange for referral of the child to drug rehabilitation centers and drug treatment services. In this respect, Cambodian government should have clear mechanisms to fight against corruption of the judicial police and staff working at drug rehabilitation centers, e.g. by increasing their salary to an appropriate

⁵²⁵ See Report of the Special Rapporteur on the Independence of Judges and Lawyers 2010, paras. 91-99.

⁵²⁶ See Human Rights Council, Report of the Working Group on the Universal Periodic Review - Cambodia, A/HRC/41/17, 5 April 2019, paras. 110.124 and 110.129 (Report of the Working Group on UPR - Cambodia).

⁵²⁷ See Report of the Special Rapporteur on the Independence of Judges and Lawyers 2010, para. 93.

⁵²⁸ See HRC Concluding Observations on the Second Periodic Report of Cambodia, para. 20; HRC Concluding Observations on the Third Periodic Report of Cambodia, para. 33; See also Report of the Working Group on UPR - Cambodia, paras. 110.119, 110.121, 110.125 and 110.127; Report of the Special Rapporteur on the Situation of Human Rights in Cambodia 2019, para. 74(t).

standard. In addition, the code of ethics for judicial police and staff at drug rehabilitation centers should be strictly enforced.

Cambodian government should also ensure that there is no compulsion, torture, violence, ill-treatment or deprivation of liberty of the child in relation to drug addiction treatment. To safeguard the rights of the child, the government should, in addition to adopting clear legal provisions, set up mechanisms or procedures whereby the child being treated at drug rehabilitation centers can file complaints about any violation of his/her rights to an independent or judicial authority. Where there is an allegation of violation of the child rights at drug rehabilitation centers, a prompt investigation should be carried out and an effective remedy should be provided to the child victim when the alleged violation of the child rights is found to be correct.

Cambodian government should further increase awareness raising about diversion and alternatives to pretrial detention among members of the community and the public so as to ensure that they understand the purposes and contents of diversion and alternatives to pretrial detention and the role they play in effective implementation of diversion and alternatives to pretrial detention. In this regard, awareness raising should be carried out via radios, televisions, social media, cooperation with civil society organizations working in the area of child justice, direct local and community education, members of the parliament, etc.

Finally, Cambodian government should increase human and financial resources for diversion and alternatives to pretrial detention. In addition to setting up children's specialized courts and trainings and education as recommended above, the government should increase the current number of social agents at the provincial and municipal Department of Social Affairs, Veterans and Youth Rehabilitation. Further, the government should appoint a number of social agents to work at the district office and at least one social agent to work at the commune level. Moreover, sufficient funds should be invested in diversion programs and alternative measures to pretrial detention to ensure that community-based diversion programs and alternative measures to pretrial detention are properly functioning and available to all children considered as offenders.

Final Words

This research finds that Cambodian child justice system is not in full compliance with the child rights-based approach both in law and in practice regarding diversion and alternatives to pretrial detention. Compared with international, and including regional, norms and standards, Cambodian law contains certain provisions infringing the rights of children considered as offenders and significant gaps that make the law unable to fully protect the rights of children considered as offenders. In addition, in practice, the rights of children considered as offenders in Cambodia are seriously violated due to weakness of the child justice system and ineffectiveness of diversion and alternatives to pretrial detention.

Certain provisions in Cambodian law concerning diversion and alternatives to pretrial detention do not comply with international and regional norms and standards. Cambodian law allows only a petty crime and misdemeanor for diversion, entirely excluding a felony. Additionally, under the law the police can place the child in custody up to 48 hours before he/she is brought before a judge. The law further sets the minimum age of deprivation of liberty of the child to only fourteen. The law does not authorize the police to terminate criminal proceedings against the child by themselves despite the fact that it authorizes the police to divert the child. Moreover, under the law the child can be deprived of his/her liberty based on the reasons of public order and security, which are general terms not clearly defined. Finally, Cambodian law limits the time for resubmission for release of the child from pretrial detention up to one month regardless of whether the child has a good reason to resubmit for release before this one-month period has elapsed or not.

The gaps in Cambodian law regarding diversion and alternatives to pretrial detention are also significant. The law is silent on many areas such as the police's referral of the child with undetermined age to the prosecutor and investigating judge, consent of the child's parents or guardian to diversion, the extent to which the child and his/her parents or guardian should be informed of diversion, diversion of repeated offenders, restorative justice, contents of the police's warnings to the child, procedures the prosecutor must follow after receiving diverted cases from the police, timeframe for submission of a social inquiry report, diversion plan contents on the effects and consequences of diversion and monitoring mechanisms, regular reports on the child's progress during the diversion process, frequency of the social agent's meeting with or contacting the child, mechanisms to complain about violation of the child's rights during diversion, decisions not to divert the child, judicial review of decisions concerning diversion, the rights of the child to request diversion, procedures to prioritize release of the child while in police custody, an adversarial hearing for pretrial detention and judicial supervision, standard and burden of proof on the prosecutor and investigating judge regarding pretrial detention and judicial supervision, examination of lawfulness of the arrest, how to reason pretrial detention and judicial supervision decisions, periodic review of pretrial detention, mechanisms to monitor judicial supervision, investigation into the reasons of the child's breach of judicial supervision, and possible sanctions for such a breach rather than automatic resort to pretrial detention.

In practice, Cambodia cannot safeguard the rights of children considered as offenders due to weak child justice system and ineffective diversion and alternatives to pretrial detention. The weakness of the child justice system is caused by lack of specialized courts for children, the child's lack of access to a lawyer, corruption in the child justice system, lack of independence and impartiality of the judiciary, and insufficient reasoning of pretrial detention and judicial supervision decisions. The ineffectiveness of diversion and alternatives to pretrial detention is due to lack of community-based diversion programs, lack of cooperation and partnership among those workings in the child justice system, violation of the child's rights and corruption at drug rehabilitation centers, lack of awareness raising about alternatives to pretrial detention and diversion among the public and community members, and insufficient human and financial resources.

To fully uphold the child rights-based approach in law and in practice with regard to diversion and alternatives to pretrial detention of children considered as offenders, Cambodia should rectify the problems identified by this research. Concerning legal problems, it is necessary that Cambodia make amendments to the current law by making it comply with international norms and standards. In addition, more provisions should be adopted to complete the loopholes in the current law based on international norms and standards so as to ensure that the rights of children considered as offenders are sufficiently protected. Regarding practical problems, Cambodia should set up children's courts, develop adequate human resources in the child justice system, ensure the child's prompt access to a lawyer, eliminate judicial corruption, promote judicial independence and impartiality, ensure partnership and cooperation among all relevant stakeholders in the child justice system, create effective mechanisms to address violation of the child's rights during the process of diversion and judicial supervision, raise public awareness and invest sufficient money in alternative measures to pretrial detention and community-based diversion programs.

This research focuses only on alternatives to deprivation of liberty of children considered as offenders in Cambodia by means of diversion and alternatives to pretrial detention. It does not address conditions or duration of pretrial detention or alternatives to custodial sentence of children considered as offenders. Therefore, the author would suggest that further research should focus on these remaining areas. In addition, the findings of this research regarding practical factors hindering the effectiveness of diversion and alternatives to pretrial detention are totally based on documents, reports and findings of previous empirical research rather than primary data collected from field work by the author. For this reason, the findings of this research may not address all the relevant practical factors or aspects or to some extent certain data might be biased. Thus, the author would further suggest that further empirical research on diversion and alternatives to pretrial detention of children considered as offenders in Cambodia should be based on collecting primary data by field work through interviews, questionnaires, surveys, observations, reviews of court documents, etc.

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