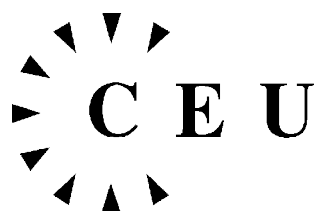


# **Recommendation for Cambodia: Study of Diversions in Juvenile Justice in Japan, South Africa, and England**

By  
Phun Vidjia

*Submitted to*



Central European University  
Department of Legal Studies

In partial fulfillment of the requirement for the degree of LL.M in Human Rights

Supervisor:

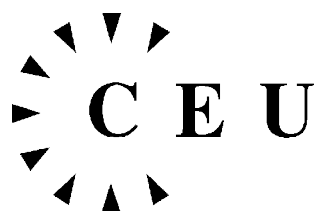
Budapest, Hungary

2008

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## ACKNOWLEDGMENT

## **EXECUTIVE SUMMARY**

## INTRODUCTION

Suppose you are a party in a criminal case and you have divert all unknown phone numbers to your lawyer (with that assumption that those numbers are most probably journalists' numbers) to avoid questions, particularly legal questions, posted by journalists on legal issues. But, I am not sure why you did so. Well, I guess maybe legal question is not your specialization but your lawyer's who you entrust to deal with legal questions. Most importantly, you want to avoid the bad consequence that your answers are being misinterpreted by the journalists.

Diverted call in the above scenario is comparable to a situation when a child accused of a criminal offence is diverted from a criminal court to other forum or other mechanism. This thesis refers the process of diverting child accused/defendant from criminal court as "diversion in juvenile justice". It is a process or a system because there are certain procedures to follow and involvement of different stakeholders; in the same sense that you needs to press certain buttons to reach certain menu and certain sub-menu to divert your incoming phone calls. The process of setting up diverted calls in Sony Ericsson is different from that of Nokia's and Samsung's. Likewise diversion process or system in juvenile justice in Japan is different from that of in South Africa and England.

See UN General Comment No. 10. A mentioning about<sup>1</sup>

With slight difference in wording but not in meaning or goals, diversion is defined as "[a system] of channeling of young people from the criminal justice system into program[s] that make them accountable for their actions".<sup>2</sup> In a bigger picture, it is a component of juvenile justice<sup>3</sup> system, which is a system of penal law that deals specifically with children

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<sup>1</sup> UN General Comment No. 10

<sup>2</sup> UNICEF Country Office – Malawi, *Malawi Fact Sheet: Diversion of Children in Conflict with the Law*, Lilongwe: UNICEF – Malawi, 2005, p. 1

<sup>3</sup> Concept of Juvenile Justice and Diversion will be discussed in detail in Chapter I of this thesis.



in conflict with law.<sup>4</sup> The terms that have different wording but the same meaning or goals as diversion are restorative justice, community mediation, sentences involving community services, alternative sentencing schemes, etc.<sup>5</sup>

Abramson (2004) emphasizes that a diversion always has to be a “diversion from A to B”, “not a mere diversion from A”. For example, diversion is said to be in place is only when young offender is diverted from criminal system to juvenile justice system; from detention (i.e. imprisonment) to non-custodial measures; from prosecution, either in the juvenile or criminal justice system, to alternatives such as restorative justice.<sup>6</sup> This means even the judges decide to give the chance to the children for rehabilitation and reintegration into the society, but without diversionary programs in place, the children would still end up in prison.

Diversion order can be implemented at various stage of criminal procedures such as “prior to arrest, prior to charge, prior to plea, prior to trial or prior to sentencing.”<sup>7</sup>

In addition to variety of terms used to mean diversion, Abramson (2004) suggests that distinct terminologies should also be used in the juvenile justice field in order to disassociate the children from a criminal justice system, which is designed for adults. This disassociation contributes to less stigmatization and rehabilitation of children. Those terms are juvenile offense (in lieu of crime), juvenile offender or delinquent (instead of a criminal), detention facility (jail), adjudication (trial), violate the law (guilty), etc. Also important to note is term “Juvenile” in this thesis is used interchangeably with young people, youthful people, and

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<sup>4</sup> Bruce Abramson, *The Right to Diversion: Using the Convention on the Rights of the Child to Turn Juvenile Justice Rights Into Reality*, International Juvenile Justice Observatory (OIJJ), 2004, p. 12, available at [http://www.oijj.org/documental\\_ficha.php?cod=5&total=7&tampag=15&vis=S&pags=1](http://www.oijj.org/documental_ficha.php?cod=5&total=7&tampag=15&vis=S&pags=1), visited on December 6, 2007

<sup>5</sup> Penal Reform International, *Juvenile Justice Training Manual: Facilitator Guides and Participant's Materials*, p. 20 & 22. The whole manual is obtainable by making request to Dena Fisher, [dfisher@penalreform.org](mailto:dfisher@penalreform.org) or visit [www.pri.org](http://www.pri.org) for further information. As a matter of fact, Abramson explains that restorative justice and types of community mediation are service component of diversion system.

<sup>6</sup> Abramson, *supra* note 4, p. 7

<sup>7</sup> South African Law Commission, *Juvenile Justice*, South African Law Commission, Issue Paper 9, Project 106, [http://www.saflii.org/za/other/zalc/ip/9/9-7\\_.html](http://www.saflii.org/za/other/zalc/ip/9/9-7_.html), visited on December 5, 2007

children to mean, in *legal sense*, a person who is under the age of 18 years old.<sup>8</sup> However, it should be noted that there is no agreed age of criminal responsibility among countries in the world. The age varies from 8 to under 18, except Cambodia and other few countries that do not have specific age of criminal responsibility for juveniles in their national legislation.<sup>9</sup>

When children committed criminal offences, various diversionary programs are needed due to three assumptions – 1) youngster are in a process of development, 2) [they have] a great potential for rehabilitation, and 3) children and adolescents are vulnerable.<sup>10</sup> Otherwise, when convicted of criminal offences, children would end up in prison, a place which children rights activist and penal system reformers argue that it does not serve the purpose of rehabilitation or giving young offenders, especially those committing first-time minor offence, a chance to reintegrate back into their communities or society as a whole.<sup>11</sup>

They further argue that rehabilitation and reintegration is a better tool than a sole punishment (by means of imprisonment) for preventing children from commission of criminal offences again in the futures.<sup>12</sup> This proposition stems for the core fact that diversion 1) help to prevent harm to the offender [physical and psychological ones], 2) promote rehabilitation, 3) protect society, and 4) cost-effective in using state resources for administration of juvenile justice.<sup>13</sup>

Their argument of a need to have diversion in juvenile justice is not unfounded.<sup>14</sup> In other word, state party to Convention on the Right of the Child (hereinafter referred to as

<sup>8</sup> Article 1 of the Convention on the Right of the Child, hereinafter is referred to as CRC

<sup>9</sup> Save the Children UK, *Modern Concept of Working with Children in Conflict with Law: Juvenile Justice*, London: Save the Children UK, 2007, p. 48

<sup>10</sup> Abramson, *supra note 4*, pp. 25-29

<sup>11</sup> **Make me criminal and putting juvenile in the prison is not the rights solution**

<sup>12</sup> Abramson, *supra note 4*, p. 9

<sup>13</sup> Abramson, *supra note 4*, pp. 7-9

<sup>14</sup> Detail of legal basis for having a diversionary system, including provisions other than Convention on the Right of the Child, will be discussed in Chapter I on Concept and Theory of Diversion

CRC) is under obligation to have a properly functioning system for diverting young people from imprisonment, as well as for diverting them from the juvenile and criminal courts.<sup>15</sup>

*Article 40 of CRC:*

(1)...

(2)...

(3) *“State Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:*

*(a)...*

*(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.”*

*(4) A variety of dispositions, such as care, guidance and supervision orders; counseling; probation; foster care; education and vocation training programs and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offense*

However, one may have legitimate concern, or public may have the fears and sentiments,<sup>16</sup> about the rights of and compensation for a victim who suffers from serious criminal offences committed by young offender. His or her concern is responded with thresholds or criteria to decide whether a juvenile offender should undergo diversion. One of the thresholds that should be codified into law is type of crimes, which by their natures are not eligible for diversion. Examples of these types of crimes are drawn up in the new Child Bill in Malawi. The said criminal offences includes rape or attempted rape, manslaughter or murder, infanticide, robbery with violence, arson, offences against aircraft, maliciously administering poison with intent to harm, etc.<sup>17</sup>

International obligation under CRC to implement diversion is also applied to Cambodia, Japan, South Africa, and England. **Japan, South Africa, and England when?**

<sup>15</sup> Bruce Abramson, *supra* note 4, p. 3

<sup>16</sup> A term used in Jørgen Jepsen, *The DIHR Support Programme and International Trend*, in Johnny Juhl Sørensen and Jørgen Jepsen (eds.), *Juvenile Justice in Transition: Bringing the Convention on the Rights of the Child to Work in Africa and Nepal*, Copenhagen: The Danish Institute for Human Rights, June 2005, p. 13

<sup>17</sup> UNICEF Country Office – Malawi, *supra* note 9, p. 4

Cambodia acceded to CRC, with no single reservation, on 15 October 1992.<sup>18</sup> But, it is a slow legal development that the country does not yet adopt domestic legal provision to offers special protection for the children who are in conflict with laws (peculiarly in the area of criminal law). In contrast existing criminal code and criminal procedure, adopted in 1992 and 1993 for the transitory period when Cambodia was just alleviated from a two decades of arm conflict, is also applicable in case of criminal offence(s) committed by a juvenile. This application offers no protection to children who are supposed to be treated as victims not necessarily as criminals and this mean there is no diversion but imprisonment if they are found guilty.<sup>19</sup> By early July 2007, partly due to civil society's advocacy effort, the law on juvenile justice system has been finally drafted and lobbied at the legal committee of the National Assembly.<sup>20</sup>

Egger (2005), in his assessment of the *Situation of Children in Conflict with Law in Cambodia*, finds that there is no formal diversionary program or scheme provided under Cambodian law to channel away children who come into conflict with laws (especially penal law) from the formal criminal justice system.<sup>21</sup> This assessment recommends diversionary program as one of reform sectors in Cambodian juvenile justice system.<sup>22</sup> However, he allocates 3 pages to discuss examples of diversionary programs. He mentioned, but not examined in depth about possible application of those diversion in Cambodia, that there are

<sup>18</sup> On Status of ratification, see <http://www2.ohchr.org/english/bodies/ratification/11.htm>

<sup>19</sup> Sandra Egger, *An Assessment of the Situation of Children in Conflict with the Law in the Kingdom of Cambodia*, Phnom Penh: UNICEF Cambodia, 2005, pp. 28 and 127, available at [http://www.oijj.org/documental\\_ficha.php?cod=0&total=7&tampag=15&vis=S&pags=1](http://www.oijj.org/documental_ficha.php?cod=0&total=7&tampag=15&vis=S&pags=1), visited on December 7, 2007

<sup>20</sup> Seng Sokhim, *Using International Law to Try Juvenile Case*, Neak Chhab Legal Brief No. 16, Phnom Penh: Cambodia Defenders Project, September 2005, p. 1

<sup>21</sup> Egger, *supra* note 18, p.127

<sup>22</sup> Sim Souyong, Pa Ngoun Kea and Lay Putheara, *Children in the Cambodian Justice System, Protection of Juvenile Justice (PJJ)*, 2003 quoted in Sandra, *supra* note 18, pg. 29

various forms of diversionary schemes around the world and well summarized in a research documented by UNICEF ICDC, Innocenti Digest 3<sup>23</sup>.

One example he cited, with variation, was “Family Group Conference” referred to as “Wagga Wagga Model”<sup>24</sup> in Australia whereby the police refer most young offenders, after their admission to the offence, to a mediation conference involving people at stake in the offence committed such as the victim and his or her supporter, the offender and his or her family, social workers and law enforcement officials. The first variation is that the conference of those interested persons seek to enable compassionate, non-adversarial, less stigmatized, and understanding dialog between offender and victim about the causes and consequences of the current offence and, if repeated, future offence. This conference ends with verbal or written promise or agreement such as apology and non-repetition as well as sanction and reparation including some forms of monetary compensation, working for the victim or community work, counseling, etc. Second variation is referral the juveniles to a conference which doesn’t involve the aforesaid persons but to a separate juvenile justice administration. Last variation is referral from a juvenile court during a pre-trial stage to a conference.

Further he has four cautions. Firstly, such family group conferencing and other forms of diversionary programs should be statutorized to avoid complete replacement of formal juvenile justice system such as possibility of challenging the charge brought against the children in case of refusal to admit alleged offence.<sup>25</sup> Secondly, diversionary programs should not be a deprivation of liberty without a judicial review. Thirdly, juvenile should be well informed about legal representation and due process in formal justice system so that they

<sup>23</sup> Quoted in Egger, *supra* note 18, p. 128. It can be found at Innocenti Digest 3, *Juvenile Justice*, Florence: UNICEF ICDC, 1998, p10-11, available at <http://www.unicef-irc.org/publications/pdf/digest3e.pdf>, visited on December 13, 2007

<sup>24</sup> Egger, *supra* note 18, p. 128

<sup>25</sup> In addition to interested actors in the process of conferencing, listing of divertible offence shall be drawn up to avoid subjective classification and risk of allowing violent crimes or other serious crimes such as rape and arm robbery unpunished.

may not admit to the offence just because of “fearing” of court. Fourthly, markedly for Cambodia,<sup>26</sup> he doesn’t recommend monetary compensation as a restorative justice due to possible corruption and negative effects on both the offender and victim, and lastly he warns about police brutality toward the children and a need for awareness and capacity building about standard administration of juvenile justice system among law enforcement officials, court, prosecutors, lawyers, etc.

Like Cambodia, diversion schemes in South African, though put into practices, has no formal legal basis. However, in South African Constitutional Court’s jurisprudence rules that the lack of formal legal basis doesn’t prevent the implementation of diversionary programs.<sup>27</sup> Diversion<sup>28</sup> of juveniles from formal court proceeding starts when a charge is dropped by prosecutor.<sup>29</sup> Diversionary programs were implemented in South African in the early 1990’s and were mainly provided by an NGO, South African National Institute for Crime Prevention and the Reintegration of Offenders (NICRO)<sup>30</sup>, but only 5% of the juvenile cases, the ones that were suitable for diversion, were diverted<sup>31</sup>.

Most common Diversion programs, supervised by NICRO, range from life skills training, to pre-trial community services, family group conferencing, and other outdoor experiential learning. Since this diversion involves cost and time, there is another “imaginative and inexpensive” type of diversion, which is reported to be beneficial for children charged of sexual offences. That type of diversion is “essay writing”, overseen by the prosecutors as a conjunction component of sentencing. The essay writing involves

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<sup>26</sup> This warning is derived from a report of a pilot project, A Family Group Conference, in one Cambodian province, *Battambang*. See Egger, *supra* note 18, p. 128

<sup>27</sup> What is reference to this jurisprudence?

<sup>28</sup> Other diversionary programs in Japan, South Africa, and England will be discussed in Chapter II

<sup>29</sup> South African Law Commission, *supra* note 10, at sec. 7.5

<sup>30</sup> More about this organization, visit <http://www.nicro.org.za/about/>

<sup>31</sup> For detail, see South African Law Commission, *supra* note 10, at sec. 7.4-7.5

description of childhood experiences and their future aspiration as well as their reflection on the offense violated and future avoidance from that offense<sup>32</sup>.

Having briefly indicated above in the assessment by Egger in 2005, Cambodia lacks of statutory provision for juvenile court/chamber<sup>33</sup> and diversionary program as well as other restorative justice schemes as a component of the administration of juvenile justice system<sup>34</sup>. Hence the writer of this thesis aimed at 1) investigating into various diversionary programs, both successful and failed “stories”, currently practiced in a country in Asia, Japan, a country in Africa, South Africa, and a Country in Europe, England; 2) analyzing feasibilities and risk of implementation of those programs in the context of Cambodia; 3) contributing to policy consideration and implementation<sup>35</sup> to offer better protection to children who are in conflict with criminal justice system and ultimately to betterment the system of juvenile justice system. These countries are chosen due to 1) the fact that they *may* have programs that are not only successful but also in conformity with the standards set out by United Nation, and 2) the need to explore some trends in different continent in the area of diversionary program for juvenile offenders.

To achieve the said goals, this thesis will use law in context approach to understand the implementation of the diversionary programs in those selected countries and access applicability of those programs in the context of Cambodia. Substantially, secondary information will be used for this study, particularly academic articles, books, NGO’s report and publication, conference paper, manual, guidelines, as well as other information obtained from internship with Penal Reform International, an organization working toward betterment of penal system worldwide, one of which is juvenile justice. Besides, the thesis will employ some primary data such as applicable and potential development of legal texts, policy papers,

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<sup>32</sup> South African Law Commission, *supra* note 10, at sec. 7.6

<sup>33</sup> Why it is called Chamber?

<sup>34</sup> Egger, *supra* note 20

<sup>35</sup> Relevance of diversion in juvenile justice reform process in addition to public awareness as an indispensable element + legal reform and legal institution (Juvenile Justice in Transition, p. 12 and 14)

guideline, Committee of the CRC's concluding observation, government's country report, etc.

The thesis is presented into three main chapters. Chapter I discovers the concept of juvenile justice system and diversion by studying the historical concept and definition of juvenile justice, international standards and norms instructing the administration of juvenile justice and diversion, and theoretical pros and cons of implementing diversion. Chapter II goes into depth examination of diversionary programs in Japan, South Africa, and England by utilizing the successful and failed examples of the implementation to understand possible challenges and find out the future solution. The comparative insight understood from success and failure of diversion in the said countries will briefly serve as starting point of discussion chapter III, which will assess the possibility of implementation of those diversionary programs in Cambodia. Legal framework, institutional framework, economic and social peculiarities will help to assess the possibility. Moreover, risks which include unintended negative effects resulting from the implementation and factors contributing to possible failure of implementation will also help to strengthen the argument about feasibilities of those diversion programs in Cambodia. The thesis will end with recommendation to avoid the risks and conclusion of overall finding and possible suggested research.



## CHAPTER I: CONCEPT OF JUVENILE JUSTICE SYSTEM AND DIVERSION

### I.1. Definition and Concept

As mentioned in the introduction part of this thesis, Abramson (2005) points out that common understanding of terminology used in the special field of children right, Juvenile Justice is very important. It is crucial because it not only facilitates successful communication with governmental officials and the public but also among either the juvenile justice professionals or children rights activist. Common understanding (what and why diversion) and successful communication (how), in his proposition, are requirements for successful reformation of the juvenile justice system, including diversion.<sup>36</sup> He adds that distinct terminologies should also be used in the juvenile justice field in order to disassociate the children from a criminal justice system, which is designed for adults. This disassociation contributes to less stigma and rehabilitation of children.<sup>37</sup> So in the following paragraphs the thesis will discuss variety of understanding of terms and concepts of diversion among juvenile justice professional and/or children rights activists.

**What is juvenile justice?** Diversion is a one system within juvenile justice system.<sup>38</sup> Hence, it is a prerequisite for understanding of diversion to briefly explore some definition and concept about juvenile justice. First off, juvenile is a denotation of young people, youthful people, and children<sup>39</sup> and it is used to refer, in a legal sense, to person who is under

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<sup>36</sup> Bruce Abramson, *The Right to diversion: Using the Convention on the Rights of the Child to Turn Juvenile Justice Rights into Reality*, in Johnny Juhl Sørensen and Jørgen Jepsen (eds.), *Juvenile Justice in Transition: Bringing the Convention on the Rights of the Child to Work in Africa and Nepal*, Copenhagen: The Danish Institute for Human Rights, June 2005, p. 50-51

<sup>37</sup> Bruce Abramson, *The Right to diversion: Using the Convention on the Rights of the Child to Turn Juvenile Justice Rights into Reality*, in Johnny Juhl Sørensen and Jørgen Jepsen (eds.), *Juvenile Justice in Transition: Bringing the Convention on the Rights of the Child to Work in Africa and Nepal*, Copenhagen: The Danish Institute for Human Rights, June 2005, pp. 62-63

<sup>38</sup> Bruce Abramson, *The Right to diversion: Using the Convention on the Rights of the Child to Turn Juvenile Justice Rights into Reality*, in Johnny Juhl Sørensen and Jørgen Jepsen (eds.), *Juvenile Justice in Transition: Bringing the Convention on the Rights of the Child to Work in Africa and Nepal*, Copenhagen: The Danish Institute for Human Rights, June 2005, p. 62

<sup>39</sup> Use Oxford dictionary

the age of 18 years old.<sup>40</sup> Distinctive terms used in juvenile justice field are reflected in standard minimum rules on the administration of juvenile justice (hereinafter is referred to as “Beijing Rules”). Those terms are well summarized in the following table by Abramson (2005).<sup>41</sup>

**Table 1: Penal Terminology**

<b>Criminal Law</b>	<b>Juvenile Justice Law</b>
Crime	Juvenile offence
Criminal	Juvenile offender/delinquent
Jail	Detention facility
Trial	Adjudication
Guilty	Committed the offence/violate the law
Sentence	Disposition
Prison	detention center/close facility

Beside distinctive term used, juvenile justice law has two types of juvenile offence; first are offences or crimes that are punishable by law if committed by adult. These offences are, for examples, theft, murder, rape, arson, etc. Second types of juvenile offences are status offences; these offences are not violation of juvenile justice law if they are committed by adult. So they are status offence because they are committed by juveniles. For instance, a child consuming alcoholic drink runs away from home, truancies school, or betting football would be a violator of juvenile justice law.<sup>42</sup>

<sup>40</sup> Article 1 of the Convention on the Right of the Child, hereinafter is referred to as CRC

<sup>41</sup> Bruce Abramson, *The Right to diversion: Using the Convention on the Rights of the Child to Turn Juvenile Justice Rights into Reality*, in Johnny Juhl Sørensen and Jørgen Jepsen (eds.), *Juvenile Justice in Transition: Bringing the Convention on the Rights of the Child to Work in Africa and Nepal*, Copenhagen: The Danish Institute for Human Rights, June 2005, pp. 62

<sup>42</sup> See also Bruce Abramson, *The Right to diversion: Using the Convention on the Rights of the Child to Turn Juvenile Justice Rights into Reality*, in Johnny Juhl Sørensen and Jørgen Jepsen (eds.), *Juvenile Justice in Transition: Bringing the Convention on the Rights of the Child to Work in Africa and Nepal*, Copenhagen: The Danish Institute for Human Rights, June 2005, pp. 63

There are two basic model designed to react to wrong-doing, namely, civil law and penal law systems. While criminal and juvenile systems form parts of penal law system, child protective service is a part of civil law system.<sup>43</sup>

**What is diversion?** As briefly discussed in the introduction part of the thesis, diversion, to Abramson (2005), must be (always) diversion from A to B to avoid harmful results caused by A. He used a metaphor of diversion of vehicles away from traffic accident scene to safe route(s) to avoid various complication such as traffic jam that prevent ambulance from reaching the scene or more traffic accident. To put it in juvenile justice context, diversion is a process of channeling the juvenile offenders from imprisonment to other child-friendly or non-custodial alternatives in order to avoid the harmful effects that often caused by prison [either in juvenile prison or within adult prison]. It must be a diversion from A to B because absence of B, the child-friendly or non-custodial alternatives, will force the judges to order the A option, imprisonment.<sup>44</sup>

**Diversion as a system:** various components, the police, the courts, the lawyers (prosecutors and defenders), the jails and prisons, the juvenile officers, and the rehabilitation, prevention, and diversion programs, constitute a system of diversion.<sup>45</sup>

First component is juvenile officers play essential roles in various stages of diversion system and their roles lessen state's complication in compliance with CRC (article 37.b, 40.3, and 40.4). Juvenile officers are government employers who are seen as service providers and supporters in diversion system. For instance, juvenile officers may be called by the police to

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<sup>43</sup> Bruce Abramson, *The Right to diversion: Using the Convention on the Rights of the Child to Turn Juvenile Justice Rights into Reality*, in Johnny Juhl Sørensen and Jørgen Jepsen (eds.), *Juvenile Justice in Transition: Bringing the Convention on the Rights of the Child to Work in Africa and Nepal*, Copenhagen: The Danish Institute for Human Rights, June 2005, pp. 63-65

<sup>44</sup> Bruce Abramson, *The Right to diversion: Using the Convention on the Rights of the Child to Turn Juvenile Justice Rights into Reality*, in Johnny Juhl Sørensen and Jørgen Jepsen (eds.), *Juvenile Justice in Transition: Bringing the Convention on the Rights of the Child to Work in Africa and Nepal*, Copenhagen: The Danish Institute for Human Rights, June 2005, pp. 51-52

<sup>45</sup> Bruce Abramson, *The Right to diversion: Using the Convention on the Rights of the Child to Turn Juvenile Justice Rights into Reality*, in Johnny Juhl Sørensen and Jørgen Jepsen (eds.), *Juvenile Justice in Transition: Bringing the Convention on the Rights of the Child to Work in Africa and Nepal*, Copenhagen: The Danish Institute for Human Rights, June 2005, p. 53-56

the scene of the offence to facilitate talking among the child, the family, and the victim(s) in order to avoid the filing of charges against the child. At pre-disposition stage, the prosecution against the child may be dropped due to possible alternatives to trial (in criminal court if there is no juvenile court) that juvenile officers suggested to the prosecutors. At post-disposition stages, social reports on the situation of the said child and possible alternatives to custodial measures prepared by the juvenile officers help the judge not to impose custodial measures but appropriate diversion scheme.<sup>46</sup> Can the roles of juvenile officers played by NGO?

### NICRO

Second component is alternative placement. There should be variety of alternative placement, either open facilities or foster home, that youth offender can reside as alternatives to imprisonments. The placement may be fully or partly owned, managed, and funded by one or more ministries including those that are not primarily responsible for justice system.<sup>47</sup>

Third component is range of services for prevention and rehabilitation of the children. These services include personal and close counseling provided by juvenile officers to the young offenders; assistance in completing court disposition on schooling and job training; and other assistance after the child completed court disposition such as employment seeking. Like the second component, the service component may be fully or partly provided by the government.<sup>48</sup> This suggests that NGOs and civil society can cooperate with government to provide variety of services for the benefit of the child as well. The service, particularly counseling, provided to the child offender shall help the child to appreciate right and wrong

<sup>46</sup> Bruce Abramson, *The Right to diversion: Using the Convention on the Rights of the Child to Turn Juvenile Justice Rights into Reality*, in Johnny Juhl Sørensen and Jørgen Jepsen (eds.), *Juvenile Justice in Transition: Bringing the Convention on the Rights of the Child to Work in Africa and Nepal*, Copenhagen: The Danish Institute for Human Rights, June 2005, p. 54

<sup>47</sup> Bruce Abramson, *The Right to diversion: Using the Convention on the Rights of the Child to Turn Juvenile Justice Rights into Reality*, in Johnny Juhl Sørensen and Jørgen Jepsen (eds.), *Juvenile Justice in Transition: Bringing the Convention on the Rights of the Child to Work in Africa and Nepal*, Copenhagen: The Danish Institute for Human Rights, June 2005, p. 54

<sup>48</sup> Bruce Abramson, *The Right to diversion: Using the Convention on the Rights of the Child to Turn Juvenile Justice Rights into Reality*, in Johnny Juhl Sørensen and Jørgen Jepsen (eds.), *Juvenile Justice in Transition: Bringing the Convention on the Rights of the Child to Work in Africa and Nepal*, Copenhagen: The Danish Institute for Human Rights, June 2005, p. 55

and this means counseling should also help the child understand what s/ he has done wrong to the victim and what s/he should have done to repair the wrongfulness and should avoid after serving court disposition. This counseling part may be more effective it is combined with mentoring and interaction with other adolescent such high school students or university students.

**What are diversions?** Abramson (2005) treats juvenile justice system as one example of diversion because the accused children are diverted from adult criminal law system to be tried in a juvenile court, which has facilities and special procedures for the children. The idea of specialized court to deal with children in penal law started in 1899 in Illinois, the United State and transformed into varied features (procedures and facilities) around the world.<sup>49</sup> The benefit of trying a child in juvenile court instead of criminal court is that the child is less stigmatized because he or she is referred to as delinquent instead of criminal, a term referred to convicted adult.<sup>50</sup> Despite being tried in juvenile court, the accused child still benefit from all the due process of criminal procedures that adults enjoy in criminal court.<sup>51</sup> The ideas was recognized internationally in 1988 when the UN General Assembly adopted resolution on Beijing Rules and bind state international obligation in 1989 when CRC entered into force.

#### *Article 40 of CRC*

*State Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children [and adolescents under 18 years] alleged as, accused of, or recognized as having infringed the penal law...*

State diverts juvenile offenders:

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<sup>49</sup> See Bruce Abramson, *The Right to diversion: Using the Convention on the Rights of the Child to Turn Juvenile Justice Rights into Reality*, in Johnny Juhl Sørensen and Jørgen Jepsen (eds.), *Juvenile Justice in Transition: Bringing the Convention on the Rights of the Child to Work in Africa and Nepal*, Copenhagen: The Danish Institute for Human Rights, June 2005, p. 55; and *Gault Case*, 387 U.S. 1, 87 S.Ct. 1428 (1967), p. 5

<sup>50</sup> *Gault Case*, 387 U.S. 1, 87 S.Ct. 1428 (1967), p. 8

<sup>51</sup> *Gault Case*, 387 U.S. 1, 87 S.Ct. 1428 (1967) and *Winship Case*, 397 US 358 (1970)

- From the criminal system to juvenile justice system;
- From detention (i.e., imprisonment) to non-custodial measures;
- From prosecution in the penal system (juvenile or criminal) to alternative measures within penal system or to a civil law system or to civil society, without further state involvement.

The third type of diversion is the focus of this thesis. Examples of the third type of diversion from Japan, South Africa, and England will be compared and analyzed in order to provide recommendation to Cambodia. However, it is important as well for this thesis to summarize hereunder the international standards for the first type of diversion, juvenile justice system.

CRC does not expressly instruct the state parties to have a juvenile justice system for minors and a separate criminal law system for adults. This is to say that CRC was written to accommodate to variety to state practice.<sup>52</sup>

***Minimum age of penal responsibility = minimum age of criminal responsibility?***

Minimum age of criminal responsibility refer to a minimum age that a juvenile can be brought into criminal law system, i.e. trying a juvenile in criminal court instead of juvenile court.<sup>53</sup> Two variations are found in a minimum age of criminal responsibility. First is absolute minim age and second is general and special minimum age (seriousness and rehabilitation). CRC requires state to set a *minimum age of penal responsibility* that is a minimum age for a child or adolescent to entry into the juvenile justice system.<sup>54</sup> This age of

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<sup>52</sup> Bruce Abramson, *The Right to diversion: Using the Convention on the Rights of the Child to Turn Juvenile Justice Rights into Reality*, in Johnny Juhl Sørensen and Jørgen Jepsen (eds.), *Juvenile Justice in Transition: Bringing the Convention on the Rights of the Child to Work in Africa and Nepal*, Copenhagen: The Danish Institute for Human Rights, June 2005, p. 65

<sup>53</sup> Bruce Abramson, *The Right to diversion: Using the Convention on the Rights of the Child to Turn Juvenile Justice Rights into Reality*, in Johnny Juhl Sørensen and Jørgen Jepsen (eds.), *Juvenile Justice in Transition: Bringing the Convention on the Rights of the Child to Work in Africa and Nepal*, Copenhagen: The Danish Institute for Human Rights, June 2005, p. 66-67

<sup>54</sup> See The Beijing Rules 2.2 (accompanying with commentary) and see also Bruce Abramson, *The Right to diversion: Using the Convention on the Rights of the Child to Turn Juvenile Justice Rights into Reality*, in Johnny Juhl Sørensen and Jørgen Jepsen (eds.), *Juvenile Justice in Transition: Bringing the Convention on the*

penal responsibility exists in state where there are two systems of penal law, criminal law system and juvenile justice system. For example, Vicheka, 11, is not brought into juvenile justice system for the juvenile offence he committed because 12 years old is a minimum age of penal responsibility in Cambodia.

There is no international standard and norm on “threshold”, but Jørgen suggests that penal reform must also consider the “hard end” of the continuum of juvenile offenders such as proportional sentences and more humane deprivation of liberty (special institutions within a social/welfare system rather than jails/prisons, special remand homes, approved schools, etc.)<sup>55</sup>

**Imprisonment:** It is a concrete international rule that the state must kept minor law violators in a detention facility which is apart from adult criminal prison. Mixing both of them in **one (use other language to mean that in one room)** detention facility can easily result in physical and emotional abuses.<sup>56</sup>

### ***Rehabilitation and Reintegration: The Twin Objective***

#### **Debate: Welfare Model v. Control Model<sup>57</sup>**

Even the best intentions of helping juveniles cannot justify violating their [children] civil and procedural rights.<sup>58</sup> Kangaroo Court

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*Rights of the Child to Work in Africa and Nepal*, Copenhagen: The Danish Institute for Human Rights, June 2005, p. 66-67

<sup>55</sup> Jørgen Jepsen, *The DIHR Support Programme and International Trend*, in Johnny Juhl Sørensen and Jørgen Jepsen (eds.), *Juvenile Justice in Transition: Bringing the Convention on the Rights of the Child to Work in Africa and Nepal*, Copenhagen: The Danish Institute for Human Rights, June 2005, p. 19

<sup>56</sup> Bruce Abramson, *The Right to diversion: Using the Convention on the Rights of the Child to Turn Juvenile Justice Rights into Reality*, in Johnny Juhl Sørensen and Jørgen Jepsen (eds.), *Juvenile Justice in Transition: Bringing the Convention on the Rights of the Child to Work in Africa and Nepal*, Copenhagen: The Danish Institute for Human Rights, June 2005, p. 64

<sup>57</sup> Debate about juvenile justice reform reflect the general conflict between the welfare model and the control model, Jørgen Jepsen, *The DIHR Support Programme and International Trend*, in Johnny Juhl Sørensen and Jørgen Jepsen (eds.), *Juvenile Justice in Transition: Bringing the Convention on the Rights of the Child to Work in Africa and Nepal*, Copenhagen: The Danish Institute for Human Rights, June 2005, p. 13

<sup>58</sup> Jørgen Jepsen, *The DIHR Support Programme and International Trend*, in Johnny Juhl Sørensen and Jørgen Jepsen (eds.), *Juvenile Justice in Transition: Bringing the Convention on the Rights of the Child to Work in Africa and Nepal*, Copenhagen: The Danish Institute for Human Rights, June 2005, p. 15

## I.2. Theoretical Pros and Cons

Why diversion?

According to Abramson, diversion has four important purposes:<sup>60</sup>

**1. Prevention of harm to the child offenders:** detention blocks children's opportunity to education, recreation, family and counseling support and exposes them not only to risks of infectious disease in detention facilities but also being sexually or physically abuse by the fellow inmates and guards. Notable effect of imprisonment is stigma that negatively affects the children psychologically such as low self-esteem, alienation, anger and despondency. The child offenders shall be treated as victims because a number of surveys suggest that children committing offences have frequently been victims of serious domestic abuse (in their own families). Thus imprisonment of young offender is not appropriate; they should be placed in diversion system to avoid negative effect of the imprisonment.

**2. Promotion of rehabilitation of the child offenders:** diversion has positive effect of rehabilitating the child offenders by providing them opportunity to treat themselves (of course with the help of juvenile officers or social workers) psychologically through schooling, sport or [recreation], job training or employment. Diversion also helps to address the family's negative effects that contribute to children's commission of offence. The ultimate goal of rehabilitation is to reduce acts of reoffending by the child offenders after receiving diversionary programs.

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<sup>59</sup> See Armstrong, Troy, *Bringing Balance to Reintegrative Interventions with Serious Juvenile Offenders: Rehabilitative Aspects of Intensive Aftercare Program (IAP) Initiative*, in Jensen & Jepsen (eds.) and Braithwaite, John, *Restorative Justice and Responsive Regulation*, New York: Oxford University Press, 2002.

<sup>60</sup> Bruce Abramson, *The Right to diversion: Using the Convention on the Rights of the Child to Turn Juvenile Justice Rights into Reality*, in Johnny Juhl Sørensen and Jørgen Jepsen (eds.), *Juvenile Justice in Transition: Bringing the Convention on the Rights of the Child to Work in Africa and Nepal*, Copenhagen: The Danish Institute for Human Rights, June 2005, pp. 57-59



**3. Protection of Society:** it is a long-term to the society when diversion helps to divert the juvenile offenders from negative effects of the prison. Children negatively affected by imprisonment are turned to alienated and angry persons who, after releasing to the society, could become as dangerous as (or more dangerous) when they committed the offence.

**4. Effective use of State Resource:** State resource, usually is scarce, is more effectively used when juveniles are diverted from the juvenile or criminal court at earlier stage. In contrast, it is more expensive and [less effective – in term of benefit resulted from usage] when resource is used to process the case from police to the court and to manage a decent imprisonment for the children.

### I.3. International Standards and Norms

**What and How:** Following are discussion of the meaning of international standards and norms regulating the implementation of diversion and administration of juvenile justice system as a whole.

	International	Regional (including the 3 studied countries)
Binding Law	<ul style="list-style-type: none"> <li>- ICCPR (1976)</li> <li>- ICESCR (1976)</li> <li>- ICRC (1989) (Ratified by Cambodia – 1992, Japan, South Africa – , England – ) (Art. 4, 37, 39, 40)</li> <li>- CRC General Comment no. 2 (2002) “The role of Independent National Human Rights Institutions in the Protection and Promotion of the Rights of the Child”, October 2002</li> </ul>	<ul style="list-style-type: none"> <li>- African Charter on Human and People’s Rights (1981)</li> <li>- African Charter on the Rights and Welfare of the Child (1990) (Art. 2-5, 17 &amp; 31)</li> <li>- The European Convention on Human Rights (1950)</li> <li>- European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children</li> </ul>

	<ul style="list-style-type: none"> <li>- Basic Principles on the Use of Restorative Justice Programs in Criminal Matters, Economic and Social Council resolution and Decision 2002/37 of 24 July 2002</li> <li>- General Comment No. 10 (2007): Children's Rights in Juvenile Justice, Committee on the Rights of the Child, of 25 April 2007</li> </ul>	<p>and on Restoration of Custody of Children</p> <ul style="list-style-type: none"> <li>- European Convention on the Exercise of the Right of the Child</li> </ul>
Non-Binding/Policy Document	<ul style="list-style-type: none"> <li>- UN Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") (1985)</li> <li>- United Nations Guidelines for the Prevention of Juvenile Delinquency ("The Riyadh Guidelines") (1990)</li> <li>- UN Rules for the Protection of Juveniles Deprived of Their Liberty ("JDL") (1990)</li> <li>- UN Standard Minimum Rules for Non-custodial Measures ("The Tokyo Rules") (1990)</li> <li>- UDHR (1948)</li> <li>- Implementation Handbook for the Convention on the Rights of the Child, UNICEF (1998)</li> <li>- Administration of Juvenile Justice ("Vienna Guidelines"), Economic and Social Council resolution 1997/30 of 21 July 1997</li> <li>- Guidelines for Action on Children in the Criminal Justice System, Economic and Social Council resolution, 1997/30 of 21 July 1997</li> </ul>	<p>Cambodia: Ministry of Justice</p> <p>Instruction: Application of both National and International Law in Trying Minor Accused, MoJ, IST/2005</p>

	- Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, Economic and Social Council resolution 2005/20 of 22 July 2005	
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- ***Convention on the rights of the Child*** was adopted by the UN General Assembly in 1989 and entered into force in 1992. There are several articles related to diversion as follow:

*Article 37 of CRC:*

*State Parties shall ensure that...*

*(a)...*

*(b)...The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.*

*Article 40 of CRC:*

*(1)...*

*(2)...*

*(3) "State Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:*

*(a)...*

*(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected."*

*(4) A variety of dispositions, such as care, guidance and supervision orders; counseling; probation; foster care; education and vocational training programs and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offense*

Article 37(b) obliges the state party to the convention to use arrest, detention or imprisonments of a child as a measure of last resort. Alternative measure(s) to arrest, detention, or imprison are answered in article 40(4) of the convention; these include care, guidance and supervision orders; counseling; probation; foster care; education and vocational training programs and other alternatives to institutional care. While article 37(b) instructs alternative measures in various situations that deprive liberty of the child, article 40(3b)

instructs states under obligation of this convention to have in place measures other than judicial proceeding to deal with children (under 18 years of age) in conflict with [penal] law.<sup>61</sup> Article 40(4) of CRC, indeed, prescribed state under the obligation to take into consideration of the circumstances and the nature of the offences to decide one or more appropriate diversion. However, the article makes it clear that such measures are appropriate and desirable only if they are in compliance with human rights and legal safeguards. Abramson (2005) interprets that paragraph 3 of article 40 of CRC refer to diversion away from the juvenile or criminal courts to measures that based on informal conflict resolution or restorative justices.<sup>62</sup> His claim is substantially correct because there are publication about the administration of juvenile justice and handbook on restorative justice in dealing with juvenile justice by UNDOC and various authors.

**Why:** Article 3 of CRC and 40(4) of CRC – the purpose of diversion is to achieve well-being or best interest of the child.

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<sup>61</sup> Bruce Abramson, *The Right to diversion: Using the Convention on the Rights of the Child to Turn Juvenile Justice Rights into Reality*, in Johnny Juhl Sørensen and Jørgen Jepsen (eds.), *Juvenile Justice in Transition: Bringing the Convention on the Rights of the Child to Work in Africa and Nepal*, Copenhagen: The Danish Institute for Human Rights, June 2005, pp. 52-53

<sup>62</sup> Bruce Abramson, *The Right to diversion: Using the Convention on the Rights of the Child to Turn Juvenile Justice Rights into Reality*, in Johnny Juhl Sørensen and Jørgen Jepsen (eds.), *Juvenile Justice in Transition: Bringing the Convention on the Rights of the Child to Work in Africa and Nepal*, Copenhagen: The Danish Institute for Human Rights, June 2005, p. 52

## CHAPTER II: DIVERSION IN JAPAN, SOUTH AFRICA, AND ENGLAND

### II.1. Current Diversionary Programs and their Implementation

#### II.1.1 Japan

##### II.1.1.1 Legal Framework (Provision and Thresholds)

Kazunori Kikuchi, Kazunori, *The Guide to Juvenile Hearing Procedures in Japanese and English*, Tokyo: Nihon Kajo Shuppan Inc. Tokyo, 1994

*Juvenile Justice Systems: An International Comparison of Problems and Solutions*, 2002

*General Assembly Resolution A/RES/S-27/2 – A World Fit for Children Pathways to Juvenile Justice Detention Reform*, [www.aecf.org](http://www.aecf.org)

*Crime Prevention Digest II: Comparative Analysis of Successful Community Safety, [www.crim-prevention-intl.org](http://www.crim-prevention-intl.org) International Trends in Crime Prevention: An Annotated Bibliography (1995) and 100 Crime Prevention Programs to Inspire Action Across the World (1999)*

#### **II.1.1.2 Diversionary Programs in Japan**

##### *II.1.2 South Africa*

#### **II.1.2.1 Legal Framework**

#### **II.1.2.2 Diversionary Programs in South Africa**

##### *II.1.3 England*

#### **II.1.3.1 Legal Framework**

Antonopoulous, G.A. and J.A. Winterdyk, *The British 1998 Crime and Disorder Act:*

*A “Restorative’s Response to Youth Offending?”, in European Journal of Crime, Criminal Law and Criminal Justice, vol. 11, no. 4, 2003, p. 391*

Children and Young Persons Act 1963 – publicity or blackout of the media about the proceeding.

Magistrate’s Court Act 1980 – tried summarily by youth court; tried in Crown Court before a judge and jury if charged with murder, manslaughter or an offence punishable if committed by an adult with fourteen or more years’ imprisonment.

Criminal Procedure (Insanity) Act 1964 – whether the accused child is fit to plead

Criminal Justice Act 1991 – Parole

Crime (Sentence) Act 1997

#### **II.1.3.2 Diversionary Programs in England**

## **II.2. Failed and Successful Stories**

## **II.3. Other Challenges and Future Developments**

Public fears and sentiment: youth violence crime in UK (statistic from the newspaper and other public document + the campaign of mayor of London to take tough approach on youth). This fears and sentiment also apply to Japan and South Africa and Denmark<sup>63</sup>

Resource predicament: the convincing argument that diversion is more cost effective. It may be costly but the result harvest would be great such as the reduction of crime rates,

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<sup>63</sup> See Jepsen, Jorgen, Juvenile Justice in Denmark: The Failure of “the Soft Approach”? In: Jensen & Jepsen (eds.)

rehabilitation and reintegration, the preservation of potential youth for future generation of development, and compliance with the international standards. Plus there are many funding sources to apply for as it is not only a domestic problem but international problems. To Abramson, building [and developing] a well-function diversion is like financial investment which require immediate injection of financial capital without which the state resource is not use effectively or in other word the resource is wasted.

## CHAPTER III: FEASIBILITIES OF DIVERSION IN CAMBODIA

### III.1. Lesson Learned from Japan, South Africa, and England

### III.2. Assessing Feasibilities in Cambodia

#### *III.2.a. Legal Framework*

#### *III.2.b. Institutional Framework*

#### *III.2.c. Economic and Social Peculiarities*

#### *III.2.d. Risk:*

#### **III.2.d.1. Unintended Negative Effects and Revisit to Theoretical Pros and Cons**

#### **III.2.d.2. Possible Failure to Achieve Intended Effects**

### III.3. Recommendation for Cambodia

Not to import a system from countries from far different circumstances<sup>64</sup> and the use of alternative placement also reflects the need for a balance of considerations that must be

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<sup>64</sup> Jørgen Jepsen, *The DIHR Support Programme and International Trend*, in Johnny Juhl Sørensen and Jørgen Jepsen (eds.), *Juvenile Justice in Transition: Bringing the Convention on the Rights of the Child to Work in Africa and Nepal*, Copenhagen: The Danish Institute for Human Rights, June 2005, p. 16



part of genuine due process<sup>65</sup>. It is possible that Cambodia can synthesize the good programs in Japan, South Africa, and England as discussed in the above section.

As indicated in this thesis, distinct terms used in juvenile justice field contribute to the rehabilitation of the children and avoid stigma placed on them. Hence, the author of the thesis suggested further research of how the English distinctive terms is translated in to Khmer, the language of Cambodian.<sup>66</sup>

## CONCLUSION

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<sup>65</sup> Jørgen Jepsen, *The DIHR Support Programme and International Trend*, in Johnny Juhl Sørensen and Jørgen Jepsen (eds.), *Juvenile Justice in Transition: Bringing the Convention on the Rights of the Child to Work in Africa and Nepal*, Copenhagen: The Danish Institute for Human Rights, June 2005, p. 17

<sup>66</sup> In the glossary section of the thesis, the authors provides Khmer version of the English distinctive terms in juvenile justice field. However, the term should be refined because they are the authors' suggested terms which do not base on substantial research.

## **GLOSSARY**

**Disposition:** court's order, the sentence or sanction that follows the conviction for having committed a penal offence.

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