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Advocacy Brief on Child Justice 2 of 5

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Diversion of Children in Conflict with the Law from Formal Judicial Proceedings in Europe and Central Asia

UNICEF Regional Office for Europe and Central Asia



“Developing diversion plans that are tailored to the needs and circumstances of each girl/boy, and especially when combined with a restorative justice approach and applied as early as possible in the child justice process and in as many child cases as possible, will decrease the chance of reoffending and stigmatisation; avoid the excessive costs of formal judicial proceedings and detention; increase the satisfaction of victims and others affected by the child’s offence; and improve national security.”

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1. The concept of 'diversion from judicial proceedings'

Diversion can be defined in different ways, but the term always refers to **measures for dealing with children in conflict with the law without resorting to formal judicial proceedings or formal trial**.¹ Diverting children in conflict with the law implies that they are referred to appropriate community-based organizations, services, programmes or activities, thereby avoiding the negative effects of formal judicial proceedings such as the stigma of conviction and a criminal record.² In addition, diversion yields good results for girls/boys, is **congruent with public safety** and has proved to be cost-effective.³ Diversion also results in reduction of pre-trial detention.⁴ A more comprehensive description of diversion is *“channelling children in conflict with the law away from judicial proceedings through the development and implementation of procedures or programmes that enable many- possibly most- to avoid the potential negative effects of formal judicial proceedings, provided that human rights and legal safeguards are fully respected.”*⁵ The **purpose of diversion** is to avoid instituting judicial proceedings against children in conflict with the law, or to suspend judicial proceedings, as well as to influence a child's proper development; to enhance their personal responsibility; and to promote their reintegration into society.⁶ Diversion can only be used in cases of **children in conflict with the law who are at or above the minimum age of criminal responsibility** and not for children under the minimum age of criminal responsibility who are involved in offending behaviour.⁷ Children under the minimum age of criminal responsibility are too young to commit offences and to be prosecuted and tried, which implies that they cannot be diverted from trial. Moreover, diversion can only be applied in cases of **children in conflict with the law who enter the child justice system**. The term 'diversion' cannot be used, for example, when the school, youth club or other community-based organization deals with children's offending behaviour through assigning the child a particular task or conducting a reconciliation session between the child and the victim, without reporting the case to the child justice system.

1 Article 40(3)(b) of the Convention on the Rights of the Child, 1989; Rule 11 of the Standard Minimum Rules for the Administration of Juvenile Justice, 1985.

2 Commentary on Beijing Rule 11, 1985; UNICEF Toolkit on Diversion and Alternatives to Detention, 2009; UNICEF Diversion not Detention: A study on diversion and other alternative measures for children in conflict with the law in East Asia and the Pacific, UNICEF EAPRO, Bangkok, 2017.

3 Paragraph 15 of General Comment No.24, 2019.

4 It has been noted that countries that already had diversion mechanisms or programmes in place, prior to the COVID-19 pandemic, were able to leverage them more easily afterwards to release children from detention as an immediate response to protect children in places of detention from the pandemic. [UNICEF, Detention of Children in the Time of COVID-19, New York, 2021.]

5 UNICEF Toolkit on Diversion and Alternatives to Detention, 2009.

6 Article 15 of the Model Law on Juvenile Justice, 2013; Paragraph 72 of General Comment No.24, 2019.

7 In the advocacy briefs, the term 'children in conflict with the law' refers to children who are at/above the minimum age of criminal responsibility.



2. International and European standards on diversion

The **United Nations Standard Minimum Rules for the Administration of Juvenile Justice (1985)**, also called 'Beijing Rules', is the first international instrument that incorporated diversion and used the term 'diversion'. It stated that *"diversion, involving removal from criminal justice processing and, frequently, redirection to community support services, is commonly practised on a formal and informal basis in many legal systems. This practice serves to hinder the negative effects of subsequent proceedings in juvenile justice administration...n"* (rule 11). The **United Nations Convention on the Rights of the Child (1989)** promotes diversion, but without using the term. It underlines that *"States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular ... whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected"* (article 40(3)(b)). The **United Nations Guidelines for Action on Children in the Criminal Justice System (1997)**, also called 'Vienna Guidelines', provide, as an annex, a comprehensive set of measures that need to be implemented in order to establish a well-functioning system of juvenile justice administration, consistent with international standards. One of these measures is diversion. It states: *"To prevent further overreliance on criminal justice measures to deal with children's behaviour, efforts should be made to establish and apply programmes aimed at strengthening social assistance, which would allow for the diversion of children from the justice system, as appropriate, as well as improving the application of non-custodial measures and reintegration programmes. To establish and apply such programmes, it is necessary to foster close cooperation between the child justice sectors, different services in charge of law enforcement, social welfare and education sectors"* (guideline 42). The Committee on the Rights of the Child elaborates in its recent **General Comment No.24 (2019)** on children's rights in the child justice system, including diversion away from judicial proceedings (paragraphs 15 to 18). The Committee recommends that children who reach 18 before completing their diversion measure, may finish their programmes/activities and are not referred to organizations for adults (paragraph 35). European instruments also incorporate diversion, but not comprehensively. The **European Rules for Juvenile Offenders Subject to Sanctions or Measures (2008)** do not mention diversion, but the **Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice (2010)** state: *"Alternatives to judicial proceedings such as ... diversion (of judicial mechanisms) ... should be encouraged whenever this may best serve the child's best interests"* (guideline 24).



3. Diversion as measure of first resort

The **Committee on the Rights of the Child’s General Comment No. 24 (2019)** states that diversion should be “an integral part of the child justice system” and “the **preferred manner of dealing with children in conflict with the law** in the majority of cases” (paragraph 16). The **Beijing Rules (1985)** and the **Convention on the Rights of the Child (1989)** also prioritize diversion. The former states that, “consideration shall be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial” (rule 11.1) and the latter says, “States Parties shall seek to promote, whenever appropriate and desirable, measures for dealing with children in conflict with the law without resorting to judicial proceedings providing that human rights and legal safeguards are fully respected.” (article 40(3)(b)). Also, one of the eight general principles is the “primacy of alternative measures to judicial proceedings [diversionary measures]” (article 13(4)). When considering diversion, the competent authority takes into account the seriousness of the offence, age of the child, circumstances of the case and any previous offending behaviour.⁸

4. Full respect and protection of human rights and legal safeguards on diversion

All international instruments dealing with diversion of girls/boys in conflict with the law refer to article 40(3)(b) of the **Convention on the Rights of the Child (1989)** which states that children’s human rights and legal safeguards should be fully respected and protected in all diversion processes and programmes. The Committee on the Rights of the Child provides details on these human rights and legal safeguards:⁹

- Diversion should be used only when there is **compelling evidence** that the child committed the alleged offence, that she/he **freely and voluntarily admits responsibility**, without intimidation or pressure, and that the admission will **not be used against the child** in any subsequent legal proceedings.
- The child’s **free and voluntary consent to diversion** should be based on **adequate and specific information** on the nature, content and duration of the measure, and on an understanding of the consequences of a failure to cooperate or complete the measure.¹⁰

⁸ Article 16(2) of the Model Law of Juvenile Justice, 2013.

⁹ Paragraph 18 of General Comment No.24, 2019.

¹⁰ It is interesting to note that the Committee on the Rights of the Child requires only the child’s informed consent to diversion (paragraph 18(b)), while other international standards mention the informed consent of the parents/legal guardian of the child as well. For example, Beijing Rule 11.3 states that “any diversion involving referral to appropriate community or other services shall require the consent of the juvenile, or her/his parents or guardian” and article 17(2) of the Model Law on Juvenile Justice, 2013, mentions that “alternative measures to judicial proceedings [diversionary measures] shall not be imposed without the legal consent of the child and, where appropriate, her/his parents or legal guardian”. Also, the previous General Comment No.10, 2007, on children’s rights in juvenile justice stated in this respect that “with a view to strengthening parental involvement, States parties may also consider requiring the consent of parents, in particular when the child is below the age of 16 years” (paragraph 27).



- The **law should indicate the cases** in which diversion is possible, and the relevant decisions of the police, prosecutors and/or other agencies should be **regulated and reviewable**. All state officials and actors participating in the diversion process should receive the **necessary training and support**.
- The child is to be given the opportunity to seek **legal or other appropriate assistance** relating to the diversion offered by the competent authorities, and the possibility of a **review of the measure**.
- Diversion measures should **not include the deprivation of liberty**.
- The completion of the diversion should result in a **definite and final closure** of the case. Although confidential records of diversion can be kept for administrative, review, investigative and research purposes, they should **not be viewed as criminal convictions** or result in criminal records.

The Committee on the Rights of the Child also recommends setting a **short time limit** for the period between the commission of the offence and the decision to divert a case from judicial proceedings.¹¹

In Kyrgyzstan, an additional legal safeguard on diversion is in place. As a measure against corruption, the police/prosecution has to justify why they have not used diversion in potentially eligible cases.

5. Benefits of diversion

Applying diversion in cases of girls/boys in conflict with the law has many advantages; that is, not only for the children and their families, but also for the child justice system and society as a whole.¹²

Benefits for children and their families:¹³

- Prevent children suffering negative developmental impact associated with formal judicial proceedings, including stigmatization of the child (and their family) and a criminal record

¹¹ Paragraph 55 of General Comment No.24, 2019.

¹² UNICEF, Toolkit on Diversion and Alternatives to Detention, 2009. See for concrete examples of diversion practices (Albania & Serbia): UNICEF, Good Practices and Promising Initiatives in Juvenile Justice in the CEE/CIS Region, A UNICEF Catalogue of Practices Documented through the Juvenile Justice Critical Mass initiative, UNICEF Regional Office for CEE/CIS, Geneva, 2010.

¹³ Girls in conflict with the law, compared to boys, tend to benefit much more from diversion and non-custodial solutions during the different phases of the criminal justice system. [Nowak, M., United Nations Global Study on Children Deprived of Liberty, United Nations, 2019.]



- Prevent the long-lasting negative impact of detention on children’s physical, mental, and emotional health and development, including the increased chance of reoffending due to deprivation of liberty
- Ensure immediate consequences for offending behaviour
- Seek to discover the reasons for offending behaviour to identify and address the needs of the child and to provide effective rehabilitation activities
- Contribute positively to children’s development
- Give children insight into the consequences of their offending behaviour
- Encourage children to take responsibility for the harm caused in ways that rehabilitate them and reintegrate them into society, particularly if diversion is combined with a restorative justice approach

Benefits for society as a whole:

- Decrease the chance of reoffending
- Avoid the excessive costs of pursuing a case through the formal justice system
- Avoid the excessive costs of pre-trial and post-trial detention
- Restore the harm caused by the offence if diversion is combined with a restorative justice approach
- Contribute to social development, conflict resolution and peace-building efforts and place the needs of victims more centrally in the process if diversion is combined with a restorative justice approach
- Contribute positively to improving national security by promoting inclusion rather than exclusion of vulnerable children in society

Benefits for the child justice system:

- Reduce the number of minor and less serious offences clogging up the formal judicial system and allow resources to be focused on reoffenders and/or high-risk offenders
- Reduce the number of children deprived of their liberty in pre-trial detention, which may improve the detention conditions for children who are deprived of their liberty
- Allow justice sector officials to deal with cases expeditiously
- Raise the professionalism, job satisfaction and morale of personnel working in the child justice sector



6. Diversion as early as possible

The Committee on the Rights of the Child is very clear that diversion should be offered to girls/boys in conflict with the law as early as possible to avoid stigmatization as much as possible. It states that *“opportunities for diversion should be available from **as early as possible** after contact with the child justice system...”*¹⁴ The power to divert at the police stage, i.e. through the use of an informal or formal warning or referring the child to an appropriate programme, is highly desirable as it limits the child’s contact with the child justice system and is often sufficient to end the child’s offending behaviour. Also, prosecutors should have discretionary power to suspend or not to initiate prosecutions against children.

In **Kyrgyzstan**, diversion is regulated in articles 467 to 475 of the recently revised Criminal Procedure Code (28 Oct. 2021 #129 in edition of 18 Jan. 2022 #4). Diversion is undertaken by police and approved by the prosecutor. Also, investigating judges (pre-trial investigation) may divert children, if not already done at an earlier stage. Diversion programmes last from three to 12 months, but are not yet implemented in practice. Currently, all relevant professionals are being trained on diversion with UNICEF’s support.

The Committee also emphasizes that *“diversion should be available at various stages throughout the child justice process.”*¹⁵ Concretely, this means that diversion may be used at any point during decision-making, including before arrest, by the **police, prosecution and/or other agencies**. Although this might be clear, there is often confusion in actual practice. All definitions of diversion state that *“diversion refers to measures for dealing with children in conflict with the law without resorting to formal judicial proceedings or formal trial”* (see section 1), but not all countries and child justice provisions define **‘the start of formal judicial proceedings/formal trial’** in the same way. Also, international standards are not clear-cut and harmonized in this respect.¹⁶ The **Committee on the Rights of the Child** states that diversion can be used *“at any time prior to or during the relevant proceedings”* (paragraphs 8 & 13(a)). It is further explained that **diversion should be available throughout the child justice proceedings**. *“The decision to bring a child into the justice system does not mean the child must go through a formal court process... the Committee emphasizes that the competent authorities – in most States the public prosecutor – should continuously explore the possibilities of avoiding a court process or conviction, through*

14 Paragraph 16 of General Comment No.24, 2019.

15 Ibid.

16 For example, the use of the term ‘pre-sentencing diversion’, which is defined as “children diverted or sentenced who enter a pre-sentence diversion scheme”, may be confusing if diversion is considered a “measure for dealing with children in conflict with the law without resorting to formal judicial proceedings or formal trial”. See, among other reports, UNODC & UNICEF, Manual for the Measurement of Juvenile Justice Indicators, Vienna & New York, 2006.



*diversion and other measures. In other words, diversion options should be offered from the earliest point of contact, before a trial commences, and be available throughout the proceedings ... Diversion should be presented to the child as a way to suspend the formal court process, which will be terminated if the diversion programme is carried out in a satisfactory manner.*¹⁷ UNICEF Europe and Central Asia Regional Office suggests using the **first trial hearing** as the start of formal judicial proceedings/formal trial in cases of children in conflict with the law. This implies that the police and the prosecution may initiate diversion at any point of their decision-making process, including before arrest. The purpose of **police-diversion** and **prosecution-diversion** before the first trial hearing is to avoid instituting judicial proceedings against children in conflict with the law. Also, the court has the discretionary power to apply diversion in cases of children in conflict with the law, but only before starting the first trial hearing.¹⁸ The purpose of **'court-diversion'** is to suspend judicial proceedings/formal trial.¹⁹ With this proposal, the Regional Office intends to **avoid 'court-diversion' becoming the norm** and the most used form of diversion in actual practice, and to avoid national legislation regulating diversion at the court stage or prioritizing diversion at the court stage instead of at the police and/or prosecution stages.²⁰ In **Advocacy Briefs 4/5 on Alternatives to Deprivation of Liberty**, the difference between diversion and alternatives to deprivation of liberty are explained (see overview in section 2).

¹⁷ Paragraph 72 of General Comment No.24, 2019.

¹⁸ When a child is deprived of her/his liberty at the pre-trial stage, it implies that diversion by the police or the prosecution was not possible or not considered and the child will be formally processed through the child justice system. The court is already involved in these cases, i.e. the court orders pre-trial detention. However, when children's circumstances change while they are in pre-trial detention, for example extended family members or others are located who can act as caregivers, diversion by the court or prosecution should still be possible. [UNICEF Toolkit on Diversion and Alternatives to Detention, 2009.]

¹⁹ Article 49 of the Model Law on Juvenile Justice, 2013, on the discontinuance of proceedings provides guidance in this respect. It states that "prior to the commencement of court proceedings against the child, the court must satisfy itself that alternative measures to judicial proceedings [diversionary measures] have been fully considered by the police or the prosecutor's office. Where the police or prosecutor have failed to consider the use of such measures, the court should have the power – depending on the legal system of the State concerned – either to decide itself on applying measures alternative to judicial proceedings or to refer the case back and require the relevant authority to reconsider its original decision to take the case to trial" (Article 49(2)(3)). Another option may be that a child's draft diversion plan is sent to the Child Court for approval and the child may start carrying out her/his diversion plan only after the court's approval. This practice is also used when a restorative justice approach is applied (section 9). The draft restorative agreement between the child and the victim is sent to the Child Court and after approval by the court the child starts carrying out her/his agreement.

²⁰ In some countries, for example Turkey and Kazakhstan, diversion before the first court hearing (also called 'pre-trial diversion') is considered to contradict the legal principle of 'presumption of innocence'. Counter arguments that may be used in this respect are:

- ✓ The country has ratified the CRC (without reservations to article 40(3)(b)) and is obliged to implement diversion ("whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected").
- ✓ Two legal safeguards that have to be fully respected and protected in all diversion processes and are of particular relevance with regard to 'presumption of innocence' are "diversion should be used only when there is compelling evidence that the child committed the alleged offence and that she/he freely and voluntarily admits responsibility, without intimidation or pressure" and "the child's free and voluntary consent to diversion should be based on adequate and specific information on the nature, content and duration of the measure, and on an understanding of the consequences of a failure to cooperate or complete the measure" (paragraph 18 of CRC-GC24). Children who maintain their innocence have the right to a full and fair trial (see Advocacy Brief 3/5 on Fair Trial).

It might be required to develop guidelines/standard operating procedures that explain, step-by-step, the diversion proceedings for professionals who are involved in diversion, including how to obtain the child's informed consent.



In **Albania**, diversion is the responsibility of the prosecution service, but legislation also regulates ‘court-diversion’. If the court is of the opinion that a case involving a child in conflict with the law is eligible for diversion, but the prosecution has not used its authority, the court may send the case back to the prosecutor for reconsideration or start the diversion process itself.

7. Diversion as much as possible

All international standards clearly state that diversion should be applied as much as possible, and **not limited to minor offences or first-time offenders**. For example, the Convention on the Rights of the Child (1989) promotes diversion “*whenever appropriate and desirable*” (article 40(3) (b)). The Committee on the Rights of the Child goes even further in its General Comment No.24 (2019) emphasizing that “*States parties should **continually extend the range of offences** for which diversion is possible, including serious offences where appropriate*” (paragraph 16). The **Model Law on Juvenile Justice (2013)** elaborates on the meaning of ‘whenever appropriate and desirable’, that is: “*the competent authority dealing...with the child’s criminal case shall consider whether alternative measures to judicial proceedings [diversionary measures] would better serve the reintegration and protection of the child, the rights of the victim, crime prevention and/or the protection of society rather than judicial proceedings*” (article 16(1)). Where it is decided that diversion is not an appropriate response in a particular case, national legislation may regulate that the competent authority has to set out the **reasons for the decision not to use diversion** in writing.²¹

8. Diversion conditions and plans tailored to children’s needs and circumstances

8.1. Diversion based on an assessment

Diverting girls/boys in conflict with the law does not mean that the child’s offending behaviour is ignored. Rather, it allows steps to be taken to identify the needs of the child and tackle the root causes of the child’s behaviour in order to prevent further offending. It implies that the girls/boys are referred to appropriate **community-based organizations, services, programmes or activities** (see section 8.3.). In other words, diversion is conditional.²² In order to ensure that children’s diversion plans address the root causes of their offending behaviour and support their

²¹ Commentary on article 16(1) of the Model Law on Juvenile Justice, 2013.

²² See definition of diversion in UNICEF’s toolkit on diversion and alternatives to detention, 2009.



reintegration and rehabilitation process, it is recommended that the social welfare agency or probation service conducts an **assessment and/or prepares a social inquiry report**.²³ When considering the services, programmes or activities that may be included in the child's diversion plan, the social worker/probation officer takes into account the type and seriousness of the offence, age and maturity of the child, circumstances of the case as well as any other factors to prevent further offending.²⁴ The Committee on the Rights of the Child leaves it to the discretion of State Parties to decide on the exact nature and content of diversion measures and to take the necessary legislative and other measures for their implementation.²⁵ However, a diversion plan has to be **reasonable and proportionate to the offence** and not be more severe or restrictive than the sanction the child would have received through judicial proceedings. Deprivation of liberty, corporal punishment, public humiliation and any other condition contrary to the Convention on the Rights of the Child cannot be part of children's diversion plans.

8.2. Unconditional diversion at the police stage

The commentary on Beijing Rule 11 explains that “*diversion at the outset and without referral to alternative (social) services may be the optimal response*” in cases of children in conflict with the law. It states that **non-intervention**, also called ‘unconditional diversion’, would be the best response, particularly where the offence is of a non-serious nature and where the family, school or other informal social control institutions have already reacted, or are likely to react, in an appropriate and constructive manner. Many children, having been warned about criminal behaviour, are unlikely to offend again.²⁶ The Committee on the Rights of the Child has not included unconditional diversion in its General Comment No.24 (2019), but uses the word ‘usually’ when stating that: “*Diversion involves the referral of matters away from the formal criminal justice system, usually to programmes or activities*” (paragraph 15). This might be interpreted that in some cases girls/boys in conflict with the law are not referred to programmes/activities and unconditional diversion is applied. In actual practice, unconditional diversion means that the police officer gives a **verbal warning to the child** on the spot or a verbal or written warning to the child at the police station in the presence of the child's parents/caregivers.²⁷ Such warnings may include an explanation of the reason for the warning, exploration of the impact of

23 UNICEF, *Toolkit on Diversion and Alternatives to Detention*, 2009.

24 UNICEF, *Toolkit on Diversion and Alternatives to Detention*, 2009.

25 Paragraph 17 of General Comment No.24, 2019.

26 Hamilton, C., *Guidance for Legislative Reform on Juvenile Justice*, UNICEF & Children's Legal Centre, 2011.

27 Other terms used in the context of unconditional diversion are ‘caution’ and ‘reprimand’ as well as ‘pre-trial disposition’ (Tokyo Rule 5.1) and ‘police informal diversion’ (UNICEF, Division of Data, Analytics, Planning and Monitoring). However, unconditional diversion is not the same as ‘dropping the case’ due to lack of evidence. The competent authority decides to unconditionally divert the case if it is considered not necessary to proceed with the case for the protection of society, crime prevention or the promotion of respect for the law and the rights of victims.



the offence on the victim(s) and the child, including the consequences of future offending and how to avoid future offending. In principle, prosecutors and judges may also give children in conflict with the law a verbal or written warning, before the start of the first trial hearing.²⁸

8.3. Constructive diversion conditions

Where the child's offending behaviour is such that 'unconditional diversion'/'non-intervention' is not an appropriate response, the police, prosecutor or judge should consider diverting the child to appropriate community-based organizations, services, programmes or activities to address her/his offending behaviour, rather than proceeding with the prosecution and charge or trial of the child. Internationally, constructive diversion conditions are promoted, i.e. services, programmes and activities that give girls/boys an opportunity to prove their personal capacity and qualities. These interventions can **contribute positively to a child's development, rehabilitation and reintegration** into society by encouraging them to take responsibility for their offending behaviour and the harm caused by their offence.²⁹ Constructive conditions that respond effectively to a child's specific needs and circumstances may help prevent future offending behaviour. It is not recommended to incorporate restrictive conditions such as not leaving the house after a certain hour, not engaging in leisure and cultural activities or not associating with certain persons in a child's diversion plan. **Examples of constructive diversion conditions** that are occur either concurrently or consecutively include:³⁰

- Written essay on the effects of the offence, designed to help the child gain an insight into the consequences of her/his offending behaviour
- Regular school attendance
- Vocational skills training
- Life skills programme or other competency development programme, such as anger management, peer pressure resistance, conflict resolution, etc.

28 Nowak, M., *United Nations Global Study on Children Deprived of Liberty*, United Nations, 2019.

29 In various countries, the limited availability of community-based programmes is considered an obstacle to a national diversion policy and/or to the establishment of a pilot on diversion. However, in practice there is usually only a lack of specialised community-based programmes. Children's diversion plans may also incorporate non-specialised community-based activities/programmes that are usually available in every community, such as attending school regularly; doing homework every day; participation in constructive/ formal leisure activities/enrolment in leisure clubs and becoming a member of a youth club/movement, etc. Moreover, when diversion is introduced for minor offences and/or first-time offenders only, there may be no need for specialised community-based programmes.

30 UNICEF, *Toolkit on Diversion and Alternatives to Detention*, 2009; UNICEF & IDLO, *Research Study: Promotion of Diversion and Alternative Measures to Detention for Children in Conflict with the Law, Region Multi-Country Report Jordan, Sudan and Tunisia*, UNICEF MENARO & IDLO, Amman, 2015; UNICEF, *Diversion not Detention: A study on diversion and other alternative measures for children in conflict with the law in East Asia and the Pacific*, UNICEF EAPRO, Bangkok, 2017; UNICEF, *Diversion of Children in Conflict with the Law (over the Minimum Age of Criminal Responsibility) in Eastern and Southern Africa, Diversion Programmes in the Eastern and Southern Africa Region: Best Practices, Opportunities and Challenges*, UNICEF EASARO, Nairobi, 2022 (draft).



- Peer/youth mentoring programme to support socially isolated children, children with mental health problems, children with substance/addiction issues, etc.³¹
- Leisure, cultural, sports and/or religious activities
- Individual or group counselling
- Counselling for the child and her/his parents/family
- Therapeutic treatment for alcohol, drugs/substance addiction or addictive behaviour, such as gambling, gaming, etc.
- Therapeutic treatment for sex offending
- Supervision/guidance by designated officials
- Voluntary community service hours³²

If the professional responsible for diversion, or the professional who prepares the child's diversion plan, considers it necessary that the child's **parents/caregivers or family participate in a parenting or family support programme**, it is recommended not to include these programmes in the child's diversion plan, but to keep them separate. Such programmes are recommended only as a supportive element to the diversion plan and where there are clear measures in place if the parents/caregivers and/or siblings fail to take part. Active participation by parents/caregivers/siblings should not have any consequences for the child and never result in formal judicial proceeding against the child. Participation of parents/ caregivers and siblings of diverted children in parenting/family support programmes is on a voluntary basis.

31 Peer/youth mentoring programmes, also called 'buddy' or 'big brother/sister' programmes build a relationship between a child/ young person (the 'mentee') and a more experienced older person (the 'peer mentor'). The peer mentor acts in a non-professional/ voluntary capacity to provide relationship-based support that benefits one or more areas of the mentee's development. [UNICEF North Macedonia, Information for Facilitators of Peer/Youth Mentoring Programs in North Macedonia, Skopje, 2022.]

32 Community service requires the child to work a specified number of hours for free to benefit the community and/or to indirectly benefit the victim(s). The purpose is to give the child the opportunity to make amends for the offence by contributing something of value to either the victim(s) or the community in general. Community service can be an effective way for children to be held personally accountable for their wrong doings. [UNICEF Toolkit on Diversion and Alternatives to Detention, 2009.]



In Serbia, the Juvenile Justice Law (2006) introduced diversion to avoid bringing criminal proceedings, to reduce recidivism and provide support to child offenders in the process of reintegration in the society (Article 6). Diversion can be initiated by both child justice public prosecutors and judges. The selection and application of the most suitable diversion measure is done in cooperation with the guardianship authority within the social work service, the child offender and his/her parents/caregivers. Article 7 of the same law recognizes five different types of diversionary measures, thus it is possible to achieve positive results by combining one or more of these measures. The diversion measures are:

- Settlement with the injured party (such as compensation for damage, apology, mediation)
 - Regular attendance of school classes or work
 - Engagement, without remuneration, in the work of humanitarian organisations or community work (welfare, local or environmental)
 - Undergoing relevant check-ups and drug and alcohol treatment programmes
 - Participation in individual or group therapy at suitable health institution or counselling centre
-

8.4. Diversion mechanisms

The decision about which diversion programme/activity, or combination of programmes/activities, is **most appropriate** for a particular child in conflict with the law can be reached in different ways: ³³

- By the competent diverting authority, i.e. the child police officer, child prosecutor or child judge
- Through an assessment/social inquiry report conducted by the social worker/probation officer involved in the case (see section 8.1.)
- By a multi-disciplinary team (sometimes called 'diversion board' or 'diversion committee')
- Through a restorative justice process (see section 9)

³³ UNICEF, Toolkit on Diversion and Alternatives to Detention, 2009. Referral of children in conflict with the law to 'Local Commissions for Minors' should not be considered an appropriate and effective form of diversion. Some of these Commissions have the power to authorise placements of children in conflict with the law that constitute deprivation of liberty for long periods without judicial review, which is incompatible with international standards on diversion. [UNICEF, Lost in the Justice System, Children in Conflict with the Law in Eastern Europe and Central Asia, UNICEF Regional Office for CEE/CIS & UNICEF Innocenti Research Centre, Geneva, 2008.]



9. Diversion combined with a restorative justice approach

Wherever appropriate, the programmes/activities to which diverted girls/boys are referred should also address the needs of the victim(s) as well as the needs of others affected by the offence. International standards strongly promote the combination of diversion with a restorative justice approach.³⁴ To understand diversion with a restorative justice approach, it is important to distinguish between restorative justice conditions that can be incorporated in children's diversion plans and restorative justice processes that define which conditions may be incorporated. Examples of **restorative conditions that may be incorporated in children's diversion plans** are:

- Acknowledge responsibility for the offence and showing understanding of the impact of the offence on the victim
- Verbal apology to the victim
- Written apology letter to the victim
- Verbal or written apology to others affected by the offence, such as parents, siblings, extended family-members, schoolteacher, sports coach, community-members, etc.
- Financial or material reparation/compensation to the victim
- Financially or materially paying back parents/relatives who have compensated the victim
- Symbolic reparation of the harm caused to the victim through a job or activity/ies agreed with the victim
- Symbolical reparation of the harm caused to others through a job or activity/ies agreed with parents, siblings, extended family-members, schoolteacher, sports coach, community-members, etc.
- Community service work/hours
- Participation in a victim empathy course

³⁴ Beijing Rule 11, 1985; Vienna Guideline 15, 1997; Lima Declaration on Restorative Juvenile Justice, 2009; Commentary to European Rule 12, 2008; UNICEF Toolkit on Diversion and Alternatives to Detention, 2009; Article 18 of Model Law of Juvenile Justice, 2013; Paragraph 17 of General Comment No.24, 2019.



In Georgia, diversion was first initiated in 2010, with the amendment of the Criminal Procedure Code. In 2015, the Juvenile Justice Code of Georgia introduced higher standards and prioritised diversion for children aged 14 years and over, who had allegedly committed less grave or grave offences, if this proved to be appropriate to the child's resocialisation and rehabilitation (article 38). No previous criminal record is also among the preconditions for diversion (Juvenile Justice Code, article 40 (b)). Diversion can also be applied in cases of young adults (19 to 21 years). If there is compelling evidence that a child allegedly committed a less grave or grave offence, the prosecutor shall primarily consider using diversion. A prosecutor has the discretionary power not to initiate or to suspend prosecution and to take a decision on diverting the child from criminal prosecution and further judicial proceedings. If a prosecutor decides not to use diversion, it is obligatory to provide a reasoned decision which is subject to appeal to the senior prosecutor. The Juvenile Justice Code provides the possibility of the first instance court applying diversion at a pre-trial hearing or at a hearing on the merits and returning the case to the prosecutor, who will reconsider the initial decision and this time offer diversion to the child (article 39(2)). A diversion contract between the prosecutor and the child is drawn up based on the child's individual assessment report. The Juvenile Justice Code provides elements of restorative justice within the diversion measures, including involvement of the child in the diversion-mediation programme or in another programme which might serve to restore the damages rendered by the offending behavior (article 44). Diversion and the mediation programme are often applied in actual practice with the involvement of specialized mediators.

Most international instruments do not detail restorative diversion conditions, such as those above, instead they describe **restorative justice processes through which (diversion) conditions can be defined**.³⁵ The restorative justice processes that are used most often in cases of children in conflict with the law are:³⁶

- Family/group conferencing, which is a process that brings together the child offender, his/her parents, the victim and members of their respective 'communities of care' in order to discuss how they and others have been harmed by the offence, how those harms might be repaired and how to prevent the child from reoffending.
- Victim-offender mediation, which is a process in which a neutral person (the 'mediator') assists the victim of the offence and the child-offender to discuss and resolve the conflict and to reach a solution acceptable for both parties.



10. Monitoring children's compliance with their diversion plan

Social workers/probation officers **assist diverted children and monitor their participation** in the programmes and activities included in their diversion plan. One of the legal safeguards is that the completion of the diversion plan should result in a **definite and final closure of the case**.³⁷ When the child has completed her/his diversion plan, meaning that she/he has participated in all agreed programmes and activities within the agreed timeframe, *"no charges may be laid in relation to the criminal offence for which diversion has been imposed and has been completed by the child"*.³⁸ A child who has **successfully completed** her/his diversion plan is not regarded as having been convicted of a criminal offence and is not treated as having a criminal record. If a child breaches one or more diversion conditions, the prosecution will not automatically start judicial proceedings. Depending on the reason why the child did **not comply with her/his diversion plan**, the diversion conditions and/or timeframe of the diversion plan may be adjusted. If judicial proceedings are initiated, the court will take into consideration the part of the diversion plan that was already completed by the child when sentencing.³⁹

³⁷ Paragraph 18 of General Comment No.24, 2019.

³⁸ Article 19 of the Model Law on Juvenile Justice, 2013.

³⁹ Article 20 of the Model Law on Juvenile Justice, 2013.



11. References on diversion

International legal instruments:

- United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), 1985.
- United Nations Convention on the Rights of the Child (CRC), 1989.
- United Nations Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules), 1990.
- United Nations Guidelines for Action on Children in the Criminal Justice System (Vienna Guidelines), 1997.
- Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, 2002.
- European Rules for Juvenile Offenders Subject to Sanctions or Measures, 2008.
- Lima Declaration on Restorative Juvenile Justice, 2009.
- Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice, 2010.
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