



2021

THE LEGAL FRAMEWORK OF ORPHANAGE TRAFFICKING IN CAMBODIA: Enhancing Identification, Prosecution & Prevention

Rebecca Nhep and Dr Kate van Doore

This report is part of a study funded by UBS Optimus Foundation and the Law Futures Centre, Griffith University, entitled 'Enhancing the identification, prosecution and prevention of orphanage trafficking through the legal frameworks of Nepal, Uganda and Cambodia: Stage 1'.

Disclaimer

The opinions expressed in this publication are those of the authors. They do not purport to reflect the opinions or views of Griffith University, Better Care Network or UBS Optimus Foundation.

Acknowledgements

This Report was prepared by Ms Rebecca Nhep, Chief Investigator, and Dr Kate van Doore, Principal Investigator, as part of the UBS Optimus grant, 'Enhancing the identification, prosecution and prevention of orphanage trafficking through the legal frameworks of Nepal, Uganda and Cambodia: Stage 1'.

We acknowledge the support of the Law Futures Centre, Griffith University and the Better Care Network. In particular, we acknowledge the support and work of Ms Melea Lewis, Ms Sarah Hoff and Dr Caitlin Hamilton.

We extend deep appreciation to Dr Nalini Tarekshwor and Ms Dragana Aquilante of UBS Optimus Foundation for their encouragement and support throughout this research.

Table of Contents

Acknowledgements	3
Section One: Introduction and Background	5
The rise and fall of fraudulent intercountry adoptions	5
The emergence of orphanage trafficking	6
Failure to prosecute orphanage trafficking offences	7
Scope of this report	8
Section Two: Overview of the Cambodian Legal System	9
Overview	9
Treatment of international human rights treaties	10
Statutory interpretation	12
Section Three: Overview of the Criminal Justice System	14
Cambodian Criminal Code	14
Criminal Procedure Code	15
Reporting criminal offences	15
Process for commencing investigations and laying charges	16
Role of the judicial police	17
Role of the Prosecutors Department and prosecutors	18
Role of investigating judges	19
Criminal courts and prosecution	20
Initial trial proceedings	20
Appeals process	20
Extradition provisions	21
Section Four: Analysis of Laws and Offences Relevant to Orphanage Trafficking	22
Law on Suppression of Human Trafficking and Sexual Exploitation	22
TSE child trafficking offences and unlawful removal of a minor	24
Requirement of means for child trafficking offences	25
Offences under which orphanage trafficking may be prosecuted	26
Legal powers and justification for referring or placing a child to residential care	32
Legal justification and powers for a residential care service provider to receive and retain a child in residential care.	32
Relationship between specific offences and orphanage trafficking	35
Offences for sexual exploitation or assault occurring in conjunction with orphanage trafficking	38
Ancillary offences for orphanage trafficking from the Criminal Code	39
Section Five: Detecting and Reporting Cases of Orphanage Trafficking	45
Detecting orphanage trafficking	45
Conducting residential care facility inspections	46
Responding to reports, allegations or complaints	47
Section Six: Formal Processes for Trafficking Victim Identification and Rescue	48
Section Seven: Conclusion	51
Section Eight: Annexes	52
Annex One: Ratification and domestication of international treaties	52
Annex Two: Matrix of domestic laws relevant to orphanage trafficking	53
Annex Three: Matrix of regulation relevant to orphanage trafficking	63

Section One: Introduction and Background

Orphanage trafficking is a type of child trafficking that involves the recruitment and/or transfer of children to residential care institutions, for a purpose of exploitation and/or profit. It typically takes place in developing countries where child protection services systems are highly privatised, under-regulated, and primarily funded by overseas sources. In such circumstances, residential care is used prolifically and inappropriately as a response to child vulnerability, including lack of access to education.

THE RISE AND FALL OF FRAUDULENT INTERCOUNTRY ADOPTIONS

The trafficking of children into orphanages in Cambodia was originally associated with fraudulent intercountry adoptions in the late 1990s.¹ Orphanages were a transit destination where trafficked infants would be transferred, harboured and represented as orphans eligible for intercountry adoption. Each child would attract fees of up to USD \$20,000 paid by adoptive parents. A number of stakeholders profit from this practice, including adoption agencies, brokers, buyers, child recruiters, officials involved in issuing fraudulent documentation and the directors of the institutions where children were harboured. Evidence of the widespread practice of trafficking of Cambodian children for intercountry adoption came to light in 2001. The industry was largely shut down as countries, most notably the US, closed their borders to adoptions from Cambodia. The primary US adoption agency and adoption broker at the centre of the largest racket were prosecuted in the US under visa fraud and money laundering charges.² In Cambodia, human trafficking charges were brought against three orphanage staff involved in the trafficking; however, none progressed to prosecution, with charges in all three cases 'quietly dropped'.³

Since then, the Law on Intercountry Adoption and supporting regulations have been introduced in Cambodia to meet its obligations under the Hague Convention aimed at eradicating fraudulent international adoptions. Specific offences were also included in the 2008 Criminal Code to enable the prosecution of prohibited conduct with respect to the facilitation of adoption. Adoption was also included as a specific purpose for trafficking offences in the Law on Suppression of Human Trafficking and Sexual Exploitation 2008 (TSE Law). Intercountry adoption from Cambodia remains largely closed whilst critical child protection and care system reforms are implemented. Such reforms are necessary to ensure intercountry adoption is used as an option of last resort for children for whom all domestic possibilities have been genuinely explored and exhausted.

¹ T. Maskew, 'Child Trafficking and Intercountry Adoption: The Cambodian Experience' (2004) 35 *Cumberland Law Review* 619.

² K Raser et al, 'Imperfect Remedies: The Arsenal of Criminal Statutes Available to Prosecute International Adoption Fraud in the United States' (2011) 55(3) *New York Law School Review* Article 6;
Bill Bainbridge 'US adoption agent guilty of visa fraud', *The Phnom Penh Post* (19 December 2003) <<https://www.phnompenhpost.com/national/us-adoption-agent-guilty-visa-fraud>>.

³ Law enforcement authorities often did not take appropriate action against suspected or convicted traffickers, including orphanage directors complicit in child trafficking crimes.

THE EMERGENCE OF ORPHANAGE TRAFFICKING

In more recent years, the trafficking of children into orphanages has re-emerged in an adapted form. Commonly referred to as 'orphanage trafficking', this type of child trafficking is not for the primary purpose of intercountry adoption, and orphanages are no longer a transit destination. Rather children are trafficked into institutions where they are harboured long-term for the purpose of exploitation (such as sexual or labour exploitation) or, more commonly, for profit-making purposes whilst in 'care'. Profiting from the institutionalisation of children typically involves the marketing of children as 'orphans' or as abandoned children found in dire situations and in need of support, care, love and attention. The majority of these children have parents. In some cases, fraudulent documentation, such as birth certificates, are issued to disassociate children from their biological parents and support claims of orphanhood or abandonment. Donors are encouraged to ameliorate the child's situation by donating to the orphanage and/or visiting institutions by way of orphanage tourism. These donors are, however, unaware that orphanage tourism and foreign funding are the primary drivers of orphanage trafficking in Cambodia and are credited with contributing to the 75% increase in the number of institutions in operation in Cambodia between 2010 and 2015.⁴

Media reports and records dating back to 2013 note the 'signs of human trafficking' in conjunction with the closure of abusive orphanages in Phnom Penh and Siem Reap.⁵ Allegations of human trafficking were made; however, trafficking charges were not filed. In 2016 the Global Slavery Index identified orphanage tourism in Cambodia as driving the demand for the sale and institutionalisation of children. Specific forms of exploitation were noted as occurring in institutions, all related to the purpose of profit making. This included forcing children to work on farms, perform for tourists and hand out flyers in the streets to raise funds.⁶

The phenomenon of orphanage trafficking was documented as occurring in Cambodia in the US Department of State's Trafficking in Persons (TiP) Report, first in 2018 and then subsequently in the 2019 and 2020 reports. Whilst numerous cases of sexual exploitation occurring in residential care institutions in Cambodia have been prosecuted (often in conjunction with unregistered institutions), there is no known case of the prosecution of orphanage trafficking under Cambodia's trafficking offences. In fact, the 2018 TiP report noted specifically the failure of law enforcement to take appropriate action against 'orphanage directors complicit in child trafficking crimes'.⁷

⁴ Cambodian Ministry of Social Affairs *With the Best Intentions: A Study of Attitudes Towards Residential Care in Cambodia* (2011) <https://www.thinkchildsafe.org/thinkbeforevisiting/resources/Study_Attitudes_towards_RC.pdf>.

⁵ 'Cambodia shuts orphanage after reported abuse', USA Today (25 March 2013) <<https://www.usatoday.com/story/news/world/2013/03/25/cambodia-shuts-orphanage-after-reported-abuse/2017279/>>.

⁶ Global Slavery Index 2016 ('GSI') 100.

⁷ United States Department of State, *Trafficking in Persons Report* (2018) ('TiP report 2018') 125.

FAILURE TO PROSECUTE ORPHANAGE TRAFFICKING OFFENCES

Reported cases where orphanage trafficking was suspected, or could have been reasonably suspected, have often been dismissed as irregular admission into institutions and dealt with under child protection regulation, or at times prosecuted for a constituent element, such as sexual exploitation. This in part reflects the Cambodian criminal justice system's response to trafficking, which is characterised by insufficient investment in investigation, low levels of prosecution, a tendency to prosecute for lesser offences and a lack of willingness to address trafficking cases involving corruption amongst government officials.⁸ These issues, amongst others, resulted in Cambodia being downgraded to the Tier Two Watch List in the 2020 US State Department TiP Report.⁹

Other, more specific, challenges impact upon the identification and prosecution of orphanage trafficking. Firstly, orphanage trafficking is a relatively new issue, therefore Cambodia's law enforcement and child protection officials do not yet fully understand its constituent elements and indicators, or how Cambodia's trafficking offences apply. It is likely that this reduces the opportunity for cases to be referred for investigation and progressed to prosecution. Secondly, orphanage trafficking occurs under the guise of a child protection intervention, with offenders purporting to provide 'care' to orphaned, at-risk or vulnerable children. The association of orphanages with child protection, charity and altruism makes it less likely that officials coming in contact with potential child victims in institutions will detect and correctly interpret risk indicators for child trafficking and take appropriate action. Thirdly, the historical lack of regulation over residential care facilities and the processes for admitting children into alternative care results in the normalisation of irregular and even unlawful admission of children into institutions, and reduces the likelihood of identification and investigation of offences.

Despite the conflation with a child protection response, the mechanisms of orphanage trafficking can be readily distinguished from legitimate child protection interventions. The acts involved in admitting a child into an institution in a case of orphanage trafficking by definition occur in contravention of procedures outlined in child protection law and policy and are therefore irregular and unlawful. Additionally, admission is not for the purpose of protection or care; rather, it is for exploitation. The combination of the unlawful nature of the admission and the exploitative purpose of admission distinguishes orphanage trafficking from the placement of a child in an institution as a child protection response. Where the acts involved in unlawfully admitting a child into an institution for the purpose of profit breach child protection regulations and meet the criteria for acts criminalised under Cambodia's trafficking offences, trafficking charges can theoretically be laid and prosecution for orphanage trafficking sought.

⁸ See generally *Trafficking in Persons Reports 2017-2020*.

⁹ United States Department of State, *Trafficking in Persons Report (2020)*.

SCOPE OF THIS REPORT

Orphanage trafficking occurs at the nexus of criminal law (human trafficking offences) and child protection regulation. This report examines the intersection of these two legal systems for the purpose of developing a strategy to identify and prosecute orphanage trafficking. The report is divided into six sections. This section provides a background to the issues, while the following section summarises the Cambodian legal system, its origins, structure, sources of law and rules for statutory interpretation. Section Three provides an overview of the criminal justice system and explores the primary criminal procedural law, identifying processes, stakeholders and bodies relevant to progressing allegations of orphanage trafficking through to prosecution. Section Four outlines the specialist law pertaining to human trafficking and analyses specific offences and subsidiary offences in the Criminal Code, in conjunction with the child protection and alternative care regulatory framework. It is here that we seek to identify the range of potential offences under which perpetrators involved in different acts comprising orphanage trafficking could be prosecuted and what requirements must be met. Section Five explores how orphanage trafficking may be detected and by whom, looking at the mechanisms internal to the child protection system through which concerns, or suspicions are most likely to be raised and how this could trigger the mandatory procedures for victim identification, support and referral. Section Six briefly examines the formal victim identification and referral procedures which, when implemented, lead to the full investigation and prosecution of trafficking offences.

The purpose of this examination and analysis is to identify existing mechanisms and offences conducive to the prosecution of orphanage trafficking to develop a prosecutorial strategy. This is the first step in a multi-stage, three country project that seeks to elevate awareness of orphanage trafficking and promote appropriate criminal justice responses to combat and prevent orphanage trafficking crimes against children.

Section Two: Overview of the Cambodian Legal System

OVERVIEW

The Cambodian legal system follows the civil law tradition;¹⁰ however, it has been described as a hybrid system that amalgamates three distinct influences: Cambodian customs, the French civil system (due to the period of colonisation), and, more recently, common law (attributed to legal and judicial reforms influenced by foreign aid).¹¹ There are two main sources of law within the Cambodian system:

1. **Primary sources**, which include all legal instruments enacted by competent state bodies, including domestic and international laws to which Cambodia is a State party, and
2. **Secondary sources**, which include ‘custom, tradition, conscience, equity, judicial decisions, arbitral awards and doctrines’.¹²

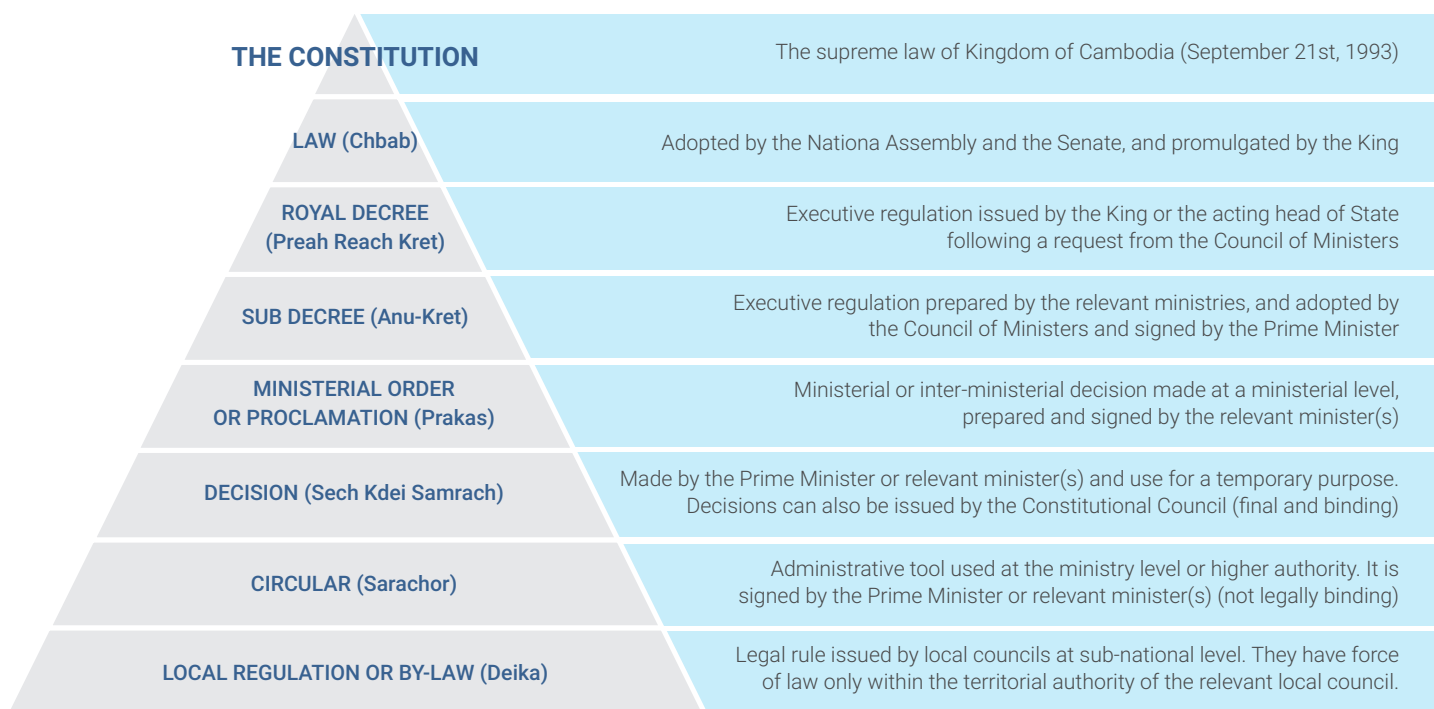


Figure 1: Hierarchy of norms in the Cambodian legal system. *Cambodian Law Library.*

¹⁰ UNODC *Country Review Report of Cambodia*, Review by Togo and Myanmar of the implementation by Cambodia of articles 15–42 of Chapter III. “Criminalization and law enforcement” and articles 44 - 50 of Chapter IV. “International cooperation” of the United Nations Convention against Corruption for the review cycle 2010–2015 (2015) 2 <<https://uncaccoalition.org/files/Cycle1-Country-Report-Cambodia.pdf>>.

¹¹ Kong Phallak, ‘Overview of the Cambodian Legal system’ 8.

¹² *Ibid.*

Primary sources of law are organised in an eight-tier hierarchy of norms, with each legal instrument drawing its competence from an instrument in the preceding tier.¹³ The Constitution is the supreme law with which all other laws must be consistent. Laws (Chbab) sit directly under the Constitution and must be approved by majority vote of the legislature and promulgated by the King through the issuance of a Royal Code (Preah Reach Krom), which brings the law into effect. This same process is employed to incorporate international treaties to which Cambodia is party into domestic law.

Royal Decrees occupy the third tier and are issued by the King. They are used to establish public institutions, government bodies (including ministries), and national level committees, and they also appoint high level officials (including judges). Sub-Decrees are executive regulations issued by ministries. They clarify provisions within laws (Chbab) and set out the functions of government agencies and officials.

Ministerial Proclamations (Prakas) are also issued by ministries. They clarify specific provisions in higher level laws and provide instruction around implementation. Decisions issued by a Minister or the Prime Minister are temporary instruments that disappear from the body of law once their goal has been achieved. Decisions can also be issued by the Constitutional Council with respect to the interpretation of the constitution and laws passed by parliament.¹⁴ These Decisions are permanent and binding. Circulars are non-binding instruments used to give instruction pertaining to specific legislative or regulatory provisions. They are issued by ministers or the Prime Minister. By-laws (Deika) are the only sub-national level legal instruments. They are issued by local councils and are enforceable only within their jurisdiction. Executive regulations (Decrees, Sub-decrees and Prakas) can only be enacted under laws passed by the legislature and entered into force by Royal Code or, where they pertain to functions, Royal Decrees establishing a government body bestowed with specific law-making powers can be issued by the King.

TREATMENT OF INTERNATIONAL HUMAN RIGHTS TREATIES

Whilst international law is included as a primary source of law, there is some debate among legal scholars about the status of international law in the Cambodian domestic legal order and whether Cambodia employs a monist or dualist approach to incorporation. Article 31 of the Constitution creates an obligation for the State to respect human rights norms established under international law, referencing key human rights instruments. Article 48 specifically protects child rights as enshrined in the Convention on the Rights of the Child (CRC).¹⁵ Despite the significance this affords international human rights law in Cambodia's most supreme law, treaties are not specifically ranked in the hierarchy of legal norms established by the Constitutional Council.¹⁶

¹³ CCHR, 'Hierarchy of Laws in Cambodia' (January 2014) *8 Rule of Law Series Special Edition* - <<https://cchrcambodia.org/admin/media/factsheet/factsheet/english/CCHR%20Fact%20sheet%20-%20Hierarchy%20of%20laws%20in%20Cambodia%20-%20ENG.pdf>>.

¹⁴ The Constitutional Council is the body responsible for interpreting the Constitution and determining the constitutionality of laws on the request of the King or certain members of the legislature.

¹⁵ Constitution of the Kingdom of Cambodia 1993 ('Constitution').

¹⁶ Kuong Teilee, 'Cambodian Constitutional Provision on Treaties: A story of constitutional evolution beyond rhetoric' (2010) *1 Cambodian Yearbook on Comparative Legal Studies* 1.

Articles 90 and 26 of the Constitution set out a three-step process to bring an international treaty into force. Article 90 requires an international treaty to be approved by votes of the National Assembly and Senate. Article 26 requires ratification by the King after approval by the legislature. The King does this by promulgating the treaty by a signed Royal Code. The treaty is then taken to be 'in force' and therefore a legitimate basis for interpretation and judicial decision making. This process precisely mirrors domestic law-making procedures as stipulated in Article 28 of the Constitution and is the reason that Cambodia is generally regarded as a dualist country.¹⁷ However, as noted by the UNODC, self-executing treaty provisions can be applied once a treaty has been promulgated without the need for further implementing legislation.¹⁸

Constitutional Council Decision No.009 was issued in 2007 and clarified the place of international law in the domestic system. It affirmed the courts' requirement to rely on all law, including 'international treaties recognised by Cambodia, especially the Convention on the Rights of the Child' in human rights interpretation and judicial decisions.¹⁹ In its ruling, the Constitutional Council directly extracted a relevant article from the CRC and reiterated Cambodia's obligation to implement it as State party to the Convention. Furthermore, the Decision referenced Article 48 of the Constitution which obliges Cambodia to protect the rights of children as enshrined in the CRC. The essence of the Constitutional Council determination was that a provision in a domestic law could not be taken as intended to apply to children, or override protections afforded to children in older legislation, where it would conflict with a provision in the CRC, as this would render the domestic law unconstitutional. As such, the ruling created a clear expectation for courts to use human rights treaties as interpretive guidance to determine the applicability of conflicting domestic laws. It also accorded higher status to international human rights obligations than domestic laws, based on constitutional protection afforded under Articles 31 and 48.

The status afforded to international human rights law is particularly important for the rights of children, as Cambodia lacks an overarching domestic child protection law. The

Article 31

The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights and the covenants and conventions related to human rights, women's and children's rights.

¹⁷ Constitution Art 28.

¹⁸ UNODC (n10) 2.

¹⁹ Constitutional Council Decision No. 092/003/2007 Dated 10 July 2007.

Article 5: Interpretation of Criminal Law

In a criminal case, the law is strictly interpreted. The judge can neither broaden his/her sphere of application nor proceed doing so by means of an analogy.

Cambodia lacks an overarching domestic child protection law. The legal and policy framework is fragmented and characterised by an overdependence on lower-level regulations.²⁰ This results in gaps in protection for groups of children in certain circumstances. Against this background, the Constitutional Council decision should have been significant. However, domestic courts still cite the CRC, albeit infrequently.²¹

STATUTORY INTERPRETATION

In the civil law tradition, court judgments are classically based on interpretation of the specific articles of law and rarely refer to precedent. Where laws lack the specificity to deal with the circumstances of a given case, secondary sources are generally relied upon for decision making rather than case law.²²

This is reflected in Article 5 of the Criminal Code which states:

Article 5: Interpretation of Criminal Law

*In a criminal case, the law is strictly interpreted. The judge can neither broaden his/her sphere of application nor proceed doing so by means of an analogy.*²³

For criminal law application and interpretation, the Criminal Code is the primary source of law, however its interpretation is subject to the Constitution and to international treaties to which Cambodia is party, as discussed above.²⁴ The Criminal Code takes precedent in the case of conflicts with other criminal laws or criminal provisions with the exception of specialty criminal laws,²⁵ such as the TSE Law. Therefore, with respect to orphanage trafficking, relevant offences under the Criminal Code can be considered as subsidiary offences; however, where offences overlap, as is in the case

²⁰ Nhep, R., Fronek, P (forthcoming) Cambodian Country Care Profile, Ministry of Social Affairs, Veterans and Youth, Better Care Network, Phnom Penh.

²¹ Child Rights International Network *Cambodia: National Laws* <<https://archive.crin.org/en/library/publications/cambodia-national-laws.html>>; Peng Hor, 'The Modern Era of Cambodian Constitutionalism' in Hor Peng, Kong Phallack, Jörg Menzel (eds) *Introduction to Cambodian Law* (Konrad-Adenauer-Stiftung 2012) 23, 44.

²² Phallak (n 11) 8; CCHR (n 13).

²³ Criminal Code of Cambodia 2009 ('Criminal Code') Art 5.

²⁴ Criminal Code Art 7.

²⁵ Criminal Code Art 668.

of unlawful removal of a minor, offences under the TSE law take precedence, particularly as they attract a higher penalty.²⁶

²⁶ Law on Suppression of Human Trafficking 2008, *Explanatory Note* ('TSE Explanatory Note').

Section Three: Overview of the Criminal Justice System

The criminal law system in Cambodia is inquisitorial, which is in line with Cambodia's civil tradition. Sources of criminal law include the Constitution, international law, the Criminal Code, the Criminal Procedure Code, specialist criminal laws and statutory instruments issued by the executive branch of government.²⁸ The 2009 Criminal Code is considered the primary substantive law and the 2007 Criminal Procedure Code is the primary procedural law stipulating 'due process' for the enforcement of criminal law by the various bodies that comprise the criminal justice system.

This section will briefly examine these with a focus on summarising the procedures by which crimes are reported and progressed through the criminal justice system. Doing so aids in identifying the range of bodies and authorities who may need to be engaged in awareness raising and sensitisation activities as a component of a prosecutorial strategy for orphanage trafficking.

CAMBODIAN CRIMINAL CODE

The Criminal Code was adopted by the legislature in 2009 and entered into force in December 2010. The enactment of the Criminal Code abrogated the Law on Aggravating Circumstances of Felonies (2002), all criminal law provisions prior to 1992 and provisions related to criminal law, criminal procedures, and the judicial system of the UNTAC Law adopted in 1992 by the Supreme National Council.²⁹

The Criminal Code is divided into six books. Book One sets out the general provisions of criminal law, including general principles of interpretation, application of offences, classification of offences, temporal application, territorial and extra territorial application, and criminal responsibility (including definitions of liable persons and entities), and also sets out the penalties for complete and incomplete crimes.³⁰ It deals with categories of penalties and sentencing principles, including special provisions for minors, penalties for legal entities and aggravating and mitigating circumstances. Article 670 extends the application of these general provisions to the whole body of criminal law, including special laws stipulating other criminal offences or provisions.³¹ As such, the general provisions within the Criminal

²⁷ R Broadhurst, C Keo, T Bouhours, 'Crime and Justice in Cambodia' in Handbook of Asian Criminology (2013) 167–181.

²⁸ V Phann, (2012) The Basics of Substantial Cambodian Criminal Law, in Hor Peng, Kong Phallack, Jörg Menzel (eds) Introduction to Cambodian Law (Konrad-Adenauer-Stiftung 2012) 197, 199.

²⁹ Ibid 201.

³⁰ Ibid.

³¹ Criminal Code Art 670 and Law on Suppression of Human Trafficking and Sexual Exploitation 2008 ('TSE Law') Art 51.

Code repealed Articles 2, 3, 4 and 6 of the 2008 Law on Suppression of Human Trafficking and Sexual Exploitation which dealt with territorial application, criminal responsibility and concurrence of offences.³²

Books Two to Four set out the range of criminal offences, under the categories of offences against persons, offences against property and offences against the nation. Book Two contains a chapter on offences against minors and the family, relevant to acts associated with orphanage trafficking. Book Four also contains offences related to bribery and forgery of public documents, which may be relevant in cases of orphanage trafficking involving the falsification of identity documents by public officials.

The Criminal Code also stipulates the criminal offences associated with prohibited actions under non-criminal public laws relevant to this analysis, such as the Law on Inter-Country Adoption and the Law on Tourism (see Section 4 for a further discussion of these frameworks).

CRIMINAL PROCEDURE CODE

The Criminal Procedure Code was adopted by the legislature in 2007 and repealed a number of prior provisions.³³ The Criminal Procedure Code sets out the rules for the operation of the criminal justice system in Cambodia. It describes the roles and responsibilities of the various institutions and bodies involved in the criminal justice system and their oversight and disciplinary mechanisms. It details the categorisation of crimes, lists liable persons, identifies statutes of limitation, and sets out procedures for lodging complaints, initiating and conducting investigations, laying charges, criminal trials, and appeals. It also addresses the rights of the accused and the intersection of civil law in criminal cases, and outlines the procedures by which civil action can be brought in conjunction with criminal action before a criminal court or to a civil court after criminal proceedings have concluded.

Procedures and roles relevant to the identification, reporting, investigation and prosecution of child trafficking offenses are briefly outlined below.

REPORTING CRIMINAL OFFENCES

Criminal offences can be reported through a number of channels to initiate criminal proceedings. Often criminal offences come to the attention of the police via reports made about crimes that are in process or have just occurred (flagrant offences) or by complaints lodged by victims after the crime has occurred. Criminal offences can also be reported directly to the prosecutor.

³² Criminal Code 2009 Art 671.

³³ Code of Criminal Procedure 2007 Art 611. Those repealed include all provisions governing criminal procedures in place prior to 1992, provisions on criminal procedures included in the 1992 UNTAC law, the 1993 Law on Criminal Procedure, the 1999 Law on Duration of Pre-Trial Detention and procedural provisions of the 1993 Law on the Organization and Activities of the Courts of the State of Cambodia.

Under Article 42 of the Criminal Procedure Code, all public officials and officers must report criminal offences they become aware of to either the judicial police or prosecutor for investigation.³⁴ This creates an important connection between the child protection system and the criminal justice system, as the most likely avenue for orphanage trafficking crimes to be uncovered or reported is via the child protection authorities, through the alternative care inspectorate or monitoring system. In such cases, child protection officials must report the offence to the judicial police or prosecutor to initiate criminal proceedings. This means that such matters cannot be solely dealt with under child protection regulations and penalties, which in practice, has often been the case. Section 5 explores this issue in more detail by looking at the regulations that govern alternative care inspections and complaints mechanisms.

PROCESS FOR COMMENCING INVESTIGATIONS AND LAYING CHARGES

The Criminal Procedure Code sets out the investigative procedures for crimes based on their classification as felonies, misdemeanours or petty crimes. As offences associated with orphanage trafficking are all classified as felonies, only felony-related procedures have been extracted and discussed in this report. Authorities involved in the investigative proceedings for felony cases include the judicial police, prosecutors and investigating judges. Their specific roles in investigations are discussed below.

The most common pathway for initiating an investigation is when the prosecutor of the Court of First Instances receives a complaint or denunciation from the judicial police.³⁵ A preliminary investigation is carried out by the prosecutor to establish if there are grounds for laying criminal charges.³⁶ For cases with sufficient legal grounds, prosecutors issue an 'introductory requisition' for a full investigation to be conducted by an investigating judge. The introductory requisition determines the scope of the investigation by identifying specific offences to be examined by the court-appointed investigating judge.³⁷ Serious offences must also be reported to the Prosecutor General and to the Minister of Justice.³⁸ Should additional facts arise during this process that may give rise to new offences, another introductory requisition must be sought from the prosecutor to investigate these new facts and potential offences. The exception to this is when the new facts constitute aggravating circumstances to the original offences.³⁹ On completion of the investigation and the determination of the final charges, the investigating judge refers the case to the provincial or municipal Court of First Instance for trial.

A less common pathway to commence an investigation is via victim complaints directly filed with the prosecutor and/or investigating judge. Articles 5, 6 and 139 of the Criminal Procedures Code outline the two distinct victim complaints mechanisms and their legal effect.

³⁴ Art 42. The role of judicial police is explained in detail below.

³⁵ Code of Criminal Procedure 2007 Art 40.

³⁶ Ibid Art 44 124.

³⁷ The investigating judge is permitted to confer with the prosecutor.

³⁸ Code of Criminal Procedure 2007 Art 40.

³⁹ Ibid Art 125.

Ordinary complaints filed by victims with the prosecutor do not initiate criminal actions or bring about charges. Rather, the prosecutor is responsible for considering the complaint and initiating the procedures outlined above.

The filing of a civil complaint before an investigating judge can trigger criminal proceedings should the investigating judge submit an order to the prosecutor after considering the civil party petition. In this instance, the prosecutor must examine the petition and open an introductory requisition triggering an investigation by the investigating judge. If the prosecutor requests for an investigation not to proceed, the investigating judge may agree and notify the plaintiff of their decision, or proceed with an investigation, notifying the prosecutor of the factual and legal basis for the decision.⁴⁰ A decision by the prosecutor to 'hold a file' and not proceed with bringing criminal charges can be appealed to the Court of Appeals by complainants. Should the Prosecutor General of the Court of Appeals find grounds for criminal charges to be brought, an injunction is issued to the prosecutor at the Court of First Instance instructing the prosecutor to initiate charges. In the case of victims who are minors, civil action can be filed by a guardian,⁴¹ and in cases pertaining to offences listed in the Law on Suppression of Human Trafficking and Sexual Exploitation, an organisation registered as providing services to victims of trafficking or sexual exploitation, can file suit as plaintiff on behalf of the victim, provided the victim or their legal representative is in agreement.⁴²

It is also relevant to note that criminal charges can be brought against natural persons and legal entities.⁴³ Organisations involved in orphanage trafficking, typically those registered for the purpose of running the residential care facility, can be indicted along with the individuals involved. Charges can also be brought against perpetrators, co-perpetrators, instigators or accomplices.⁴⁴

ROLE OF THE JUDICIAL POLICE

The judicial police are an extension of the judiciary and fall under the supervision of the Prosecutor General of the Court of Appeals. As such, they report to the judicial branch of government. However, as a department of the National Police, their employment falls under the Ministry of Interior, which is part of the executive branch of government. This creates a complicated command and management structure that effectively diminishes the authority of prosecutors over judicial police officers and agents. This is despite Article 70 of the Code of Criminal Procedure stipulating that orders for the judicial police are to come strictly from the court of authority.⁴⁵ The dual management of the judicial police also contributes to the lack of independence between the executive and judicial branches of government, which has been widely criticised as undermining the legitimacy of the Cambodian criminal justice system.⁴⁶

⁴⁰ Ibid Art 139.

⁴¹ Ibid Art 15.

⁴² Ibid Art 18, Art 20.

⁴³ Ibid Art 597.

⁴⁴ Phann (n 28) 206.

⁴⁵ Code of Criminal Procedure Art 70.

⁴⁶ Broadhurst (n 27).

The role of judicial police is to ‘receive complaints and denunciations and make inquiries of all offences’.⁴⁷ Judicial police have a role in undertaking investigations, which differ slightly in process depending on whether the case is deemed a ‘flagrant felony’, where police are called to an offence that is underway or has just been committed, or a ‘primary investigation’ into a matter reported by a complainant, government official or member of the public after the fact. In flagrant felony cases, the judicial police may immediately commence an investigation without an order from the prosecutor; however, they must immediately notify the prosecutor and seek an order before conducting any searches and request instruction from the prosecutor for investigations that extend beyond 7 days.⁴⁸ In other cases, where an offence is reported by a complainant, they may commence an investigation at their own discretion or seek an order of the prosecutor.⁴⁹ At the end of the investigation, the judicial police officer sends the record of the investigation to the prosecutor⁵⁰ to proceed with an assessment on the grounds for laying criminal charges. The jurisdiction of judicial police is geographically bound to the province or municipality where they are stationed. However, in some cases, and by issue of a decree or order, it can be extended to national jurisdiction. Additionally, judicial police under the national police have no jurisdiction in military cases. Only Royal Gendarmerie are authorised to act as judicial police or agents in matters involving military offences.⁵¹

Judicial police also play roles as directed by the investigating judge and prosecutor throughout the investigation, including implementing arrest warrants, orders to bring a material witness before an investigating judge and other tasks stipulated in the Criminal Procedure Code.

ROLE OF THE PROSECUTORS DEPARTMENT AND PROSECUTORS

The Prosecutors Department is ultimately responsible for making an accusation, initiating investigations, bringing criminal charges, issuing conclusions for the courts to enforce laws, implementing criminal law decisions and disseminating arrest warrants to judicial police for enforcement.⁵² Each province has a Public Prosecutors Department attached to the Court of First Instance. This department is comprised of prosecutors and deputy prosecutors. The Prosecutors Department attached to the Supreme Court and Court of Appeals has a slightly different structure and is staffed by a Prosecutor General, Deputy Prosecutor General and prosecutor/s. The overall management of all prosecutors as well as judicial police units and officer falls under the Prosecutor General of the Court of Appeals.⁵³

Prosecutors at the Court of First Instance are responsible for initiating a felony investigation to be conducted by the investigating judge. As detailed above, they receive denunciations from the judicial police, or a civil party complaint forwarded by an investigating judge and

⁴⁷ Code of Criminal Procedure Art 71.

⁴⁸ Ibid Art 106.

⁴⁹ Ibid Art 111.

⁵⁰ Ibid Art 107.

⁵¹ Ibid Art 81.

⁵² Ibid Art 27.

⁵³ Ibid Art 29.

conduct a preliminary investigation to determine the basic facts and legal grounds for pursuing charges. They issue an introductory requisition filed with the investigating judge which enables the investigating judge to commence the full investigation. Prosecutors take part in aspects of the full investigation and decision making in conjunction with the investigating judge. Additionally, they direct the operations of the judicial police involved in investigations to which they are assigned⁵⁴ and are responsible for ensuring judicial police comply with legal procedures.⁵⁵ They must also be present during all criminal trials, in representation of the Prosecutors Department.

ROLE OF INVESTIGATING JUDGES

The mandate of the investigating judge to conduct an investigation is triggered by the prosecutor issuing an introductive requisition as discussed above. Investigating judges have no authority to investigate until this has been issued⁵⁶ and are limited to investigating offences detailed in the introductive inquisition.

Investigating judges are responsible for progressing the investigation to the point of charges or acquittal.⁵⁷ The roles of the prosecutor and investigating judge intersect throughout this process. The prosecutor may request the investigating judge to investigate certain facts or circumstances useful to the case. The investigating judge can accept or reject the request, providing a written rationale in the event of the latter.⁵⁸ The investigating judge must also seek the opinion of the prosecutor before issuing arrest warrants or releasing the accused on bail.⁵⁹

Investigating judges are responsible for interviewing the accused as well as informing them of the charges filed against them and their rights. They are also responsible for interviewing civil parties and witnesses. They have the power to issue orders to appear for witnesses⁶⁰ and direct police forces via an 'order to bring' to escort a non-compliant witness to meet with the investigating judge.⁶¹

In the course of an investigation, investigating judges may conduct searches and forensic examinations, engage experts on the national list (or non-listed expert in particular cases), order listening devices to be installed or request access to communication records. Investigating judges determine when the investigation can be closed and issue a warrant to proceed to trial or a non-suit order to dismiss as case. Once charges are laid, investigating judges issue arrest warrants, court summons, make decisions about pre-trial detention, bail and the application of judicial control orders.

⁵⁴ Ibid Art 58.

⁵⁵ Ibid Art 37.

⁵⁶ Ibid Art 124.

⁵⁷ Ibid Art 127.

⁵⁸ Ibid Art 132.

⁵⁹ Ibid Arts 197, 215.

⁶⁰ Ibid Art 186.

⁶¹ Ibid Arts 150, 153, 190.

CRIMINAL COURTS AND PROSECUTION

There are three courts involved in the criminal justice system in Cambodia: the Court of First Instance, which operates at the provincial and municipal level, the Court of Appeals, and the Supreme Court, which are both located in the capital. The Ministry of Justice is responsible for oversight over the court system and the Supreme Council of Magistracy for the management of judges and prosecutors.⁶²

INITIAL TRIAL PROCEEDINGS

The provincial and municipal Court of First Instance is the lower court, or the court of first trial, and has jurisdiction to rule on criminal felonies, misdemeanours and petty crimes that occur within its jurisdiction.⁶³ There is no system for trial by jury in Cambodia with all criminal cases heard by presiding judges. Felony cases are heard by a 3-judge bench while misdemeanours and petty offences are heard by a single judge. Judges are not permitted to preside over a case in which they have acted as the investigating judge.⁶⁴

Judges presiding over the trials are responsible for hearing the prosecution and defence and ruling on the guilt or innocence of the accused. They are also responsible for determining the sentence in accordance with the law in cases where guilt is declared.⁶⁵ Where a civil suit has been filed in conjunction with criminal charges, the judge is responsible for ruling on the civil remedy at the same time as the criminal charges.

APPEALS PROCESS

There are two rounds of appeals provided for in criminal law: firstly to the Court of Appeals, and secondly to the Supreme Court of Cambodia.

Appeals of criminal trial judgements made from the Court of First Instance can be made to the Court of Appeals, which is located in Phnom Penh. The Court of Appeals includes a criminal chamber with jurisdiction to decide on appeals of criminal cases tried at any of the provincial or municipal Courts of First Instance across the country.⁶⁶ Appeals can be filed by the prosecutor of the Court of First Instance, the Prosecutor General of the Court of Appeals, a person subject to a guilty verdict, a civil party or civil responsible persons.⁶⁷

Where an appeal is made by the guilty person, the appeal decision can alter the judgement, including by replacing the offence. Secondary sentences cannot be added to the existing sentence, nor can the sentence imposed by the Court of First Instances be increased. If, however, a mandatory secondary sentence was omitted by the Court of First Instances,

⁶² Broadhurst (n 27).

⁶³ Criminal Procedure Code Art 289.

⁶⁴ Ibid Art 54.

⁶⁵ Ibid Art 350.

⁶⁶ Ibid Art 373.

⁶⁷ Ibid Art 375.

the Court of Appeals can void the initial judgement and declare a new sentence. Where the appeal is made by the prosecutor or Prosecutor General, the court can overrule a judgement, aggravate a sentence and/or add a secondary mandatory sentence not declared by the Court of First Instance.⁶⁸ An appeal lodged by a civil party can only pertain to the civil interests of damages and compensation associated with the criminal case.⁶⁹

The Supreme Court is the highest court in Cambodia and is located in Phnom Penh. Judgements of the Criminal Chamber of the Court of Appeals can be appealed in the Supreme Court and examined by the Supreme Court Criminal Chamber.⁷⁰ Appeals to the Supreme Court can be made by the Prosecutor General of the Court of Appeals, the guilty person, a civil party or a civil responsible person.⁷¹ The Criminal Chamber of the Supreme Court can reject an appeal or overrule a previous judgment in whole or in part.⁷²

EXTRADITION PROVISIONS

Book 9 on Separate Procedures of the Criminal Procedure Code contains a section on extradition provisions, allowing for foreign states to request the extradition of a foreign national subject to criminal charges or sentence for an offence committed in Cambodia.⁷³ Extradition can occur in the event that the acts the foreign national is charged with or convicted of are also an offence under the laws of the requesting state. This is permitted for all offences that carry at least a 2-year maximum sentence, even in the event the offences are differently worded, or elements differ, provided that 'the whole set of elements of the acts presented by the requesting state is considered an offence under the provisions of laws in force in Cambodia'.⁷⁴ However, extradition is not permitted in the case of an offence committed entirely in Cambodia which has been completely tried in Cambodia.⁷⁵

Extradition laws are relevant to orphanage trafficking where acts have been committed by a foreign national and where the foreign state's human trafficking laws criminalise the same elements and carry extraterritorial application.

⁶⁸ Ibid Art 400.

⁶⁹ Ibid Art 402.

⁷⁰ Ibid Art 417.

⁷¹ Ibid Art 418.

⁷² Ibid Art 439.

⁷³ Ibid Art 566.

⁷⁴ Ibid Arts 569, 571.

⁷⁵ Ibid Art 574.

Section Four: Analysis of Laws and Offences Relevant to Orphanage Trafficking

This section analyses criminal law offences relevant to the prosecution of orphanage trafficking and/or related acts. The primary focus is on the Law on Suppression of Human Trafficking and Sexual Exploitation, as the relevant specialist law, as well as Criminal Code offences. The analysis draws on relevant provisions within child protection and alternative care regulations to distinguish between lawful child protection interventions and criminal acts of trafficking and exploitation occurring in institutions. This is necessary to determine at what point the criteria for the various human trafficking offences may have been met.

LAW ON SUPPRESSION OF HUMAN TRAFFICKING AND SEXUAL EXPLOITATION

The Law on Suppression of Human Trafficking and Sexual Exploitation 2008 (TSE Law) repealed the 1996 human trafficking law, the Law on Suppression of Kidnapping, Human Trafficking/Sale of Human Being and Exploitation of Human Being.⁷⁶ The TSE law implements Cambodia's state party obligations to various international treaties pertaining to human trafficking, most notably the UN Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children (the Protocol).⁷⁷ The TSE Law goes further than the Protocol and includes a section on sexual offences, prosecutable irrespective of whether they occur in connection with or separately to human trafficking offences.⁷⁸

The TSE law criminalises the full range of conduct that falls under the three constituent elements of trafficking (act, means and exploitative purpose), as per the Protocol's definition; however, it does not include provisions for victim support. It contains offences that equate to trafficking, where all three elements are required, except in the case of minors where means is omitted. The TSE law also contains offences that criminalise acts perpetrated without intent to traffic, such as Abduction, Detention or Confinement, or Receipt of a Person for the Purpose of Assisting the Offender. Offenders can be prosecuted for concurrent offences, where the full scope of their conduct is not captured in a single offence. This includes being prosecuted as instigators or accomplices of some offences and principal offenders of others. Concurrent punishments can be pronounced where multiple charges are brought; however, where the punishments are of the same nature, only one can be applied to the maximum penalty of the most serious offence.⁷⁹

Offences covered by the TSE law criminalise intent⁸⁰ and, as such, attempted crimes are liable to equal punishment as completed crimes, and accomplices and instigators are liable to

⁷⁶ TSE Law (n 31) Art 50.

⁷⁷ Ibid Art 1.

⁷⁸ TSE Explanatory Note (n 26) p. 13.

⁷⁹ Ibid 22.

⁸⁰ Ibid 19.

receive equal punishment as the principal perpetrator(s). Legal entities and their responsible persons can also be charged and punished with fines and/or other penalties when convicted. Whilst the TSE Law does not provide a definition of ‘accomplice’, ‘instigator’, or ‘attempts’, these definitions can be found in the Criminal Code and are as follows:

Article 28: Definition of instigator

An instigator of a felony or a misdemeanour shall be any person who:

- (1) gives an instruction or order to commit a felony or misdemeanour;*
- (2) provokes the commission of a felony or misdemeanour by means of a gift, promise, threat, instigation, persuasion or abuse of authority or power.*

An instigator may only be punishable if the felony or misdemeanour was committed or attempted.

An instigator of a felony or misdemeanour shall incur the same penalties as the perpetrator.⁸¹

Article 29: Definition of accomplice

An accomplice shall be any person who knowingly, by aiding or abetting, facilitates an attempt to commit a felony or a misdemeanour, or its commission. An accomplice may only be punishable if the felony or misdemeanour was committed or attempted.

An accomplice to a felony or a misdemeanour shall incur the same penalties as the perpetrator.⁸²

Article 27: Definition of attempt

An attempt to commit a felony or, in the cases provided for by law, a misdemeanour, shall be punishable if the following conditions are met:

- the perpetrator has started to commit the offence, that is, he or she has committed acts which lead directly to the commission of the offence;*
- the perpetrator did not stop his or her acts voluntarily but was interrupted solely by circumstances beyond his or her control.*

A preparatory act which does not directly lead to the commission of the offence does not constitute a commencement of execution. An attempt to commit a petty offence shall not be punishable.⁸³

Trafficking offences

There are a number of offences listed in Chapter 2 of the TSE Law that explicitly require the three elements of act, means and purpose, which can therefore be understood as Cambodia’s human trafficking offences. These offences include:

⁸¹ Criminal Code Art 28.

⁸² Ibid Art 29.

⁸³ Ibid Art 27.

- Article 10 Unlawful Removal with Purpose
- Article 11 Unlawful Removal for Cross Border Transfer
- Article 12 Unlawful Recruitment for Exploitation
- Article 17 Transportation with Purpose
- Article 15 The Act of Buying, Selling or Exchanging of Human Being with Purpose
- Article 19 Receipt of a Person with Purpose

Each of these offences criminalise trafficking and, in contrast to the singular element offences, offences covered by Articles 10, 11, 12, 15, 17 and 19 all include purpose, or awareness of purpose and, by way of definition of the specific act, means. All ascribe equal punishment of 7 to 15 years' imprisonment for offences against adults and 15 to 20 years for offences against minors, thus establishing equal liability and punishment for all perpetrators involved in human trafficking irrespective of which stage or specific act they perpetrated. There are other offences included in Chapter 2 that deal with cross border offences; however, these have been omitted from this analysis as they, for the most part, lack relevance to orphanage trafficking.

TSE child trafficking offences and unlawful removal of a minor

There are seven offences contained in Chapter 2 of the TSE law that include specific clauses on minors. In most offences, these specific clauses relate only to punishment, with harsher penalties ascribed to offences against minors. Article 8, however, provides for a specific definition of unlawful removal in the case of minors, and this provision therefore has implications for a number of human trafficking offences, where unlawful removal is an element.

TSE Law Article 8: Definition of Unlawful Removal

The act of unlawful removal in this law shall mean to:

- 1) *remove a person from his/her current place of residence to a place under the actor's or a third person's control by means of force, threat, deception, abuse of power, or enticement, or*
- 2) *without legal authority or any other legal justification to do so, take a minor or a person under general custody or curatorship or legal custody away from the legal custody of the parents, care taker or guardian.*

TSE Law Article 8: Definition of Unlawful Removal

The act of unlawful removal in this law shall mean to:

- 1) remove a person from his/her current place of residence to a place under the actor's or a third person's control by means of force, threat, deception, abuse of power, or enticement, or
- 2) without legal authority or any other legal justification to do so, take a minor or a person under general custody or curatorship or legal custody away from the legal custody of the parents, care taker or guardian.

The definition of unlawful removal of a minor removes the requirement for establishing means in line with the UN Trafficking Protocol. Unlawful removal of a minor occurs in the absence of legal authority or legal justification and when the child is taken away from the legal custody of parents, caretakers or a guardian. These three criteria are explained in the TSE Law Explanatory Notes and are summarised below:

Without legal authority is taken to mean:

- removal by a person who does not possess legal authority or mandate, or
- by a person with legal authority who removes a child in a prohibited manner.

Without legal justification is taken to mean:

- removal by a person acting outside of the scope of the law to remove a child, or
- taken away under conditions or circumstances not permitted by law.

Taken away from the legal custody is taken to mean:

- taken away in cases where parental custody or legal guardianship has not been relinquished, terminated, suspended or transferred by law, or
- taken away from a situation where state guardianship is assumed (such as unaccompanied children or children on the streets) without the involvement of mandated authorities.

Consequently, any person removing a child from the legal custody of their parents, without legal authority to do so, may be removing a child unlawfully. Parental consent does not mitigate unlawful removal, as parents are not permitted by law to relinquish their children⁸⁴ except under special circumstances and only with the involvement of the courts. Any severance, temporary or otherwise, of custody or guardianship, must also involve a court decision. This has significant implications for the prosecution of orphanage trafficking, which typically commences with unlawful removal and will be discussed further in the section below.

Requirement of means for child trafficking offences

Article 3(a) of the UN Trafficking Protocol refers to the following means:

the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation...

It then goes on to say that ‘the recruitment, transportation, transfer, harbouring or receipt of child for the purpose of exploitation shall be considered “trafficking in persons” even if it does not involve any of those means. As a party to the UN Trafficking Protocol, Cambodia is obliged to eliminate the means element in the prosecution of trafficking offences against minors. However, the TSE law is inconsistent in this regard, omitting means for minors in some offences based on the definition of the act, whilst failing to differentiate in others.

⁸⁴ Criminal Code Art 321; Civil Code Art 1050

The definition of unlawful removal of a minor in Article 8(2) (extracted above) does not include a reference to means. As a result, means is not required under offences listed in Article 10 or in Articles 17 or 19 for cases involving minors, in the event that the initial act that preceded transportation or receipt constituted unlawful removal. However, where the relevant act is unlawful recruitment, it will be necessary to establish means under the offence established by Article 12. Likewise, means is inherent to the act criminalised in Article 15 and therefore cannot be practically omitted.

Article 9 provides for an offence specific to minors – Unlawful Removal, inter alia, of Minor – however, it does not require the element of purpose and is therefore more akin to a kidnapping offence than a human trafficking offence.⁸⁵

Offences under which orphanage trafficking may be prosecuted

A number of offences in the TSE law could be used to prosecute perpetrators of orphanage trafficking. Potential offences include:

TSE Law Article 10 Unlawful Removal with Purpose

A person who unlawfully removes another for the purpose of profit making, sexual aggression, production of pornography, marriage against will of the victim, adoption or any form of exploitation shall be punished with imprisonment for 7 years to 15 years. The offence stipulated in this article shall be punished with imprisonment for 15 to 20 years when:

- *the victim is a minor*
- *the offence is committed by a public official who abuses his/her authority over the victim,*
- *who abuses his/her authority over the victim,*
- *the offence is committed by an organized group.*

The terms “any form of exploitation” in this Article and Article 12, 15, 17, and 19 of this law shall include the exploitation of the prostitution of others, pornography, commercial sex act, forced labor or services, slavery or practices similar to slavery, debt bondage, involuntary servitude, child labor or the removal of organs.

TSE Law Article 15 The Act of Buying, Selling or Exchanging of Human Being with Purpose

A person who sells, buys or exchanges another person for the purpose of profit making, sexual aggression, production of pornography, marriage against will of the victim, adoption or any form of exploitation shall be punished with imprisonment for 7 years to 15 years. The offence stipulated in this article shall be punished with imprisonment for 15 to 20 years when:

- *the victim is a minor*
- *the offence is committed by a public official who abuses his/her authority over the victim,*
- *the offence is committed by an organized group.*

⁸⁵ TSE Explanatory Note (n 26) 28.

TSE Law Article 17 Transportation with Purpose

A person who transports another person knowing that he or she has been unlawfully removed, recruited, sold, bought, exchanged or transported for the purpose of profit making, sexual aggression, production of pornography, marriage against will of the victim, adoption, or any form of exploitation shall be punished with imprisonment for 7 to 15 years. The offence stipulated in this article shall be punished with imprisonment for 15 to 20 years when:

- *the offence is committed by a public official who abuses his/her authority over the victim,*
- *the offence is committed by an organized group.*

TSE Law Article 19 Receipt of a Person with Purpose.

A person who receives, harbors, or conceals another person who has been unlawfully removed, recruited, sold, bought, exchanged, or transported for the purpose of profit-making, sexual aggression, production of pornography, marriage against the will of the victim, adoption or any form of exploitation shall be punished with imprisonment for 7 to 15 years. The offence stipulated in this article shall be punished with imprisonment for more than 15 to 20 years when:

- *the victim is a minor*
- *the offence is committed by a public official who abuses his/her authority over the victim,*
- *the offence is committed by an organized group*

The application of offences in Articles 10, 17 and 19 to orphanage trafficking is contingent upon establishing three factors:

- 1. *Categorising the active recruitment of children from their families as unlawful removal. This can be ascertained by examining the legal justification and legal powers for:***
 - revocation of parental powers (including through divestment, suspension or resignation) which are outlined in the Civil Code and Law on Marriage and Family, and
 - removal of a child from parents or guardians for child protection reasons when parental powers remain intact.
- 2. *Classifying admission (referral, transfer or receipt) of children into residential care as 'irregular' and occurring in contravention of regulation.*** This can be ascertained by examining the legal powers and justifications for referral to or admission into residential care centres as per child protection regulations.
- 3. *Showing that institutionalised children are being utilised for fundraising purposes to establish the purposeful element of 'profit making' in the case where other forms of exploitation are not present.***

These three factors are examined and explained below.

Factor 1: Legal basis for classifying recruitment of children from families as unlawful removal

For the recruitment of children from their parents or legal guardians for admission into orphanages to constitute unlawful removal it must happen in violation of:

- legal justifications and powers for revocation of parental powers, and/or
- legal provisions for removal of a child from parental powers or legal guardians (where those powers remain intact) under civil law and child protection regulations.

1a. Legal powers and justification for removing a child via termination of parental powers

Book Seven Section IV of the Civil Code sets out the laws establishing the **legal power** and **legal justification** to divest parents of their parental power. Firstly, parental powers can be terminated in response to an application made to the court. Those with legal authority to submit an application to the court include the heads of the commune or sangkat, the head of a public child welfare institution, a public prosecutor or a relative of the child up to the 4th degree. The legal justification for submitting an application to the court under Article 1048 is an allegation against the parent/s of abuse or neglect of their parental obligations.⁸⁶

The Law on Marriage and Family expands on the legal justification for application to the court as provided for in Article 1048 of the Civil Code, outlining four situations that constitute abuse or neglect of obligations. It states that parental power can be revoked and transferred to any organisation if a parent fails to educate the child, violates the rights of the child, treats the child badly, or behaves against moral standards.⁸⁷

In addition to the above, a parent with custody of a child may submit an application to the court seeking to resign their parental powers. The legal justification that must be met for an order granting resignation to be made is proof of unavoidable grounds.⁸⁸

Where parental powers are divested of both parents (by court order), a relative up to the 4th degree can seek an order to assume parental powers over the child under Article 1051 of the Civil Code. If this occurs, parental powers are transferred, making lawful the removal of a child from their parents to a relative granted parental powers. If a relative up to the 4th degree does not seek an order to assume parental powers, the court is required to issue a declaration of commencement of guardianship under Article 1052 of the Civil Code and appoint a guardian. Likewise, the removal of a child from their family and transfer to the residence of their appointed guardian constitutes lawful removal.

Therefore, when a child is removed after the suspension or revocation of parental powers on the above legal grounds and is transferred to the person granted guardianship or custody, removal is lawful.

⁸⁶ Civil Code Art 1048 Order for suspension or divestment of authority of parental power holder.

⁸⁷ Law on Marriage and Family Art 119.

⁸⁸ Civil Code Art 1050 Resignation and resumption of parental power holder.

1b. Legal powers and justification to remove a child without prior revocation of parental powers

A child can also be removed from their parents or guardians without revoking or suspending parental powers, in situations that constitute an immediate risk to the child under child protection laws and regulations.

Various laws and child protection regulations stipulate the legal powers of competent authorities and legal justifications for removal of a child from their parents or guardians. These most notably include:

- Prakas no. 217 on the Enforcement of the Policy on Alternative Care for Children
- Prakas no. 2280 on the Implementation of the Policy on Alternative Care for Children
- Sub Decree 119 on the Management of Residential Care Centres
- Sub Decree 34 on the Transfer of Functions for the Management of State-Run Residential Care Centres to the Provincial and Municipal Level and the Transfer of Functions for the Inspection and Oversight of Non-Government Run Residential Care Centres to the District/City level and the Transfer of Functions for the Management of Vulnerable Children in the Community to the Municipal, City and Commune level
- Sub Decree 184 on the Functions and Structure of District Administrations
- Sub Decree 183 on the Functions and Structure of the Khan Administration
- The Law on the Prevention of Domestic Violence and Protection of Victims

The competent authorities with legal power to remove a child from their parents or guardian under a child protection response are identified in Prakas 2280 and are, in the first instance, the Commune and Sangkat Council, including the Commune Child Welfare Committee (CCWC). The legal justification for removal is immediate risk to the child, which must be evidenced by initial assessment, and may entail any of the circumstances outlined in Article 5 of the Prakas:

Prakas 2280 Article 5

Situations and difficult circumstances that cause children to be at risk of family disintegration include:

1. children whose parents or guardians are not living with them;
2. actual or threatened separation of children from family through abandonment,
3. imprisonment, trafficking or migration;
4. actual or threatened violence in the home, or physical or sexual abuse or abandoning the child, or exploitation of the child such as selling or renting the child;
5. children whose parents or guardians do not have the capacity to fulfil their
6. obligations because of a serious lack of basic necessities and services such as shelter, food, education and health care;
7. chronic illness and disability of the child or caregiver, that children are not able to receive appropriate care;
8. family with alcoholism, gambling, drug addiction or other substance abuse, that are not able to provide the children with appropriate care; or
9. children who are at risk of or being in conflict with law.

Legal powers of Commune or Sangkat Committees and CCWCs are limited to removal of children within their geographical jurisdiction. Removal must be conducted in consultation with and with the cooperation of District/Khan/ City level officials from the Office of Social Welfare, Veterans and Youth (OSVY) and documented in accordance with forms provided for under Prakas 2280. Removing the dangerous adult must be considered as a preferred course of action before removing the child is considered justified.⁸⁹ Other authorities, such as police, may participate in the removal of a child in

as police, may participate in the removal of a child in difficult circumstances. In cases of domestic violence, children can be removed from their families for protection purposes by officials from the Ministry of Women’s Affairs operating under judicial officer powers.⁹⁰

<p>Commune/ Sangkat / CCWC</p>	<ul style="list-style-type: none"> • Identification of children at risk in community • Open case where risk is verified and establish service plan • Support reintegration and follow up for families within their jurisdiction • Arrange temporary alternative care for children abandoned in the community with kin or a foster family located within their jurisdiction in cooperation with the district level authorities (OSVY). All removals must be done in consultation with District authorities • As a last resort refer an abandoned child to DoSVY at the Provincial or Municipal level.
<p>District/ City/ Khan authorities</p>	<ul style="list-style-type: none"> • Directly manage case not under the authority of the Commune/Sangkat Council including: cross jurisdictional cases, non-kin foster care, children in institutions or at risk of being institutionalised, children in need of permanency • Work with Commune/Sangkat authorities where removal from family is warranted • Track referrals • Participate in monitoring of standards of care in community and residential based alternative care settings in their jurisdiction
<p>DoSVY Provincial/ Municipal authorities)</p>	<ul style="list-style-type: none"> • Maintain an up-to-date list of all alternative care service providers or accredited individuals • Maintain the database on children in alternative care within their jurisdiction • Carry out family tracing • Carry out permanency planning • Evaluate and approval all requests for admission or exit from residential care • Final responsibility for the implementation of minimum standards in residential and community-based care settings

⁸⁹ Prakas no. 2280 on the Implementation of the Policy on Alternative Care for Children (‘Prakas 2280 MoSVY’) Art 15.

⁹⁰ Law on the Prevention of Domestic Violence and Protection of Victims Art 10.

1c. Legal provisions for guardianship of an abandoned, unaccompanied or separated child

Children found abandoned or separated from their parents and where the parents cannot be immediately located come under the temporary guardianship of the Director of Department of Social Affairs, Veterans, and Youth Rehabilitation (DoSVY) within the province in which the child is located. In such cases, guardianship is assumed and removing a child without the involvement of DoSVY is unlawful.⁹¹ This means that abandonment is not a justification for those without legal powers to remove and transfer a child to an institution for the purpose of admission into an institution. Additionally, a child cannot be formally classified as ‘abandoned’ except by the competent authorities and after at least 5 months of family tracing efforts have failed to locate the child’s parents or extended family. At this point the child is declared abandoned and added to the permanency planning list. A dossier is then filed by DoSVY with the courts for the appointment of a guardian in accordance with the Civil Code.

Factor 2: Legal powers and justification for admission of children into residential care

In order for admission into residential care to be considered lawful, certain conditions must be met, and decisions must be made by mandated authorities. These are outlined in child protection regulations and form part of the alternative care gatekeeping system which governs entry into and exit from the alternative care system.

The Ministry of Social Affairs, Veterans and Youth Rehabilitation (MoSVY) issued Sub Decree 119 on the Management of Residential Care Centres, which lists the range of permissible reasons for admitting a child into residential care. These include:

- children without parents or guardians with whom they could live
- children separated from their families through abandonment, parents or guardians being imprisoned, trafficking or migration
- children separated from their families due to threatening circumstances
- children who suffered from violence committed against them or threat to commit violence in the family, physical or sexual abuse or exploitation of all forms, which include buying, selling or renting children or so on
- children whose parents or guardian are not able to fulfil their obligation caring for their children due to their extreme difficulty, lacking necessary and basic needs, shelter, food, clothes, education and health care
- children whose parents suffer chronic disease or disability and who are thus unable to provide them with proper care, and
- children whose family members have a gambling addiction or substance abuse issues, and who are therefore unable to provide them with proper care.⁹²

The presence of a permissible reason notwithstanding, the alternative care regulations also outline a strict gatekeeping process, which governs the referral, application and approval of admission of children experiencing ‘permissible reasons’ into residential care. These gatekeeping measures have been designed to ensure that children are only admitted into residential care as a last resort, temporary measure, and that the prioritisation of family-based

⁹¹ TSE Explanatory Notes (n 26).

⁹² Sub Decree 119 on the Management of Residential Care Institutions MoSVY Chapter 5 Article 11 (‘Sub Decree 119’).

care, stipulated in law and policy, is upheld in practice. Whilst this is primarily to uphold the best interests of children, it is also designed to prevent the trafficking and exploitation of children on the basis of pre-existing vulnerabilities, in particular for intercountry adoption purposes. As such, the violation of these gatekeeping measures can be equally indicative of orphanage trafficking, which often intersects with or utilises similar acts and means as trafficking for intercountry adoption purposes.

Legal powers and justification for referring or placing a child to residential care

An authorised residential care centre is defined as any legal entity or persons with prior authorisation from MoSVY to run a residential care centre by way of entering into a formal MOU with the Ministry.⁹³ The CCWC in collaboration with City/Khan/District OSVY has the legal power to temporarily place a child in an authorised residential care centre. DoSVY is responsible for keeping an accurate list of all authorised alternative care providers, including residential care centres, operating within their jurisdiction for referral and monitoring purposes.⁹⁴ CCWCs/OSVY officials do not have legal power to place a child in an unregistered institution that is classified as 'clandestine' by law.⁹⁵

of all authorised alternative care providers, including residential care centres, operating within their jurisdiction for referral and monitoring purposes.⁹⁵ CCWCs/OSVY officials do not have legal power to place a child in an unregistered institution that is classified as 'clandestine' by law.⁹⁶

The temporary placement of a child in an institution is legally justified if:

- (a) A permissible reason for admission has been evidenced through assessment
- (b) Immediate efforts to trace the parents have been made and were unsuccessful
- (c) Immediate options for kinship care, foster care in the community or other community-based care have been explored and exhausted, and⁹⁷
- (d) Placement has been approved by DoSVY and appropriately documented using the forms associated with Prakas 2280.

Admissions into institutions are always considered temporary in nature and permitted whilst efforts to trace parents or locate other suitable family to care for the child are ongoing.

Legal justification and powers for a residential care service provider to receive and retain a child in residential care.

In order for a legal entity to be authorised to provide residential care services it must be registered and approved by MoSVY as a residential care provider and be subject to monitoring and inspections to ensure they are meeting minimum standards.⁹⁷ Residential care facilities which are operating unlawfully have no legal power to receive or admit a child into residential

⁹³ Ibid Art 6.

⁹⁴ Prakas 2280 MoSVY (n 91) Art 22.

⁹⁵ Ibid Art 10.

⁹⁶ Ibid Arts 15 21.

⁹⁷ Sub Decree 119 (n 95) Art 6; Prakas 2280 MoSVY (n 91) Art 22.

care facilities which are operating unlawfully have no legal power to receive or admit a child into residential care and can be subject to penalties for doing so without authorisation.⁹⁸

Authorised residential care service providers have certain legal powers. Firstly, they may receive and admit children removed from parents or found abandoned in the community into care by referral or placement by the CCWC, with OSVY involvement, and with DoSVY approval. Where a child's case crosses jurisdictional boundaries, DoSVY and OSVY are solely responsible for all alternative care referrals and placements, including in residential care. The CCWC has no authority to make placements outside of their commune. In all cases of placement in residential care, DoSVY or OSVY social workers are responsible for physically bringing the child to the residential care centre.⁹⁹ As such, orphanage directors or other personnel have no legal authority to remove a child from a family or community and transfer them to an orphanage for admission, even when justifiable reasons exist.

Secondly, a residential care service provider is permitted to receive and take a child into care who has been abandoned at the institution or brought by a citizen, but it must document the admission and record the details and signature of the person who brought the child to the institution. The institution must immediately notify the CCWC in the commune where the child is located and notify OSVY and DOSVY within 7 working days of the child being admitted.

DOSVY within 7 working days of the child being admitted.¹⁰⁰ The CCWC and OSVY are then responsible for initiating the process of family tracing and procedures for alternative care placement (where necessary). Where placement in alternative care is necessary, the CCWC, OSVY and DoSVY must make a joint decision and authorise the placement.¹⁰¹ Therefore, the institution is not legally justified to retain the child beyond the initial 7 working day period without the authorisation of the CCWC, OSVY and DoSVY.

Based upon the legal powers and justifications for referral or admission to residential care, residential care centre directors, staff or other personnel are not permitted to:

- receive or admit a child into residential care unless registered with MoSVY
- independently deem a child as at risk in the community and in need of residential care and arrange for the child's removal and admission into residential care
- recruit or remove a child directly from their family for the purpose of admission into residential care
- respond directly to reports of abandoned children in the community and bring or arrange for the transfer of the child to the residential care facility
- receive children directly from parents into the residential care facility, or
- receive or admit a child into care based upon a referral or request from a non-competent person or authority.

⁹⁸ Sub Decree 119 (n 95) Art 16.

⁹⁹ Prakas 2280 MoSVY (n 91) Art 23.

¹⁰⁰ Ibid Art 19.

¹⁰¹ Ibid Art 23.

Any or all of these acts could constitute irregular admission, and when coupled with unlawful removal and purpose, orphanage trafficking. An organisation who runs adoption services is subject to additional prohibitions from any involvement in family tracing efforts to further safeguard against unlawful practices and trafficking.¹⁰²

Factor 3: Classifying the admission and retention of children in residential care for fundraising purposes as 'profit making'.

The definition of 'purpose', in all of the aforementioned offences includes 'profit making, sexual aggression, production of pornography, marriage against will of the victim, adoption or any form of exploitation.'¹⁰³ 'Any form of exploitation' as referenced in Article 10, 15, 17 and 19, is defined in Article 10 to include 'exploitation of the prostitution of others, pornography, commercial sex act, forced labour or services, slavery or practices similar to slavery, debt bondage, involuntary servitude, child labour or the removal of organs.'¹⁰⁴

Listing profit making as a purpose enhances the ability to prosecute orphanage trafficking as it removes the requirement to prove the intent or actual subjection of children to exploitative conditions in the institution. Regardless of the conditions or standards of living or treatment in the institution, provided the purpose for the child's unlawful removal or receipt and admission into the institution is profit making and not based on mandated assessment procedures to determine necessity and suitability, trafficking offences can theoretically be brought against perpetrators.

This is an important measure for two key reasons. Firstly, it recognises the commodification of children as exploitative enough to warrant prosecution where it is coupled with unlawful removal, unlawful recruitment or the sale of a child. Secondly, it removes the need to rely on other forms of exploitation to prosecute trafficking, which in some cases occur as a consequence of the commodification of children rather than the express purpose. This is particularly the case with sexual exploitation of children trafficked into institutions, which often occurs due to lax child protection measures, including low standards of care, lack of supervision and allowing visitors and volunteers unfettered access to children as a part of orphanage tourism and other means of profiteering.

The specific inclusion of adoption as a purpose removes similar barriers as adoption is rarely captured under definitions of purpose limited to exploitation. Listing adoption separately to profit making ensures adoption-related trafficking that intersects with orphanages can be prosecuted regardless of whether it was for the purpose of profit making (by orphanages, adoption agencies, intermediaries or others) or to aid the family formation agenda of the adoptive parents.

¹⁰² Ibid Art 20.

¹⁰³ TSE Law (n 31) Art 10.

¹⁰⁴ Ibid Art 10.

Profit making, as it occurs in cases of orphanage trafficking, could be achieved through a range of methods, including:

- facilitating orphanage tourism, including visiting, volunteering and orphan shows/performances
- harbouring children to attract foreign donors with an interest in funding institutional care
- facilitating child sponsorship programs that match each child in care with an individual donor, and
- facilitating intercountry adoption.

Relationship between specific offences and orphanage trafficking

TSE Law Article 10 Unlawful Removal with Purpose

Article 10: Unlawful Removal with Purpose could be used to prosecute orphanage trafficking where the criteria for unlawful removal of a minor was met based on the analysis above, and where purpose, or intent to commit purpose, can be evidenced. Purpose in the case of orphanage trafficking could include:

- profit making, as outlined above
- adoption, specifically intercountry adoptions where prior placement in an institution is a legal requirement
- forced marriage or child marriage, where children are recruited into orphanages for the purpose of brokering marriages, often in connection with overseas clients who may sponsor children until they reach age of majority
- forced labour or services, where children are recruited into orphanages for the purpose of providing labour on farms or in businesses owned by orphanage directors or founders, or as domestic servants, and
- sexual exploitation, where children are recruited for the purpose of sexual exploitation by the director, staff, community members, or where children are recruited for the purpose of commercial sexual exploitation facilitated through the orphanage.

The terms “any form of exploitation” in this Article and Article 12, 15, 17, and 19 of this law shall include the exploitation of the prostitution of others, pornography, commercial sex act, forced labor or services, slavery or practices similar to slavery, debt bondage, involuntary servitude, child labor or the removal of organs.

Perpetrators who could be prosecuted under this offence include orphanage directors, orphanage personnel, child finders or brokers who unlawfully remove children through active recruitment, including those who recruit newborn babies at hospitals by coercing mothers and inciting abandonment.

Instigators who could be prosecuted under this offence include those who issue directives to third parties to recruit children for the aforementioned purposes, including orphanage directors, founders, adoption agencies and their principal representatives. Where it pertains to the conduct of adoption agencies, Article 10 of the Criminal Code provides an additional or

Law on Intercountry Adoption Article 54.5

obtaining the consent of parent(s) or guardian for minor of a child by coercion, threat, fraud or inducement through payment, gift, compensation or any advantage, or through promise of payment, gift, compensation or advantage of any kind.

alternate criminal offence for prohibited conduct under Article 54.5 of the Law on Intercountry Adoption.

Law on Intercountry Adoption Article 54.5

obtaining the consent of parent(s) or guardian for minor of a child by coercion, threat, fraud or inducement through payment, gift, compensation or any advantage, or through promise of payment, gift, compensation or advantage of any kind.¹⁰⁵

TSE Law Article 15 The Act of Buying, Selling or Exchanging Human Beings with Purpose

Article 15 could be used to prosecute the sale of children to orphanages by child finders/brokers, where children have been recruited from families and subsequently brought to orphanages for the purpose of profit making, adoption, or exploitation. It could also be used to prosecute orphanage directors or personnel who buy children who have been recruited by brokers/child finders from their families, where the act of buying a child was for the purpose of admission into the orphanage for one of the required purposes of exploitation, profit making or adoption. It could also be used to prosecute instances where child finders/brokers recruit children from families in exchange for the cancellation of debt, payment of medical bills (in cases where babies are removed from poor mothers in hospital settings) or other material or financial support, with the purpose of transferring them to an orphanage for profit, adoption or exploitation.

Whilst it is highly likely that the active recruitment would constitute unlawful removal, the criteria for unlawful removal does not need to be met under this offence. This means this offence could be used to prosecute cases where the perpetrator was a competent official removing a child for a legally justified reason, who subsequently sold the child to an institution knowing the institution intended to exploit or commodify the child for profit-making purposes.

TSE Law Article 17: Transportation with Purpose

Article 17 could be used to prosecute perpetrators who participate in orphanage trafficking via the transportation of a child who has been unlawfully removed from their

¹⁰⁵ Law on Intercountry Adoption 2009 Article 54.5.

families (based on the criteria set out above), or bought, sold or exchanged. Transportation of the child could be to an orphanage or to or from a transit destination, provided the perpetrator has knowledge of the unlawful removal and engages in or intends to engage in one of the stipulated purposes. In this case, the perpetrator may transport the child for a fee, meeting the profit making requirement, or to on-sell the child to an orphanage, which would also satisfy the element of purpose.

Perpetrators who could be prosecuted under this offence may include child finders or brokers who source unlawfully removed children for orphanages. It could also include drivers who provide transportation services for a fee, where they have knowledge of the preceding unlawful act of removal or sale or purchase of a child.

TSE Law Article 19: Receipt of a Person with Purpose

Article 19 could be used to prosecute orphanage directors and/or personnel who receive children for admission into the institution for profit making or exploitation, subsequent to their unlawful removal from their families by a third party, or being bought, sold or exchanged. Under this offence, it is not a requirement for the offender receiving the child to know that the child was unlawfully removed, bought, sold, or exchanged, provided they receive and harbour the victim for the purpose of profit making or exploitation.¹⁰⁶ As such, it is relevant to cases where the unlawful removal or purchase/exchange was not instigated by the receiving orphanage director or personnel and/or in cases where they are unaware of unlawful acts occurring prior to the receipt of the child.

Article 19 could also potentially be used to prosecute brokers/child finders or middle persons, who receive children unlawfully removed by others and harbour them for a period of time, either to independently secure foreign donor support before transferring them to an orphanage (thus meeting the criteria for profit making) or prior to selling them to an orphanage. These scenarios are more common with the trafficking of infants and in cases where fraudulent birth certificates or other documentation are organised during the harbouring period prior to admission into an institution.

A middle person who received the child with knowledge of their unlawful removal purchase or exchange, and with the intention to assist the person who unlawfully removed, purchased or exchanged the child, but without purpose could not be charged with trafficking under Article 1. They could, however, be charged under Article 20: Receipt of a Person for the Purpose of Assisting the Offender.

TSE Law Article 9: Unlawful Removal, Inter alia, of a Minor

The Offence under Article 9 does not include purpose, therefore while it could not be used to bring charges of child trafficking, it could be used to prosecute the active recruitment and removal of children from their parents and legal guardians for admission into orphanages, where it occurs without legal power or justification as previously discussed.

¹⁰⁶ TSE Law Explanatory Note (n 26) 54.

Article 9: Unlawful Removal, *inter alia*, of Minor

A person who unlawfully removes a minor or a person under general custody or curatorship or legal custody shall be punished with imprisonment for 2 to 5 years. The punishment for the offence stipulated in this article shall be remitted or mitigated when all of the following conditions are met:

- 1- the person taken under custody, being not less than fifteen (15) years of age, voluntarily gives genuine consent to the criminal act;
- 2- none of the means stipulated in subparagraph 1) of Article 8 of this law is used; and
- 3- the offender does not have any purpose to commit an offense.

The prosecution for the offence stipulated in this article may be commenced upon the filing of a complaint from the parent, custodian/care taker or lawful guardian concerned unless any of the means stipulated in subparagraph 1) of Article 8 of this law is used.

Perpetrators prosecuted under this offence could include brokers/child finders who source children for orphanages or orphanage directors or personnel who directly recruit children from their families. Instigators prosecuted under this offence could include those who issue directives to brokers/child finders or orphanage staff to actively recruit children. This may capture the role that orphanage directors, founders, and in some cases, principal donors play in driving demand for active recruitment, which results in unlawful removal.

It is important to note that a similar offence exists in Article 327 of the Criminal Code (Taking away of a minor), which attracts a lesser penalty. Based on the principles of statutory interpretation set out in the Criminal Code and discussed in Section Two, unlawful removal that does not occur in connection with trafficking or sexual exploitation is more likely to be prosecuted under the Criminal Code offence.¹⁰⁷

Regardless of whether it is addressed under the Criminal Code offence or TSE offence, the prosecution of unlawful removal for admission into orphanages may be an important element of strengthening the enforcement of the child protection gatekeeping mechanism and addressing an area of weakness that is currently being exploited to perpetrate orphanage trafficking. As such, even in the absence of purpose, encouraging prosecution of unlawful removal of a minor could form a valid part of the strategy to suppress orphanage trafficking.

Offences for sexual exploitation or assault occurring in conjunction with orphanage trafficking

Chapters 4–6 of the TSE law contain a range of sexual offences against minors that could be relevant to orphanage trafficking case where such an offence has occurred. While it is beyond the scope of this report to examine in detail all of the offences covered under Chapters 4–6, it is important to note that sexual offences can be brought against perpetrators in addition to human trafficking charges where:

- (a) sexual exploitation, prostitution or sexual aggression was the purpose of trafficking and subsequently occurred,¹⁰⁸ or
- (b) a purpose other than sexual exploitation, prostitution or sexual aggression was evidenced in

¹⁰⁷ Ibid 31.

conjunction with the trafficking act, however a sexual offence was also perpetrated against the trafficking victim.

This could be relevant in cases of orphanage trafficking where the primary purpose is profit making; however, minors trafficked into orphanages are also sexually assaulted or subject to sexual exploitation.

ANCILLARY OFFENCES FOR ORPHANAGE TRAFFICKING FROM THE CRIMINAL CODE

Whilst the TSE law is the specialist legislation for human trafficking related offences, there are a number of ancillary offences contained within the Criminal Code that could be relevant to an overall prosecutorial strategy for orphanage trafficking. These include offences found in Book 2: Title 3 on the offences against minors and the family, and include those that criminalise prohibited actions under related non-criminal public laws such as the Intercountry Adoption Law and executive regulation pertaining to child protection. Book 4: Titles 3 and 4 also contain offences on the infringement of the functioning of public administration and infringement of public confidence, including forgery and bribery offences that may capture the involvement of officials in orphanage trafficking. This could address elements such as the issuing of fraudulent birth certificates or falsification of information on gatekeeping assessments and forms used to doctor the circumstances under which a child is admitted into alternative care.

Criminal Code Article 321: Penalty for abandonment of minors

It is unlikely to be appropriate to charge parents relinquishing their children to institutions with this offence in the majority of cases of orphanage trafficking, due to the coercion, deception and exploitation of vulnerability that typically occurs. However, it is an important offence for the establishment of the illegality of voluntary abandonment without court involvement under the Civil Code. It may also be an important component of raising awareness in efforts to prevent and suppress orphanage trafficking.

Criminal Code Article 326: Failure to hand over minors

This offence links to the violation of civil rights of parents as enshrined in the Civil Code in Book Seven, Chapter Four,

Article 321: Penalty for abandonment of minors

The abandonment of a minor under fifteen years of age by a legal custodian shall be punishable by imprisonment from one to five years and a fine from two million to ten million Riels where the circumstance of the abandonment endangers the health or safety of the minor.

¹⁰⁸ Ibid 33.

Article 326: Failure to hand over minors:

Maliciously failing to hand over a minor to the person who has the right to claim shall be punishable by imprisonment from one month to one year and a fine from one hundred thousand to two million Riels.

Article 327: Taking away of minors

Taking away a minor from the person who has legal custody shall be punishable by imprisonment from one month to one year and a fine from one hundred thousand to two million Riels. The offence shall be punishable by imprisonment from one year to three years and a fine from two million to six million Riels if the minor is kept outside the territory of the Kingdom of Cambodia.

Section III, Article 1047: 'Demand to Hand Over a Child', which states:

1047 (Demand to hand over child)

(1) The parental power holder may demand hand-over of the child by a third party who illegally refuses to hand over the child.¹⁰⁹

This offence could be used to prosecute orphanage directors or personnel who refuse to relinquish children in institutions back into the care of their parents and guardians in cases where guardianship has not been terminated and where admission into institutional care was not mandated by the competent authority (in other words, no care order is in place). This could include cases in which orphanage directors/personnel refuse to allow reintegration to take place, despite policy directives and requests from parents. It could also include cases where coercion exists in the form of unlawful contracts or agreements threatening legal action or financial consequence in the event a parent/guardian removes their child from the institution before a stipulated age or point in time. Where this is done wilfully (as evidenced through contracts, threats, and refusal to comply with policy around reintegration), without legal justification (without the involvement of competent authorities or a court decision divesting parental rights or terminating guardianship) and wrongfully (in contravention of child protection and alternative care regulations and child rights law), it could be argued that the requirements for 'maliciously' failing to hand over a minor have been met. Where profit making is the purpose associated with failing to hand over the child, it may also potentially meet the requirement of 'maliciously', despite purpose not being a required element of this offence.

Criminal Code Article 327: Taking away of minors

Similar to the Unlawful Removal offence in the TSE law, this offence could be used to prosecute orphanage directors, personnel and child finders/brokers who remove children from their parents or legal guardians for the purpose of admission into an institution, without the involvement of mandated child protection authorities and in contravention to gatekeeping measures as stipulated in law.

¹⁰⁹ Civil Code Art 1047.

With this offence, it is not a requirement to establish a purpose or prove means. However, as previously stated, due to the rules on statutory interpretation the unlawful removal of a minor offence in the TSE would take precedent over Article 327 in the event of child trafficking.

Chapter 4: Offences against familial relationships

Criminal Code Article 330: Incitement to abandon a child

This offence could be used to prosecute the active recruitment of children for admission into institutions, where it involves inciting parents to abandon their child and where the recruiter seeks to profit from the child's abandonment and admission into an institution, including through orphanage tourism, fundraising or intercountry adoption. This offence could be used to prosecute a range of perpetrators who engage in active recruitment including child finders, brokers, orphanage directors, orphanage personnel and intercountry adoption agencies and their personnel.

Article 330 directly links to and provides the criminal offence for a prohibited act by agencies involved in intercountry adoption of '*provoking, for profit-making purpose, the parent(s) to abandon an already-born or a yet-to-be-born child in order to be offered for inter-country adoption*'.¹¹⁰

Criminal Code Article 331: Acting as an intermediary in case of adoption or abandonment

These two offences, like Article 330, criminalise prohibited conduct under Article 54 of the Law on Intercountry Adoption.¹¹¹

In the context of the law on intercountry adoption, this conduct is specifically prohibited of adoption agencies.¹¹² However, as this specificity of application is not reflected in the Criminal Code, it is foreseeable that it could be used as an ancillary offence in addition to human trafficking offences in the prosecution of orphanage trafficking, where admission into an orphanage preceded the finalisation of intercountry adoption. Under intercountry adoption law and regulation, children eligible for intercountry adoption must be residing in an authorised residential care institution or other alternative care placement supervised by MoSVY.¹¹³ As such, trafficking

Criminal Code Article 330: Incitement to abandon a child:

The direct incitement for pecuniary gain of one or both parents to abandon a child, born or to be born, shall be punishable by imprisonment from one month to six months and a fine from one hundred thousand to one million Riels.

Criminal Code Article 331: Acting as an intermediary in case of adoption or abandonment;

Acting as an intermediary for pecuniary gain between a person or a couple desiring to adopt a child and a parent desiring to abandon its born or unborn child shall be punishable by imprisonment from one month to six months and a fine from one hundred thousand to one million Riels.

¹¹⁰ Law on Intercountry Adoption Art 54.1.

¹¹¹ Ibid Art 54

Criminal Code Article 332: Intermediary between an adoptive parent and a pregnant woman

Acting as an intermediary for pecuniary gain between a person or a couple desiring to adopt a child and a woman agreeing to bear the child with the intent to give up the child to them shall be punishable by imprisonment from one month to six months and a fine from one hundred thousand to one million Riels.

Criminal Code Article 333: Acts of substitution, false representation or concealment of a child existence

Substitution, false representation or concealment of the existence of a child which infringes his or her civil status shall be punishable by imprisonment from one month to one year and a fine from one hundred thousand to two million Riels.

for intercountry adoption purposes does typically involve the trafficking of a child into an institution.

Perpetrators may include orphanage directors or personnel, child finders or brokers, or conceivably, personnel from the adoption agency. Instigators who may be prosecuted under this offence could include orphanage directors or personnel or adoption agency directors or personnel who issued a directive to a third party to act as an intermediary in order to source a child for adoption.

As of 2020, intercountry adoption from Cambodia remains closed to the vast majority of countries with very few adoptions being approved. Whilst this offence is an important safeguard for when intercountry adoption opens once again, there is currently little incentive for trafficking children into orphanages for the purpose of intercountry adoption.

Criminal Code Article 333: Acts of substitution, false representation or concealment of a child existence

This offence also appears to have been drafted primarily to suppress and prosecute criminal conduct within the context of intercountry adoption. However, it could be used to prosecute offenders who conceal a child's true identity and falsely represent them under a doctored identity in conjunction with orphanage trafficking. In some cases, birth certificates are falsified to change the child's name and/or change the names of the parents listed on the birth certificate. This enables perpetrators to conceal the child's identity, thus frustrating efforts of parents to locate their children, who may have been transported to an orphanage or transferred from one orphanage to another. It also aids in efforts to fraudulently meet the criteria for admission – in other words, abandonment or death of parents.

Chapter 5: Endangerment of minors

Criminal Code Article 337: Depriving minor under the age of 15 years of food or care

This offence could potentially be brought against orphanage directors and/or personnel who wilfully subject children to substandard conditions in an institution, including deprivation of adequate food and sufficient care to ensure their safety and protection. This is particularly relevant where children are trafficked into orphanages for the purpose of profit making,

¹¹² Ibid Art 54.

¹¹³ Ibid Art 10(3).

as orphanage personnel may be aiming to solicit funds from orphanage tourists or donors who seek to ameliorate the poor conditions they witness. The lack of adequate care leading to harm or, in accordance with the aggravated offence in Article 338, death, can occur when inadequate staff or adult supervision is provided. In some cases, the disingenuous nature of institutions involved in orphanage trafficking (concerned with profit instead of children's care) means staff are not hired and children can be left to fend for themselves. This can be coupled with a culture of violence inside the institution, including staff perpetrating abuse, or encouraging child-on-child abuse.

Relevant provisions within the Minimum Standards for Residential Care could be used as a basis for determining what meets the threshold of 'deprivation and 'endangering health' where the offence has occurred in a residential care facility. Article 337 could act as the criminal offence associated with a failure to meet certain minimum standards where the threshold of 'endangering health' has been met, warranting the initiation of criminal proceedings in conjunction with remedial measures under child protection regulations.

Criminal Code Article 344: Inciting minor to beg

This offence could potentially be brought against orphanage directors or personnel who force minors in residential care institutions to beg, including where begging is to solicit donations for the residential care institution. It is possible this offence could be brought concurrent to other offences in the TSE law or the criminal code.

Criminal Code Article 337: Depriving minor under the age of 15 years of food or care:

Depriving a minor under the age of 15 years of food or care to the point of endangering his or her health, inflicted by any person having authority over him or her, shall be punishable by imprisonment from two to five years and a fine from four million to ten million Riels.

Criminal Code Article 344: Inciting minor to beg

The direct incitement of a minor to beg shall be punishable by imprisonment from one month to one year and a fine from one hundred thousand Riels to two million Riels.

Criminal Code Article 594: Acceptance of bribery

The direct or indirect request for or acceptance of gifts, offers, promises or interests, without authorization, by a public official or a holder of public elected office shall be punishable by imprisonment from seven to fifteen years where it is committed:

- (1) perform an act related to or facilitated by his or her function;
- (2) to refrain from performing an act related to or facilitated by his or her function.

Criminal Code Article 629: Forgery of public document

Forgery committed in an authenticated document or a document issued by a public body for the purpose of establishing a right, an identity or a capacity, or to grant an authorisation shall be punishable by imprisonment from five to ten years.

Criminal Code Article 637: Bribery by authorized person to issue falsified attestation

Any person who, acting in the exercise of his or her profession, requests or accepts offers, gifts, promises or interests of any kind to produce an attestation or a certificate stating facts that are materially inaccurate shall be punishable by imprisonment from two to five years and a fine from four million to ten million Riels.

Criminal Code Article 638: Bribery of authorized person to issue falsified attestation

Any person who makes offers, gifts, promises or interests of any kind to another person to produce an attestation or a certificate stating facts that are materially inaccurate shall be punishable by imprisonment from one to three years and a fine from two million to six million Riels.

These offences¹¹⁴ could be relevant components in a prosecutorial strategy against orphanage trafficking where there has been involvement from government officials. Perpetrators may include:

- mandated child protection authorities who use their powers to unlawfully remove or authorise the removal of a child, falsely attest to conditions that warrant removal or admission into institutional care, including a child's status as abandoned or orphaned, accept bribes from unlawfully operating or non-compliant orphanages in exchange for impunity, including in response to reports of abuse or criminal conduct, and
- local government officials who issue fraudulent birth certificates or death certificates in conjunction with orphanage trafficking.

Prosecuting these crimes as a component of a prosecutorial strategy for orphanage tourism is critical to addressing the corruption that often results in impunity for perpetrators of orphanage tourism.

¹¹⁴ Book Four of the Criminal Code on Offences Against the Nation.

Section Five: Detecting and Reporting Cases of Orphanage Trafficking

DETECTING ORPHANAGE TRAFFICKING

In order for orphanage trafficking to be effectively suppressed and punished through prosecution, the issue of detection must also be addressed as part of the prosecutorial strategy. Risk indicators for orphanage trafficking can differ significantly from the typical set of indicators used to identify a potential trafficked person in other settings. As orphanage trafficking occurs in pseudo child protection spaces, some of the most critical indicators can be easily misinterpreted or dismissed. As such, the specific set of risk indicators that may be used to detect orphanage trafficking needs to be identified. Subsequent to identification, targeted awareness raising and sensitisation activities amongst the range of actors most likely to come across victims or reports of orphanage trafficking must be implemented as a component of an effective prosecutorial strategy.

There are a wide range of factors that may indicate a risk of orphanage trafficking. These can be used for detection and indicate a need for further investigation. It is often the combination of more than one risk indicator that may suggest the possibility of orphanage trafficking. Risk indicators may include, but are not limited to:

- operation of an unauthorised residential care institution
- irregular admission of children into institutional care (without involvement of competent authorities and including but not limited to active recruitment of children from families)
- failure to meet the national Minimum Standards of Residential Care
- orphanage tourism and volunteering
- absence of child files, incomplete or irregular information contained in child files, or irregularities noticed across child files (including with respect to the place, date, issuing authority or parent's names listed on children's birth certificates)
- contracts with parents or guardians attempting to prevent parents from exercising parental powers, and/or containing threats
- suspicion, allegations or indicators of child abuse, severe neglect, violence, or extreme control exerted over the children by directors/caregivers
- interference by orphanage personnel or directors with social worker efforts to access and/or assess children for reintegration, provide counselling to children or otherwise speak with the children independent of staff/personnel
- evidence of children providing labour to farms, businesses or domestic service within households associated with the orphanage management or personnel
- evidence of marketing materials or methods (online or otherwise) that disclose children's identities and other confidential information, such as previous traumas or HIV status, for fundraising purposes

- irregular exits, or lack of procedures for exiting care, or evidence of concerning circumstances for young people leaving care (for example exiting care after making reports, leaving in connection with overseas marriages, the disappearance of children or young people, or young people leaving either after or shortly followed by coming into conflict with the law)
- evidence of children's involvement in unlawful activities such as begging or prostitution
- inconsistencies in children's stories, in particular with respect to names, status of their parents (deceased or alive) and circumstances of their removal and reasons for admission (abuse, trafficking, abandonment, orphanhood, and so on), or
- close connections with intercountry adoption brokers or agencies.

There are a number of ways in which risk indicators for orphanage trafficking may be detected, reported and investigated. However, the most likely avenue for initial detection or reporting is through the alternative care monitoring and gatekeeping systems. It is unlikely that the initial concern or suspicion would be of orphanage trafficking. Orphanage trafficking may, however, be uncovered as part of an investigation into an initial allegation or concern and/or an issue of non-compliance.

Concerns or complaints may be raised by children, including former residents of an orphanage or children who remain in care, or by families or civil society organisations. Inspectors of residential care facilities may also observe or uncover risk indicators during the course of a minimum standards inspection or local authorities may become aware of an unauthorised residential care facility in operation within their jurisdiction. Social workers involved in the reintegration of children from institutions may also uncover indicators in the course of case work and even come to suspect orphanage trafficking. In some cases, former volunteers or donors may be the ones to report concerns or irregularities. They may, however, opt to report to another non-government organisation rather than to the competent authorities.

CONDUCTING RESIDENTIAL CARE FACILITY INSPECTIONS

It is a requirement under child protection regulations that all residential care facilities are supervised and monitored by the MoSVY. The functions of the alternative care monitoring system are shared across a range of competent authorities at the national and subnational levels, and have been increasingly decentralised as a part of national decentralisation and deconcentration reforms.

Competent authorities, including DoSVY/ OSVY and Commune/Sangkat officials are permitted to enter and monitor residential care facilities without notice and gain direct access to children and their records.¹¹⁵ This includes for the purpose of monitoring child placements, conducting inspections and responding to reports or allegations.

Annual inspections of residential care institutions against the Minimum Standards for Residential Care are the responsibility of DoSVY and OSVY officials. A digital inspection form is used to score the facility against the minimum standards requirements and note

¹¹⁵ Prakas 2280 MoSVY Art 22.

irregularities or areas of non-compliance. In the event issues are discovered, there are a number of courses of action permitted under law, depending on the severity of the issues and safety needs of the children. In the event the issue constitutes a failure to comply with an aspect of the minimum standards but is not a report of violence, abuse or neglect of a child, the residential care facility is given a three-month period to rectify issues. If, upon re-inspection at the three-month mark, the facility remains non-compliant, DoSVY is required to report the facility to MoSVY for a suspension of license and/or further legal action.¹¹⁶ If abuse, violence, or neglect is disclosed or suspected, DoSVY is required to take more immediate action, following the reporting procedures as outlined below.

RESPONDING TO REPORTS, ALLEGATIONS OR COMPLAINTS

In the event that a report is made to the authorities about potential violence, abuse or neglect of a child in temporary alternative care, DoSVY, under the oversight of the Director of the Child Welfare Department is responsible for investigating the allegations and interviewing the child within 48 hours of receiving the report. Interviews can be jointly conducted with police and/or commune authorities,¹¹⁷ which is likely to be warranted where the alleged conduct may involve criminal investigation falling under the jurisdiction of the judicial police. The regulations allow for DoSVY officials to immediately remove the alleged perpetrator or a child from the alternative care setting in cases where the initial response/investigation reveals sexual abuse, serious physical violence or life-threatening neglect.¹¹⁸ This is to ensure the immediate safety of the child.

Whilst the alternative care regulations pertaining to inspections or responding to reports of abuse, violence or neglect do not specifically mandate reporting to police where a criminal offence is suspected or has occurred, under Article 18 of the Criminal Procedure Code all public officials are required to report criminal offences they become aware of to the judicial police or prosecutor.¹¹⁹ Therefore, regardless of whether orphanage trafficking is immediately indicated or not, child protection authorities must refer the matter to the criminal justice system for further investigation and action provided an indicator that constitutes a criminal offence is evidenced or suspected. Matters that reach the threshold of a criminal offence cannot be solely dealt with under child protection regulations and remedial measures.

As such, DoSVY, OSVY and Commune/Sangkat officials are important stakeholders in raising awareness of risk indicators for orphanage trafficking. Given the likelihood of indicators being detected through the inspection functions, the incorporation of specific directives in the inspectorate forms may be warranted. This could aid in ensuring that, when indicators are detected, they are appropriately interpreted and referred for further investigation and for formal victim identification, which will be discussed in the section below.

¹¹⁶ Minimum Standards for Residential Care Art 10.

¹¹⁷ Prakas 2280 MoSVY Art 23.

¹¹⁸ Prakas 2280 MoSVY Art 23.

¹¹⁹ Criminal Procedure Code Art 18.

Section Six: Formal Processes for Trafficking Victim Identification and Rescue

The process of formal identification of a victim of human trafficking is outlined in the Guidelines on Forms and Procedures for the Identification of Victims of Human Trafficking for Appropriate Service Provision (the Guidelines).¹²⁰ The Guidelines recognise the challenges for victims to come forth independently in many cases, due to various factors including dependencies cultivated by traffickers, threats, involvement of family members and a lack of awareness on the part of victims that acts perpetrated against them constitute trafficking. As such, the Guidelines seek to enhance the capacity of mandated authorities to detect indicators of trafficking and search for elements through observation, information gathering and interviewing.

The responsibility for initial victim identification rests with the competent authority who locates or comes across the victim in the course of their duties or in response to a report from a non-competent authority. This can include local commune, district, city or municipal authorities, judicial police from the national police or the anti-human trafficking division of the Royal Gendarmerie, Social Affairs officials with responsibilities over women and children, staff of non-government organisations involved in the protection of victims of human trafficking, or other government officials at any level involved in efforts to combat human trafficking.¹²¹

Competent authorities eligible to carry out initial identification are to receive training on the use of forms, identification methods, interview and communication techniques, and ethics in order to fulfil this role.¹²² Where someone is suspected of being a victim of human trafficking, based on observation of behaviour, information from third-parties or evidence of elements, the person should be initially considered a victim with the right to protection, removed from the place of suspected exploitation and brought to a safe place or referred to a victim support service. A preliminary interview could then be conducted.¹²³ Where removal requires a rescue, the judicial police must be informed and enact a rescue in accordance with the Guidelines of the National Police on the Implementation of the Operation to Rescue Victims of Human Trafficking and/or Sexual Exploitation.¹²⁴ The competent authority who conducts the initial identification is then responsible for initiating the victim support referral process, which follows the pathway outlined in the diagram below taken from the Guidelines. In the case of a rescue, the judicial police take over the process of initial identification from the informing agency or official. Formal identification of a victim of human trafficking is made by the prosecutor as part of the criminal justice process.

¹²⁰ Guidelines on Forms and Procedures for the Identification of Victims of Human Trafficking for Appropriate Service Provision (2015) ('ID Guidelines').

¹²¹ Including the Department on Anti-Trafficking and Juvenile Protection under the Ministry of Interior, and the Office of Human Trafficking within the Royal Gendarmerie, which both carry responsibilities for victim identification.

¹²² ID Guidelines 10.

¹²³ ID Guidelines 11.

¹²⁴ ID Guidelines 20.

Those responsible for preliminary victim identification shall follow the procedures below:

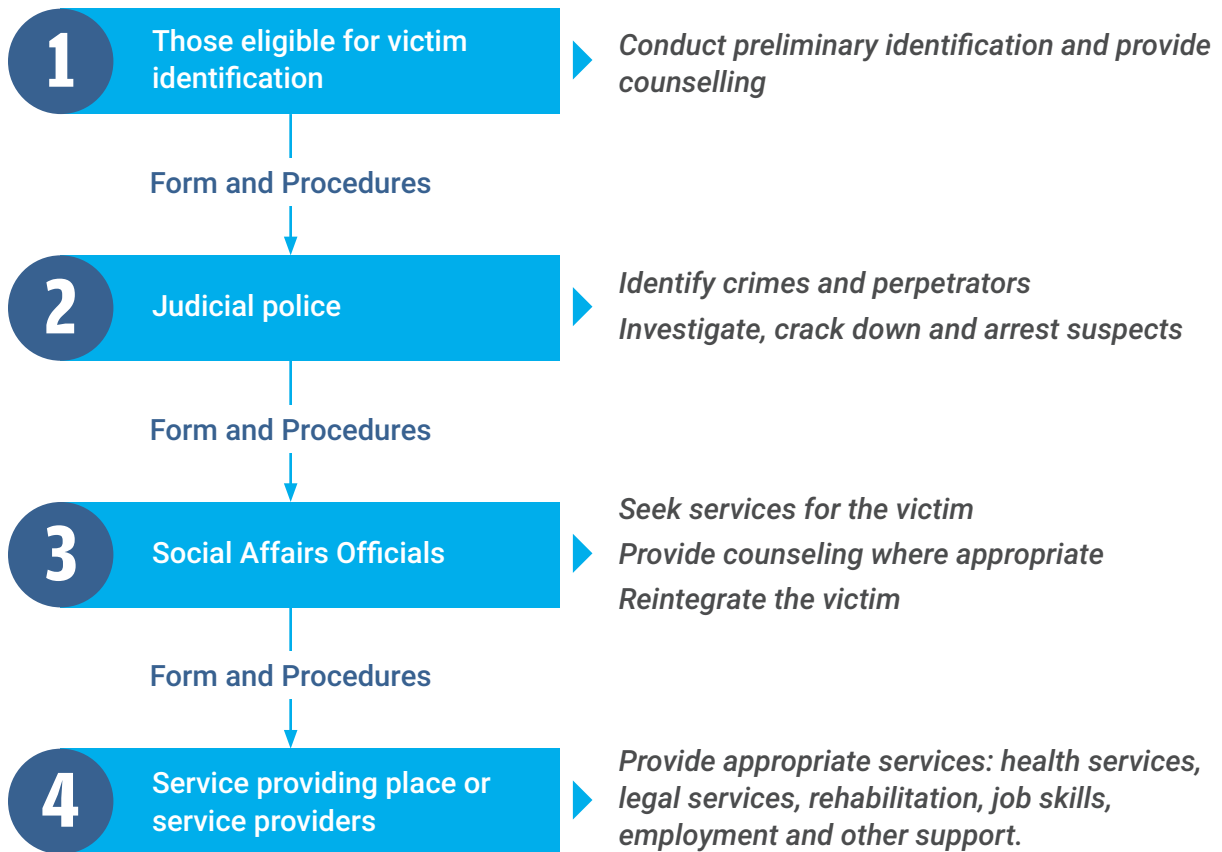


Diagram: Identification Guidelines Referral Procedures, p14

The guidelines recognise the need for cross referral between the criminal justice system and victim protection and support system to ensure the full scope of victim rights, including protection and access to legal services, are upheld. The following diagram also taken from the Guidelines demonstrates the pathways and points for cross-referral for this purpose.

3.A. Chart outlining referral system

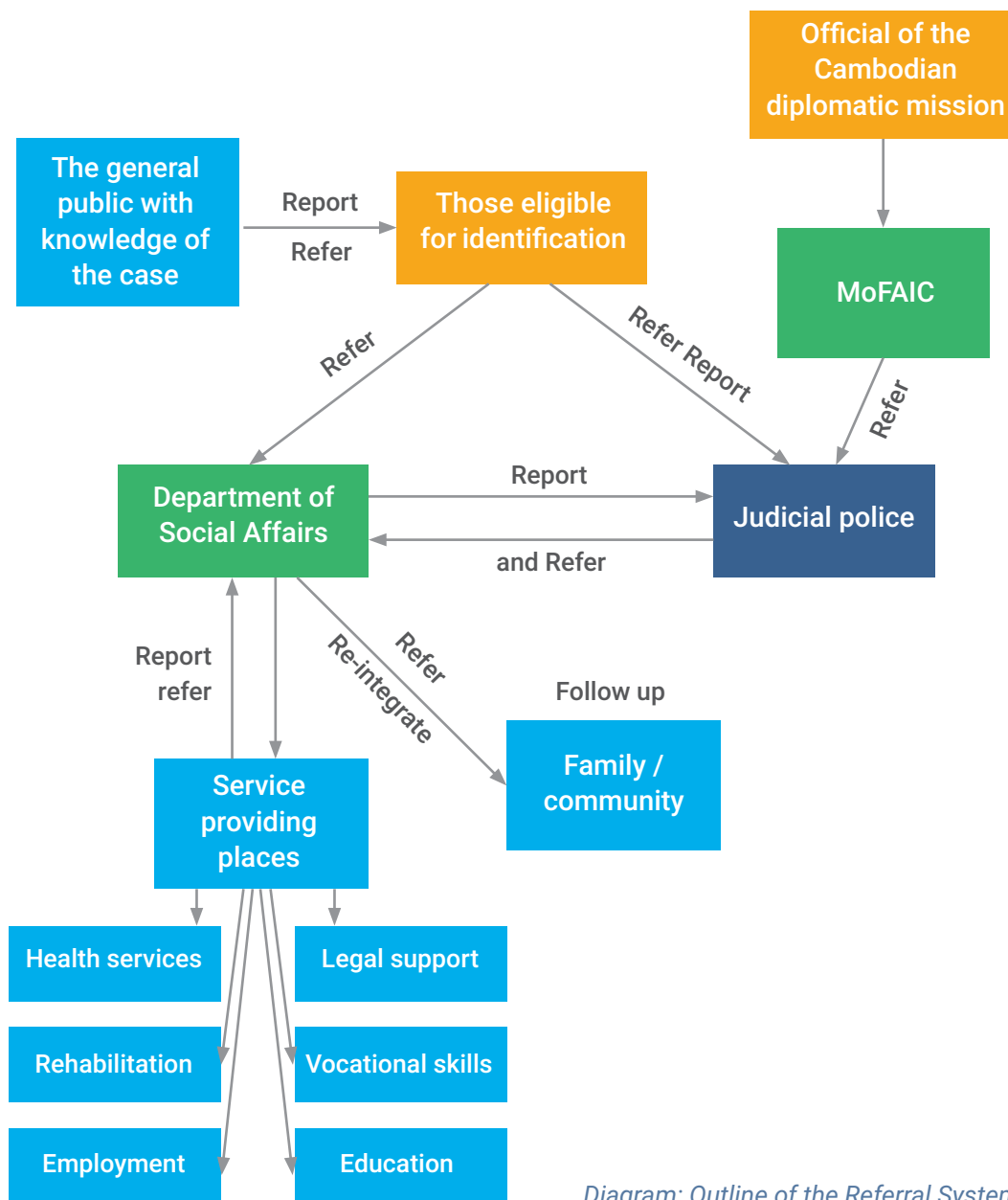


Diagram: Outline of the Referral System p. 18

The identification and referral procedures outlined in the Guidelines are equally relevant to cases of orphanage trafficking as they are to other types of trafficking. However, the indicators included in the Guidelines to aid with detection are more indicative of trafficking and exploitation that occurs in commercial or domestic settings, rather than in context of social welfare services. As a result, orphanage trafficking and associated exploitation may go undetected or inappropriately classified as ‘irregular’ from a regulatory and procedural perspective rather than an offence under criminal law. Consequently, it may only be dealt with through administrative processes or penalties, such as written notification for failure to meet minimum standards requirements, or deregistration of services, denying victims their rights to legal remedy and protection and support. This reaffirms the importance of awareness raising of the indicators specific to this form of trafficking as discussed in the preceding section.

Section Seven: Conclusion

Orphanage trafficking is a complex crime that can masquerade as a child protection intervention and occurs in sites purporting to offer child protection services. This blurring of lines between ‘protection’ and ‘exploitation’ makes orphanage trafficking a particularly challenging crime to identify, evidence and prosecute.

This report outlines how Cambodia’s existing legal and policy framework contains sufficient provisions to differentiate between lawful child protection interventions and instances of orphanage trafficking, and to pursue prosecution under a range of trafficking offences, where orphanage trafficking is found to have occurred. The potential for orphanage trafficking to be prosecuted under existing law is aided significantly by the inclusion of profit making as a specific purpose in the TSE law trafficking offences, thus capturing and criminalising the main impetus for the trafficking of children into orphanages.

Other offences relating to the unlawful removal of a child and inciting abandonment contained within the Criminal Code are also relevant and could be used to prosecute instances of the active recruitment of children into orphanages. Whilst active recruitment does not always indicate orphanage trafficking, it is the normalisation of unlawful removal and irregular admission into residential care by non-authorised persons that facilitates traffickers’ access to children and masks predatory behaviour. Therefore, using existing provisions in criminal law to reinforce important alternative care gatekeeping mechanisms and curtail this practice could form an important part of a prosecutorial strategy to suppress orphanage trafficking.

The identification of legal mechanisms by which orphanage trafficking might be prosecuted in Cambodia is a promising development. In practice, however, successful prosecution is as contingent upon the degree to which actors responsible for detection, referral and investigation are sensitised as it is to the presence of relevant laws. Significant efforts are required to increase the level of awareness of orphanage trafficking amongst mandated child protection authorities and actors who enact and enforce the criminal justice system. The identification and integration of orphanage trafficking indicators into the alternative care inspectorate system, anti-human trafficking victim identification and referral mechanisms would be an important first step to improving detection and encouraging referrals across the child protection and criminal justice systems. Without concerted awareness raising and cooperation across these two systems, the prosecution of orphanage trafficking remains difficult as issues of victim identification, referral to the criminal justice system and offence classification will continue to impede and circumvent legal action.

Section Eight: Annexes

ANNEX ONE: RATIFICATION AND DOMESTICATION OF INTERNATIONAL TREATIES

INTERNATIONAL TREATIES		
Treaty name	Date of ratification/ accession	Entry into force
Convention on the Rights of the Child	15 Oct 1992	Unknown
Implementing Legislation:		
1	No overarching child protection law. See Cambodian Country Care Profile table for a list of supplementary legislation for child protection and alternative care	
CRC Optional Protocol on the Sale of Children and Child Prostitution and Pornography (CRC-OP-CS)	Criminal Code of Cambodia (2009) Royal Kram NS/RKM/1109/022 30th May 2002	Royal Kram NS/RKM/0202/090 Approval of the two optional protocols of the CRC
Implementing Legislation:		
1	Law on the Suppression of Human Trafficking and Sexual Exploitation (2008) Royal Kram NS/RKM/0208/005	
2	Law on Inter-Country Adoption (ICA) Royal Kram NS/RKM/1209/024 (2009)	
3	Law on Tourism Royal Kram No NS/RKM/0609/007	
4	Criminal Code of Cambodia (2009) Royal Kram NS/RKM/1109/022	
5	Prakas on the Prohibition of Hazardous Child Labour 2004 MoSVALY	
United Nations Convention Against Transnational Organized Crime	Ratified 12 December 2005	Royal Kram NS/RKM/1105/038
Implementing Legislation:		
1	Criminal Code of Cambodia (2009) Royal Kram NS/RKM/1109/022	
UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children	Ratified 2 July 2007	Royal Kram NS/RKM/0106/004
Implementing Legislation:		
1.	Royal Kram NS/RKM/0208/005 on the Suppression of Human Trafficking and Sexual Exploitation (2008)	
2.	Criminal Code of Cambodia (2009) Royal Kram NS/RKM/1109/022	

ILO Convention No. 182 concerning the prohibition and immediate action for the elimination of the worst forms of child labour	14 March 2006	Royal Kram NS/RKM/1005 /032
--	---------------	-----------------------------

Implementing Legislation:

1. Prakas on the Prohibition of Hazardous Child Labour 2004 MoSVALY
2. Prakas No. 298 on Derogation of Prohibition of Children from Performing Night Work MOSALVY (1998)

Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption 1993	1 August 2007	Royal Kram NS/ RKM/0107/003 (2007)
---	---------------	------------------------------------

Implementing Legislation:

- 1 Law on Inter-Country Adoption (ICA), Royal Kram NS/RKM/1209/024 (2009)
- 2 Prakas No. 1980 MoSVY date 2014 on Procedure to Authorize Inter- Country Adoption Agencies.
- 3 Prakas No. 139 MoSVY dated 2014 on The Guide to Implement Inter- Country Adoption Procedure for Child who Needs Special Care and Child with Special Needs.
- 4 Prakas No. 138 MoSVY dated 2014 on The Guide to Implement Relative Inter-Country Adoption Procedure.
- 5 Instruction No. 003 MoSVY dated 2013 on Criteria for Authorizing ICA Agencies.
- 6 Joint Prakas No. 1039 MEF 2016 on the provision of public services of the Ministry of Foreign Affairs and International Cooperation.

ANNEX TWO: MATRIX OF DOMESTIC LAWS RELEVANT TO ORPHANAGE TRAFFICKING

DOMESTIC LEGISLATION

Tier One: Constitution

Title of legislation	Date of ratification/ accession	Entry into force
The Constitution of the Kingdom of Cambodia (1993)	1993	Repealed 6 previous constitutions
Relevant Articles:		
26	Article 26 The King signs and ratifies international treaties and conventions after their approval by the National Assembly and the Senate.	
31	Article 31 “The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights and the covenants and conventions related to human rights, women’s and children’s rights.”	
38	Article 38 “The law guarantees there shall be no physical abuse against any individual.” “Every citizen shall enjoy the right to defence through judicial recourse”	

46	Article 46 “The commerce of human beings, exploitation by prostitution and obscenity which affect the reputation of women shall be prohibited.”
48	Article 48 “The State shall protect children from acts that are injurious to their educational opportunities, health and welfare.”
90	Article 90 The National Assembly votes the approval or the abrogation of international treaties or conventions.

Tier Two: Chbab (laws and Royal Codes)

Title of legislation	Date of ratification/ accession	Entry into force
Law on the Suppression of Human Trafficking and Sexual Exploitation (2008) Brought into force by: Royal Kram NS/ RKM/0208/005	15 February 2008	Repealed the 1996 Law on Suppression of Kidnapping, Human Trafficking/Sale of Human Being and Exploitation of Human Being Articles 2, 3, 4 and 6 of this law have been replaced by Articles of the 2009 Criminal Code

Relevant Articles:

7	Article 7: Definition of a Minor: “A minor in this law shall mean a person under the age of eighteen years. A person who keeps a minor under his/her supervision or control shall be presumed to know the minor’s age unless the person proves that he/she reasonably believes the minor’s age to be eighteen years or more.”
8	Article 8: Definition of Unlawful Removal: “The act of unlawful removal in this law shall mean to: (1) remove a person from his/her current place of residence to a place under the actor’s or a third person’s control by means of force, threat, deception, abuse of power, or enticement, or (2) Without legal authority or any other legal justification to do so, take a minor or a person under general custody or curatorship or legal custody away from the legal custody of the parents, care taker or guardian.”
9	Article 9: Unlawful Removal, inter alia, of Minor “A person who unlawfully removes a minor or a person under general custody or curatorship or legal custody shall be punished with imprisonment for 2 to 5 years. The punishment for the offence stipulated in this article shall be remitted or mitigated when all of the following conditions are met: 1- the person taken under custody, being not less than fifteen (15) years of age, voluntarily gives genuine consent to the criminal act; 2- none of the means stipulated in subparagraph 1) of Article 8 of this law is used; and 3- the offender does not have any purpose to commit an offense. The prosecution for the offence stipulated in this article may be commenced upon the filing of a complaint from the parent, custodian/caretaker or lawful guardian concerned unless any of the means stipulated in subparagraph 1) of Article 8 of this law is used.”

10	<p>Article 10: Unlawful Removal with Purpose</p> <p>“A person who unlawfully removes another for the purpose of profit making, sexual aggression, production of pornography, marriage against will of the victim, adoption or any form of exploitation shall be punished with imprisonment for 7 years to 15 years. The offence stipulated in this article shall be punished with imprisonment for 15 to 20 years when:</p> <ul style="list-style-type: none"> - the victim is a minor - the offence is committed by a public official who abuses his/her authority over the victim, - the offence is committed by an organized group. <p>The terms “any form of exploitation” in this Article and Article 12, 15, 17, and 19 of this law shall include the exploitation of the prostitution of others, pornography, commercial sex act, forced labor or services, slavery or practices similar to slavery, debt bondage, involuntary servitude, child labor or the removal of organs. The consent of the victim to any of the intended purpose set forth in paragraph 1 of this article shall be irrelevant where any of the means set forth in subparagraph 1) of Article 8 of this law is used. This shall apply to the offences stipulated in Article 15, 17, and 19 of this law as well.”</p>
13	<p>Article 13: Definition of the Act of Selling, Buying or Exchanging of Human Being</p> <p>“The act of selling, buying or exchanging a human being shall mean to unlawfully deliver the control over a person to another, or to unlawfully receive the control over a person from another, in exchange for anything of value including any services and human beings.</p> <p>The act of procuring the act of selling, buying or exchanging a human being as an intermediary shall be punished the same as the act of selling, buying or exchanging a human being.”</p>
15	<p>Article 15: The Act of Selling, Buying or Exchanging of Human Being with Purpose</p> <p>“A person who sells, buys or exchanges another person for the purpose of profit making, sexual aggression, production of pornography, marriage against will of the victim, adoption or any form of exploitation shall be punished with imprisonment for 7 years to 15 years. The offence stipulated in this article shall be punished with imprisonment for 15 to 20 years when:</p> <ul style="list-style-type: none"> - the victim is a minor - the offence is committed by a public official who abuses his/her authority over the victim, - the offence is committed by an organized group.”
17	<p>Article 17: Transportation with Purpose</p> <p>“A person who transports another person knowing that he or she has been unlawfully removed, recruited, sold, bought, exchanged or transported for the purpose of profit making, sexual aggression, production of pornography, marriage against will of the victim, adoption, or any form of exploitation shall be punished with imprisonment for 7 to 15 years.</p> <p>The offence stipulated in this article shall be punished with imprisonment for 15 to 20 years when:</p> <ul style="list-style-type: none"> - the offence is committed by a public official who abuses his/her authority over the victim, - the offence is committed by an organized group.”
19	<p>Article 19: Receipt of Person with Purpose</p> <p>“A person who receives, harbors, or conceals another person who has been unlawfully removed, recruited, sold, bought, exchanged, or transported for the purpose of profit-making, sexual aggression, production of pornography, marriage against the will of the victim, adoption or any form of exploitation shall be punished with imprisonment for 7 to 15 years.</p> <p>The offence stipulated in this article shall be punished with imprisonment for more than 15 to 20 years when:</p> <ul style="list-style-type: none"> - the victim is a minor - the offence is committed by a public official who abuses his/her authority over the victim, - the offence is committed by an organized group.”

20	<p>Article 20: Receipt of Human Beings for the Purpose of Assisting the Offender</p> <p>“A person who receives, harbors, or conceals a victim who has been unlawfully removed, recruited, sold, bought, exchanged, or transported for the purpose of assisting the offender who has unlawfully removed, recruited, sold, bought, exchanged or transported that victim shall be punished with imprisonment for 2 to 5 years and a fine of 4,000,000 to 10,000,000.</p> <p>The offence stipulated in this article shall be punished with imprisonment for 5 to 10 years when the victim is a minor.”</p>
42	<p>Article 42: Sexual Intercourse with Minors under Fifteen Years</p> <p>“A person who has sexual intercourse with another person of the age of less than fifteen years shall be punished with imprisonment for 5 to 10 years.”</p>
33	<p>Article 33: Offense with regard to Child Prostitution</p> <p>“A person who commits any of the offenses set forth in Articles 30, 31 and 32 of this law shall be punished with imprisonment for 7 to 15 years when the offense is committed with regard to child prostitution. When the offense set forth in Paragraph 1 of this article applies, the term “prostitution” in the relevant provisions of this Chapter shall be replaced with the term “child prostitution.”</p>
41	<p>Article 41: Child Pornography</p> <p>“A person who transports another person knowing that he or she has been unlawfully removed, recruited, sold, bought, exchanged or transported for the purpose of profit making, sexual aggression, production of pornography, marriage against will of the victim, adoption, or any form of exploitation shall be punished with imprisonment for 7 to 15 years.</p> <p>The offence stipulated in this article shall be punished with imprisonment for 15 to 20 years when:</p> <ul style="list-style-type: none"> - the offence is committed by a public official who abuses his/her authority over the victim, - the offence is committed by an organized group.”
19	<p>Article 19: Receipt of Person with Purpose</p> <p>“A person who distributes, sells, leases, displays, projects or presents in public place, a child pornography shall be punished with imprisonment for 2 to 5 years and a fine of 4,000,000 to 10,000,000 riels.</p> <p>A person who possesses, transports, imports, or exports a child pornography for the purpose of use in commission of the offense stipulated in the above paragraph 1 shall be punished the same.</p> <p>A person who produces a child pornography shall be punished with imprisonment for 5 to 10 years.</p> <p>A person who produces a child pornography for the purpose of use in commission of any offense stipulated in the above-stated first and second paragraphs shall be punished with imprisonment for 10 to 20 years. A person who distributes, sells, leases, displays, projects or presents in public place, a child pornography shall be punished with imprisonment for 2 to 5 years and a fine of 4,000,000 to 10,000,000 riels. A person who possesses, transports, imports, or exports a child pornography for the purpose of use in commission of the offense stipulated in the above paragraph 1 shall be punished the same. A person who produces a child pornography shall be punished with imprisonment for 5 to 10 years. A person who produces a child pornography for the purpose of use in commission of any offense stipulated in the above-stated first and second paragraphs shall be punished with imprisonment for 10 to 20 years.”</p>

Criminal Code of the Kingdom of Cambodia (2009)

Brought into force by:
Royal Kram No. NS/RKM/1109/022 (2009)

December 2010

Repealed Articles 2, 3, 4 and 6 of the Law on Suppression of Human Trafficking and Sexual Exploitation. Replaced

Repealed the law on aggravating circumstances of felonies promulgated by Krom No.0102/004 dated 7 January 2002

7	<p>Article 7: Application of Cambodian criminal law</p> <p>“In criminal matters, the scope of application of Cambodian law in space shall be determined by the provisions of this Code, subject to international treaties.”</p>
18	<p>Article 18: Characterisation of offence committed by a legal entity</p> <p>“The characterisation of an offence committed by a legal entity as a felony, misdemeanour or petty offence shall be determined by the penalty incurred by a natural person.”</p>
25	<p>Article 25: Definition of perpetrator</p> <p>“The perpetrator of an offence shall be any person who commits the relevant criminally prohibited act. The definition of perpetrator includes any person who attempts to commit a felony or, in the cases provided for by law, a misdemeanour.”</p> <p><i>Note: attempts are defined in Article 26</i></p>
29	<p>Article 29: Definition of accomplice</p> <p>“An accomplice shall be any person who knowingly, by aiding or abetting, facilitates an attempt to commit a felony or a misdemeanour, or its commission.”</p>
28	<p>Article 28: Definition of instigator</p> <p>“An instigator of a felony or a misdemeanour shall be any person who:</p> <ol style="list-style-type: none"> (1) gives instructions or order to commit a felony or misdemeanour; (2) provokes the commission of a felony or misdemeanour by means of a gift, promise, threat, instigation, persuasion or abuse of authority or power. <p>An instigator may only be punishable if the felony or misdemeanour was committed or attempted. An instigator of a felony or misdemeanour shall incur the same penalties as the perpetrator.”</p>
42	<p>Article 42: Criminal responsibility of legal entities</p> <p>“Where expressly provided by law and statutory instruments, legal entities, with the exception of the State, may be held criminally responsible for offences committed on their behalf by their organs or representatives.</p> <p>The criminal responsibility of legal entities shall not preclude that of natural persons for the same acts.”</p>
239	<p>Article 239: Definition of rape</p> <p>“Rape shall mean any act of sexual penetration with a sexual organ or an object committed against another person of either sex by violence, coercion, threat or by being opportunistic.</p> <p>Rape shall be punishable by imprisonment from five to ten years.</p> <p>The age for sexual majority shall be fifteen years of age.”</p>
240	<p>Article 240: Aggravating circumstances (means used or status of the perpetrator)</p> <p>“Rape shall be punishable by imprisonment from seven to fifteen years if it is committed:</p> <ol style="list-style-type: none"> (1) with the use or threatened use of a weapon; (2) with the use of a narcotic or any means liable to overcome or weaken the victim’s resistance; (3) by any person having authority over the victim; (4) by any person abusing the authority vested in him or her by his or duties; (5) by several persons acting as perpetrators, co-perpetrators, instigators or accomplices.”
321	<p>Article 321: Penalty for abandonment of minors</p> <p>“The abandonment of a minor under fifteen years of age by a legal custodian shall be punishable by imprisonment from one to five years and a fine from two million to ten million Riels where the circumstance of the abandonment endangers the health or safety of the minor.”</p>
326	<p>Article 326: Failure to hand over minors</p> <p>“Maliciously failing to hand over a minor to the person who has the right to claim shall be punishable by imprisonment from one month to one year and a fine from one hundred thousand to two million Riels.”</p>
327	<p>Article 327: Taking away of minors</p> <p>“Taking away a minor from the person who has legal custody shall be punishable by imprisonment from one month to one year and a fine from one hundred thousand to two million Riels.</p> <p>The offence shall be punishable by imprisonment from one year to three years and a fine from two million to six million Riels if the minor is kept outside the territory of the Kingdom of Cambodia.”</p>

330	<p>Article 330: Incitement to abandon a child</p> <p>“The characterisation of an offence committed by a legal entity as a felony, misdemeanour or petty offence shall be determined by the penalty incurred by a natural person.”</p>
331	<p>Article 331: Acting as an intermediary in case of adoption or abandonment</p> <p>“Acting as an intermediary for pecuniary gain between a person or a couple desiring to adopt a child and a parent desiring to abandon its born or unborn child shall be punishable by imprisonment from one month to six months and a fine from one hundred thousand to one million Riels.”</p>
332	<p>Article 332: Intermediary between an adoptive parent and a pregnant woman</p> <p>“Acting as an intermediary for pecuniary gain between a person or a couple desiring to adopt a child and a woman agreeing to bear the child with the intent to give up the child to them shall be punishable by imprisonment from one month to six months and a fine from one hundred thousand to one million Riels.”</p>
333	<p>Article 333: Acts of substitution, false representation or concealment of a child existence</p> <p>“Substitution, false representation or concealment of the existence of a child which infringes his or her civil status shall be punishable by imprisonment from one month to one year and a fine from one hundred thousand to two million Riels.”</p>
339	<p>Article 339: Subjecting minor to working conditions harmful to his or her health</p> <p>“Subjecting a minor to working conditions harmful to his or her health or physical development shall be punishable by imprisonment from two to five years and a fine from four million to ten million Riels.</p>
341	<p>Article 341: Indecent assault of minor under 15 years of age</p> <p>“An indecent assault is the act of touching or exposing the sexual organs or other parts of another person’s body, or of letting another person to touch the sexual organs or other parts of the perpetrator’s body or that of a third person for the purpose of sexual arousal or satisfaction of the perpetrator. Where an indecent assault is committed upon a minor under fifteen years of age the perpetrator shall be punishable by imprisonment from one year to three years and a fine from two million to six million Riels”</p>
346	<p>Article 346: Arrangement by an adult of indecent exposure or sexual relations involving minors</p> <p>“The arrangement, by an adult, of meetings involving indecent exposure or sexual relations at which minors are present or participate shall be punishable by imprisonment from one to five years and a fine from two million to ten million Riels.”</p>
594	<p>Article 594: Acceptance of bribery</p> <p>“The direct or indirect request for or acceptance of gifts, offers, promises or interests, without authorization, by a public official or a holder of public elected office shall be punishable by imprisonment from seven to fifteen years where it is committed:</p> <ol style="list-style-type: none"> (1) perform an act related to or facilitated by his or her function; (2) to refrain from performing an act related to or facilitated by his or her function.”
626	<p>Article 626: Definition of forgery</p> <p>“Forgery consists of any fraudulent alteration of the truth, liable to cause harm and made by any means in a document or other medium of expression when all the following conditions are satisfied:</p> <ol style="list-style-type: none"> (1) where the forgery is intended or its effect is to provide evidence of a right or of an act carrying legal consequences; (2) where the harm may cause damage.”
629	<p>Article 629: Forgery of public document</p> <p>“Forgery committed in an authenticated document or a document issued by a public body for the purpose of establishing a right, an identity or a capacity, or to grant an authorisation shall be punishable by imprisonment from five to ten years.”</p>
637	<p>Article 637: Bribery by authorized person to issue falsified attestation</p> <p>“Any person who, acting in the exercise of his or her profession, requests or accepts offers, gifts, promises or interests of any kind to produce an attestation or a certificate stating facts that are materially inaccurate shall be punishable by imprisonment from two to five years and a fine from four million to ten million Riels.”</p>

638	<p>Article 638: Bribery of authorized person to issue falsified attestation</p> <p>“Any person who makes offers, gifts, promises or interests of any kind to another person to produce an attestation or a certificate stating facts that are materially inaccurate shall be punishable by imprisonment from one to three years and a fine from two million to six million Riels.”</p>
-----	---

<p>Code of Criminal Procedure (2007)</p> <p>Brought into force by: KHM-2007-L-82933</p>	<p>All provisions governing criminal procedures prior to 1992</p> <p>Repealed the Law on Criminal Procedure, (1993) Royal Kram KHM-1993-L-64041</p> <p>The Law on Duration of Pre-trial Detention; Royal Kram No.0899/09 dated 26 August 1999 promulgated Law on Amendment of Article 36, 38, 90, and 91 of the</p> <p>Law on Criminal Procedure promulgated by Royal Kram No. 0102/005 dated 10 January 2002</p>
--	---

Relevant Articles:

17	<p>Article 17</p> <p>Associations for Eliminating All Acts of Sexual Violence, Domestic Violence or Violence against Children</p>
18	<p>Article 18</p> <p>Associations for Eliminating All Acts of Kidnapping, Human Trafficking and Sexual Exploitation</p> <p>Any association, which has made a valid declaration within three (3) years before the date of an offense that a subject of its governing statutes is a struggle against kidnapping, trafficking of persons or sexual exploitation, has the recognized right to be a plaintiff in a civil action for an offense regulated by Law on the Suppression of Kidnapping, Human Trafficking and Sexual Exploitation.</p>

<p>Law on Intercountry Adoption (2009)</p> <p>Brought into force by: Royal Kram NS/RKM/1209/024 (2009)</p>	2009	<p>Non-specific repeal Art 57: Any legal provisions inconsistent with this law</p>
---	------	--

Relevant Articles:

5	<p>Art 5 (7)</p> <p>“The competent authorities involved in inter-country adoption procedures shall ensure that the inter-country adoption process does not result in unlawful financial gain and that the abduction of, sale of and trafficking in children are prevented. Only expenses, fees and contributions prescribed by legal provisions in this law shall be paid.”</p>
10	<p>Article 10</p> <p>“Children that may be subject of inter-country adoption shall meet all the conditions below:</p> <ol style="list-style-type: none"> 1. The child is of Cambodian nationality who permanently resides in the Kingdom of Cambodia; 2. The child is below 8 (eight) years of age at the date of receipt of the application for adoption; except that in the case of children who need special care, adoption may be authorised at an age below 18 (eighteen) years old. In the case of children who are biological siblings and one sibling is under the age of 8(eight) years, joint adoption may be authorised of that child together with his/her older biological siblings below 18(eighteen) years old;

	<p>3. The child is residing in an orphanage or other appropriate placement that is supervised by Ministry in charge of Social Affairs;</p> <p>4. The child is under guardianship for minor or is under parental power holder(s) who is in extremely difficult circumstances; and</p> <p>5. The child has been declared adoptable in accordance with Article 13 of this law. In the case of a relative adoption, adoption may be authorized of a child of any age below 18 (eighteen) years old, who lives in or outside an orphanage.”</p>
11	<p>Article 11</p> <p>“When a child is found abandoned and sent to an orphanage, and his/her parent(s) or relatives or guardian for minor cannot be found, the director of the orphanage shall inform the capital/provincial Department in charge of Social Affairs, about the presence of the child in the orphanage not later 7 (seven) working days from the arrival of the child. The capital/provincial Department in charge of Social Affairs shall immediately inform the Ministry in charge of Social Affairs to place the child in its registry of children who have been reported abandoned.</p> <p>The capital/provincial Department in charge of Social Affairs shall exert all possible efforts to search for the child’s parent(s), relatives and guardian for minor throughout the Kingdom of Cambodia, using possible public media such as TV, radio, newspaper and picture poster of the child. Any person claiming that he/she is a parent(s), relative or guardian for minor of the child shall provide evidence of his/her relative or guardianship link with the child, in accordance with existing legal provisions.”</p>
12	<p>Article 12</p> <p>“If the parental power holder(s) who is in extremely difficult circumstances has placed the child under the care of the Ministry in charge of Social Affairs, the Ministry shall place the child in the registry of children who have been placed under the care of the Ministry in charge of Social Affairs.</p> <p>The Ministry in charge of Social Affairs shall prepare and regularly update a registry of children whose parental power holder(s) has placed the child under the care of the Ministry in charge of Social Affairs.”</p>
13	<p>Article 13</p> <p>“The Ministry in charge of Social Affairs shall exert all reasonable efforts to return the child to his/her birth family, and if such is not possible, to place the child for domestic adoption within the Kingdom of Cambodia before considering the eligibility of the child for inter-country adoption.”</p>
25	<p>Article 25</p> <p>“The adopters shall pay expenses, fees, and contributions for the support of alternative care options and the general support of state-run orphanages throughout the country, and other necessary costs for services related to the inter-country adoption, which will be determined by a joint Prakas of the Minister of Economy and Finance and the Minister in charge of Social Affairs. Neither the adopters nor their agency shall be charged other fees. Neither the adopters nor their agency shall be allowed to pay, a per child or per adoption fee that will be transmitted to a particular orphanage, or be permitted to provide fees, donations or payments of any kind to the orphanage that the child has been adopted from, or to its staff, directors or board members, either directly or indirectly.”</p>
48	<p>Article 48</p> <p>In order to get authorisation to operate in an inter-country adoption from the Ministry in charge of Social Affairs of the Kingdom of Cambodia, the agency must fulfil the following qualification:</p> <ol style="list-style-type: none"> 1. have been accredited by competent institutions of the receiving country, 2. pursue only non-profit objectives and fulfil the conditions set up in legal provisions concerning non-profit legal persons, associations or NGOs, or other relevant legal provisions pertinent to the characteristics of such agencies, and 3. be directed and staffed by persons qualified by their ethical and moral standards and by training and experience to work in the field of inter-country adoption. <p>An agency that operates in the adoption process in the Kingdom of Cambodia shall not be authorized to run or use any orphanage as a source to supply orphaned infants and children in the Kingdom of Cambodia.</p>

Article 54

“Notwithstanding penalty provisions in the existing laws, the Ministry in charge of Social Affairs may suspend or revoke the authorisation or refuse to renew an authorization if any inter-country adoption agency is proven to have engaged in any of the acts below:

1. the direct act of provoking, for profit-making purpose, the parent(s) to abandon an already-born or a yet-to-be-born child in order to be offered for inter-country adoption;
2. the act of serving one-self as an intermediary/middle person between a couple who desire to adopt a child through inter-country adoption and a parent(s) who desires to abandon his/her/their already-born or a yet-to-be-born child, for profit making purpose;
3. the act of serving one-self as an intermediary/middle person between a couple who desires to adopt a child through inter-country adoption and a woman accepting to bear a pregnancy of the child and to deliver this child to the adopter afterward, for profit making purpose;
4. falsifying or being an accomplice in falsifying extremely difficult situations in order to get consent from biological parent(s) or guardian for minor of a child;
5. obtaining the consent of parent(s) or guardian for minor of a child by coercion, threat, fraud or inducement through payment, gift, compensation or any advantage, or through promise of payment, gift, compensation or advantage of any kind;
6. releasing in whole or in part the dossiers and records concerning any specific inter Country adoption case without authorisation from the Ministry in charge of Social Affairs or competent court;
7. imposing or accepting directly or indirectly any consideration, money, goods or services in exchange for an allocation of a child for adoption;
8. offering money, goods or services to any official or representative of the Inter Country Adoption Administration, the Ministry in charge of Social Affairs, Central Authority responsible for inter-country adoption affairs or another relevant officials to give preference in the inter-country adoption procedures to any adopters;
9. advertising or publishing the identity or photograph of a child who is subject of adoption to influence any individual to apply for adoption;
10. appointing or designating any representative without the approval of the Ministry in charge of Social Affairs;
11. engaging in matching arrangement or in any contact between the adopter(s) and biological parent(s) or guardian for minor of the child for the purpose of preidentifying a child to be adopted;
12. any other act in violation of this law, minimum standards on alternative care of children and other existing legal provisions of the Kingdom of Cambodia.”

54

Article 56

“Offences concerning the Law on Inter-country Adoption shall be punished in accordance with the existing laws and other legal provisions.”

56

Law on Tourism (2009)

2009

Non-specific repeal Article 76:
Any previous laws and regulations inconsistent with this law

Brought into force by:
Royal Kram NS/RKM/0609/007

Relevant Articles:**Art 48**

“All tourism business operators and their agents, employees and contractors shall comply with and attach the following obligations:

- (a) Instantly complain or report to the nearest Tourist Police, authorities in-competence or tourist authority, in case of having known or suspected the offences of drug trafficking and usage, human trafficking and confinement, child trafficking and sexual exploitation/prostitution, disseminations of pornographic pictures and materials or other criminal offences;”

48

50	<p>Article 50</p> <p>“Tourists shall comply with and observe the following obligations:</p> <p>(d) Not to take part in any activities in relation to drug trafficking and use, sexual human trafficking and confinement, child trafficking and sexual exploitation/prostitution, disseminations of pornographic pictures and materials, money laundering and causing insecurity to the society;”</p>
----	---

Civil Code of Cambodia (2007)

Brought into force by:
Royal Kram NS/RKM/1207/030

1012	<p>1012 (Criteria for determination of establishment of full adoption)</p> <p>“Full adoption shall be established where it is extremely difficult or inappropriate for the natural parent(s) to care for the child to be adopted or where other special circumstance exist such that this is considered especially necessary for the benefit of the child.”</p>
1034	<p>1034 (Definition of parental power holder)</p> <p>“A parental power has the right and duty to effect physical custody of the child and management of the child’s property.”</p>
1047	<p>1047 (Demand to hand over child)</p> <p>“(1) The parental power holder may demand hand-over of the child by a third party who illegally refuses to hand over the child.”</p>
1048	<p>1048 (Order for suspension or divestment of authority of parental power holder)</p> <p>“If a father or mother exercising parental power abuses his or her rights or neglects his or her obligations, the court, upon application by a commune relative of the child up to the 4th degree of relationship, a sangkat or head, the head of a public child welfare institution or a public prosecutor, may order the suspension or divestment of the authority of the parental power holder.”</p>
1049	<p>1049 (Cancellation of suspension or divestment of parental power)</p> <p>“If the ground provided in Article 1048(Order for suspension or divestment of authority of parental power holder) has disappeared, the court, upon application by the person who was subject to the order for suspension or divestment or his or her relative up to the 4th degree of relationship, may cancel the said order.”</p>
1050	<p>1050 (Resignation and resumption of parental power holder)</p> <p>“(1) With the permission of the court, a father or mother exercising parental power over a child may resign as the parental power holder where there are unavoidable grounds.</p> <p>(2) With the permission of the court, if the grounds described in paragraph (1) cease to operate, the father or mother who has resigned may resume the parental power.”</p>
1052	<p>1052 (Commencement of guardianship of minor)</p> <p>“If a child ceases to have any parental power holder by virtue of Article 1048 (Order for suspension or divestment of authority of parental power holder) or paragraph (1) of Article 1050(Resignation and resumption of parental power holder) and moreover there is no change of parental power holder by virtue of Article 1051(Change of parental power holder), the court shall issue a declaration of commencement of minor guardianship in respect of the child.”</p>

Law on Marriage and Family (1989)	26 July 1989	
Decree No. 56 KR dated 20 July 1989		

Relevant Articles:

119	<p>Article 119 “Parental power shall be revoked and transferred to any organization or relative by blood, from parent who is at fault as follows: The parents fail to educate their child; The parents use improper power in violation of the child rights or forcing him to commit crimes or acts against society; The parents treat badly their children, The parents behave against the moral standards which have a bad influence over their children.”</p>
120	<p>Article 120 “The People’s Court may withhold the power from the parents who committed a fault if there is a complaint brought by the state organization, the mass organization, the authorities attached to the people’s court or any relatives of the parents.”</p>

Law on Domestic Violence	24 October 2005	N/A
---------------------------------	-----------------	-----

Relevant Articles:

13	<p>Article 13 “In order to prevent domestic violence which is occurring or is believed to occur, the authorities in charge shall intervene urgently by: - Seizing the weapons or concrete objects that have been used or could use by the perpetrators - Moving the perpetrators from the scene or moving the victims if there is a request from the victims. In any special case the victim can be removed without a request if there is a necessary reason to do so. - Offering the appropriate assistance to the victims in accordance with their circumstances, especially providing the temporary shelter in which safety can be guaranteed and urgent medical assistance”</p>
----	--

ANNEX THREE: MATRIX OF REGULATION RELEVANT TO ORPHANAGE TRAFFICKING

REGULATIONS

Tier Four: Decrees

Title	Date entered into force	Repealed/abrogated
Sub Decree 119 on the Management of Residential Care Centres	11 September 2015	Article 19 – any provision contrary to this sub-decree

Relevant Articles:

5	<p>Article 5 Gives MoSVY the legal power to issue orders to close a residential care institution.</p>
---	---

13	<p>Article 13</p> <p>In case of information or report on irregularities in the residential care centre is received the Ministry of Social Affairs, Veterans and Youth Rehabilitation shall conduct inspection immediately within 48hrs to resolve those irregularities.</p> <p>In case of complaint or report on abuse, violence or neglect of children residing in the residential care centre, MoSVY shall cooperate with relevant ministries and institutions, in particular Mol, MoJ, MoH and representatives of NGOs to establish a joint committee to take legal action.</p>
14	<p>Article 14</p> <p>In case of suspicion of child abuse by the managed or staff of the RCI and with due investigation conducted by MoSVY, those committed the abuse shall be temporarily suspended from their job to avoid direct contact with the child. All withdrawal of children from their care shall be done in the best interests of children.</p>
15	<p>Article 15</p> <p>RCIs that do not follow the provisions of this sub decree shall be punished as follows:</p> <ul style="list-style-type: none"> • Written warning • Temporary suspension • License revocation <p>The above punishments do not impede the implementation of other criminal laws</p>
16	<p>Article 16</p> <p>Physical persons or legal persons establishing or running residential care centre without prior permission from MoSVY shall be considered clandestine centre and subject to penalty according to the existing laws in force.</p>

Sub Decree 34 MoSVY on transfer of functions of RCIS

Relevant Articles:

6	<p>Article 6</p> <p>Transfers the functions for oversight over non-government residential care institutions to the municipal or district level government, including:</p> <ul style="list-style-type: none"> • the inspection of residential care institutions against the Minimum Standards of Residential Care • Address and resolve cases of child rights violations that occur in non-government run residential care institutions • Inspect and approval all applications to admit or exit a child from a non-government institution. • Follow up on cases of children referred for admission to non-government residential care services.
7	<p>Article 7</p> <p>Transfer the management of services for children at risk in the community to the municipal and commune governments for:</p> <ul style="list-style-type: none"> • Conducting risk and protective factors assessments of children identified as at risk in their families • Preparing a family plan, including necessary services to preserve the child in the family where possible • Closing a case or referring a child at risk in their family to temporary alternative care services <p>Organising the temporary placement of a child in need of alternative care due to abandonment with their relatives, a foster family, with monks or in faith-based care, a group home or in residential care</p>

Sub Decree 184 on Functions and Structure of District Administrations

As part of the decentralisation and deconcentration reform, this Sub Decree replaces earlier Sub Decrees/ Prakas assigning functions for case management and management of non-government RCIs to MoSVY

Relevant Articles:

26	<p>Article 26</p> <p>The social affairs and welfares office shall act as the secretariat for district administration in the area of social affairs and welfares, and be responsible for following functions:</p> <ul style="list-style-type: none">• Social works, veterans and youth rehabilitation• Health affairs• Women’s affairs• Cult and religious affairs• Employment and vocational training affairs• Cultural and fine art affairs• Disaster affairs• Other tasks as assigned by the district governor.
	<p>Annex 1</p> <p>Clarifies the functions of the different offices.</p> <p>Relevant functions ascribed to the office of Social Affairs, Veterans and Youth Rehabilitation include:</p> <p>1. Management of cases of orphans and vulnerable children</p> <ul style="list-style-type: none">• Manage and define identification of victims of human trafficking, victims of sex trafficking, and child sexual abuse• Manage, search, and estimate vulnerable families• Manage, monitor, and close cases of vulnerable children who were integrated into communities <p>8. Checking on child care centres of Non-Government Organizations</p> <p>Relevant functions ascribed to the office of Women’s Affairs include:</p> <p>1. Facilitation, prevention, and addressing violence against women and children and trafficking of women and children</p>
15	<p>Article 15</p> <p>RCIs that do not follow the provisions of this sub decree shall be punished as follows:</p> <ul style="list-style-type: none">• Written warning• Temporary suspension• License revocation <p>The above punishments do not impede the implementation of other criminal laws</p>
16	<p>Article 16</p> <p>Physical persons or legal persons establishing or running residential care centre without prior permission from MoSVY shall be considered clandestine centre and subject to penalty according to the existing laws in force.</p>

Tier 5: Ministerial Proclamations (Prakas)

Prakas 2280 MoSVY Procedures to Implement the Policy on Alternative Care for Children			
6	<p>Article 6 Commune Council (CC), which staff are also members of the Commune Committee for Women and Children (CCWC), has the duty to visit the child or family who are facing situations as stated in Article 5 and assess the risks and strengths in the family. If there is risk and the family or child is not able to cope with the situation, a case shall be opened for further services, with collaboration and intervention from the City/District/Khan WCCC, Provincial/Municipal WCCC, as well as collaboration, and technical support and services first sought from City/District/Khan Office of Social Affairs, Veterans, and Youth Rehabilitation (OSVY) and then from the Provincial/Municipal Department of Social Affairs, Veterans, and Youth Rehabilitation (DoSVY).</p>		
15	<p>Article 15 Family Preservation has the following procedures: 1- At the initial assessment, protecting the safety of children and their caregiver is required to be done routinely. 2- If there is an immediate danger to the safety of the child or primary caregiver, it may be necessary to separate them from the danger. In case an adult causes danger to the child and/or caregiver, removing the dangerous adult in the home shall be considered before removing the child from the home. 3- All removals must be done in consultation between CCWC and the City/District/Khan OSVY and clearly documented. Placement of the child out of his/her home shall follow the order of relatives, community-based care and residential care.</p>		
Joint Prakas on the Determination of Expenses, Fees and Contributions for Inter-Country Adoptions			Non-specific repeal article for inconsistent provisions in other instruments
MEF No. 488 SHV. BrK			
1	<p>Article 1 Caps ICA fees at USD \$5,000 per child termed a ‘humanitarian contribution’.</p>		
6	<p>Article 6 30% of Fees are to cover ICA administrative costs with 70% directed to alternative care services including state-run orphanages.</p>		
5	<p>Article 5 Establishes a Humanitarian Fund Committee tasked with managing the administration of fee and comprised of members of the Central Authority and MEF. Other articles establish transparent process for use of funds.</p>		
Prakas on the Procedures to Authorize Intercountry Adoption Agencies (2014)			
4	<p>Article 4 Criteria for authorization from MoSVY. Limits authorization to not-for-profit agencies accredited by the central authority of receiving countries.</p>		
5	<p>Article 5 Prohibits agencies from using orphanages as a source to supply children for adoption</p>		

15	<p>Article 15 Lists prohibited actions including direct recruitment, provoking abandonment, profit making, coercing parents to relinquish a child through gift giving, payment, threat, fraud, exchange for services or other means, falsifying or embellishing information, offering money to officials, and engaging in any practice not in conformity with the Hague Convention or ICA law.</p>
----	---

Prakas 33 MoSVY on the Establishment and Functioning of the Department of Social Services, Veterans Affairs and Youth Rehabilitation

2	<p>Article 2.K Outlines the responsibilities of DoSVY for social services and includes two relevant provisions: Preparation of social services for orphaned children, child victims of human trafficking and care for abandoned babies.</p>
3	<p>Article 4.3 Outlines the functions of the Social Affairs and Anti Trafficking Office including the responsibility to support trafficking victims, including reintegration, monitor and inspect NGO run shelters and services, implement the guidelines on victim identification and protection and locate families for reintegration purposes.</p>
4	<p>Article 4.4 Outlines the functions of the Child Welfare Office within DOSVY, including for the inspection of NGO run RCIs, management of State run RCIS, oversight of orphan and vulnerable children's services</p>