

# 8 - Diversion from formal judicial proceedings

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Diversion refers to alternatives to the formal judicial proceedings. Formal criminal proceedings have many harmful consequences for the children involved, including stigmatization and criminal records. These in turn severely impact on children's capacity for reintegration into society. Measures and programs whereby children do not follow the formal criminal justice process are meant to offset these negative consequences and reflect an approach more conducive to their best interests. It is however important to note that the goal of protection cannot result in waiving some of the important procedural guarantees of the criminal justice process.

Diversion has been recommended as early as 1985 through the adoption of the [Beijing Rules](#), and it is reiterated in most recent international instruments (such as the [CRC Committee General Comment no. 24](#)). References to diversion are however minimal in the case law of the ECtHR or in EU law.

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## 1. Stages in the criminal trial when diversionary measures can be applied

Article 40 (3) (b) of the [CRC](#) has been interpreted as requiring that diversion is an integral part of the child justice system. The **CRC Committee** has recommended that diversion options are opened from the earliest point of contact of the child with the authorities and that such options are available throughout the proceedings ([General Comment no. 24](#), § 72). Diversion should suspend the formal court process and be terminated upon satisfactory completion of the diversion programme ([General Comment no. 24](#), § 72).

Similarly, the **European Committee on Social Rights** (the ECSR) has interpreted the text of Article 17 of the European Charter of Social Rights (the right of children to social protection) as obliging states to ensure the possibility for children to have the process diverted away from courts already from the first encounter with the police ([ICJ v Czech Republic](#), 148/2017 § 122).

## 2. Types of offences / age of the children

The **CRC Committee** has underlined that diversion should be available to all children, regardless of the seriousness of the offence, meaning that children suspected of a serious offence should also be eligible for diversionary measures ([General Comment no. 24](#), § 16).

Conversely, **the ECSR** has been called upon to assess, among others, whether the exclusion of children below the minimum age of criminal responsibility from diversionary measures was compatible with children's right to social and economic protection under Article 17 of the 1961 European Charter on Social Rights. The Committee has held that children under the age of criminal responsibility should be able to benefit of diversionary measures available for older children ([ICJ v Czech Republic](#), cited above, § 124)

### 3. Types of measures

Article 40 (3) (b) of **the CRC** encourages states to adopt measures diverting children from judicial proceedings. The same Article provides a non-exhaustive list of measures such as: care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes. The CRC Committee clarifies that states have discretion in choosing the most appropriate measures of diversion and takes note of a variety of community-based programmes which have been developed, such as community service, supervision and guidance by designated officials, family conferencing and other restorative justice options, including reparation to victims ([General Comment no. 24](#), § 17). The same view is taken by the ECSR ([ICJ v Czech Republic](#), § 121). The Guidelines of the Committee of Ministers also mention mediation as an alternative to judicial proceedings (Guidelines of CM, 17 November 2010, §§24-26).

Diversion in the form of institutional care should be seen as a measure of last resort applicable only where other alternatives do not exist (UN HRC, Concluding Observations on the third periodic report of the Czech Republic adopted on 24 July 2013, § 20 (b)). In any event, should this be the case, institutional care would amount to deprivation of liberty and all the guarantees under Article 5 ECHR and the Procedural Safeguards Directive will apply.

### 4. Diversion and fair trial guarantees for children

It is of utmost importance that diversion respects the child's best interests and all other rights of children. Article 40 (3) (b) of the CRC expressly provides that all human rights and legal safeguards should be fully respected in these cases. On the appropriateness of Diversion, **the CRC Committee** adds in [General Comment no 24](#) § 18 that "Diversion should be used only when there is compelling evidence that the child committed the alleged offense, that he or she freely and voluntarily admits responsibility, without intimidation or pressure, and that the admission will not be used against the child in any subsequent legal proceeding"

In the same vein under Rule 11.3. of the **Beijing Rules** "any diversion involving referral to appropriate community or other services shall require the consent of the juvenile, or her or his parents or guardian, provided that such decision to refer a case shall be subject to review by a competent authority, upon application [...]." Reference to diversion is also made in the [United Nations Riyadh Guidelines](#).

It has been considered that Article 5 (1) (e) of the **ECHR**, laying down the possibility to deprive children of liberty for the purposes of educational supervision was drafted so as to enable states to adopt a different response to child offending (Fenton-Glynn, C. (2021). *Children and the European Court of Human Rights*, Oxford University Press, USA). Nevertheless, so far the ECHR has not read into the text of Article 5 or 6 an obligation for states to provide for alternatives to detention or to trial. The ECtHR has held however, that all guarantees of Article 5 and 6 – as the case may be – apply whenever a child has been deprived of liberty within the meaning of the Convention notwithstanding that the state is arguing that detention was meant to protect the child (Blokhin v Russia, 2016).

In the context of children's right to be heard the **CRC Committee** has specified that children should be given the opportunity to free and voluntary consent for diversion (General Comment No. 12, § 59). When diverted, children should be informed properly so that they have a good understanding of their options ([General Comment no. 24](#), § 47). They should also have access to legal or other advice in determining the appropriateness and desirability of the measure proposed ([General Comment no. 12](#), § 59). The Committee has emphasized that *other appropriate assistance, as opposed to legal assistance*, could be acceptable for children who are diverted from the criminal justice process provided that the diversion system does not result in convictions, criminal records or deprivation of liberty ([General Comment no. 24](#), § 52).

The Council of Europe [Child Friendly Guidelines](#) encourage states to develop alternatives to judicial proceedings and clarify that offering such alternatives should not hamper children's access to justice ([Child Friendly Guidelines](#) § 24). The Guidelines further specify that children should be informed of the options they have, they should be able to choose either option and they should be able to obtain legal advice or other assistance in determining the appropriateness or desirability of the proposed alternatives ([Child Friendly Guidelines](#) § 25). In any event, alternatives to court proceedings should guarantee an equivalent level of legal safeguards (Child Friendly Guidelines § 26). More recently the [Council of Europe Strategy 2022-2077](#) encourages the development of diversion measures and alternatives to detention.

Alternative dispute resolution mechanisms have been included among the indicators to the [Sustainable Development Goal no 16](#).

## 5. Diversion and restorative justice

Diversion should be distinguished from restorative justice which has been defined in the [Basic Principles on the Use of Restorative Justice adopted by ECOSOC \(Res. 2002/12\)](#) as: " Any process in which the victim, the offender and/or other individuals or community members affected by a crime actively participate with the help of a fair and impartial third party. Examples of restorative justice include mediation, conferencing and sentencing circles."

The two concepts are related but not identical in that diversion covers with alternatives to trial or prosecution and it does not necessarily imply an interaction between the child and the victim whereas restorative justice can be but it is not always an alternative to prosecution.

Restorative justice has been subject to much academic writing which has highlighted both benefits and risks of this process (for more details and academic writing on this topic please see the References section below).

Restorative justice is mentioned in several non binding instruments at international and European level such as: [General Comment no. 24](#), § 17; the [EU Strategy on the Rights of the Child](#); the Council of Europe Committee of Ministers [Strategy](#) for the Rights of the Child (2022-2027); the Recommendation [CM/Rec\(2018\)8](#) concerning restorative justice in criminal matters, Council of Europe [Venice Declaration 2021](#). At EU level, the [victims' rights directive](#) is a binding instrument particularly interesting in relation with restorative justice.

## Further reading

### Legal Sources:

- Vienna Guidelines for Action on Children in the Criminal Justice System Recommended by Economic and Social Council resolution 1997/30 of 21 July 1997 (UN Doc. 1997/30 (1997)) (para 15)

### Academic Literature:

- Wolthuis, A., & Chapman, T. (2021). Restorative justice from a children's rights perspective (Studies in restorative justice ; 2).
- Lynch, N. (2010). Restorative justice through a children's rights lens. *The International Journal of Children's Rights*, 18(2), 161-183;
- Eliaerts, C., & Dumortier, E. (2012). Restorative justice for children: In need of procedural safeguards and standards. In *Restorative justice: Theoretical foundations* (pp. 226-245).
- Willan; Morris, A., & Maxwell, G. (Eds.). (2001). *Restorative justice for juveniles: Conferencing, mediation and circles*. Bloomsbury Publishing.
- Weitekamp, E., & Kerner, H. (2003). *Restorative Justice: Theoretical foundations*. Cullompton: Willan.
- Chapman, T. et al, *Protecting Rights, Restoring Respect and Strengthening Relationships: A European Model for Restorative Justice with Children and Young People*, 2015, at
- Dünkel, P. Horsfield and A. P?ro?anu, *European Research on Restorative Juvenile Justice*, 2015, at <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjCzs7N1Ov5ACwQQFnoECAwQAQ&url=https%3A%2F%2Flirias.kuleuven.be%2Fretrieve%2F319003&usq=AOvV>
- EFRJ Manual on Restorative Justice Values and Standards for Practice, 2021
- EFRJ website, Child justice information: <https://www.euforumrj.org/en/restorative-justice-and-childjustice> and thematic brief: <https://www.euforumrj.org/sites/default/files/202011/Thematic%20Brief%20on%20Restorative%20on>
- EFRJ-Terre des hommes, Joint Position Paper EU Strategy on the rights of the child, 2021-2024
- i-RESTORE: Protecting child victims through restorative justice (2019-2021) [https://childhub.org/en/child-protection-news/journey-so-far-and-future-steps-i-restore-closingconference-focuses-child-participation-increase-access-restorativejustice?fbclid=IwAR0fi5CS2zXbfMDfiUoXlvsaj8rRCS-8\\_1tAGot1ZoUqA5PL7pzzq1q9IOE](https://childhub.org/en/child-protection-news/journey-so-far-and-future-steps-i-restore-closingconference-focuses-child-participation-increase-access-restorativejustice?fbclid=IwAR0fi5CS2zXbfMDfiUoXlvsaj8rRCS-8_1tAGot1ZoUqA5PL7pzzq1q9IOE)
- Office of the Special Representative of the Secretary General on Violence against children: *Promoting restorative justice for children*, 2016
- Pali, B, and Randazzo, S., *Practical Guide on Implementing Restorative Justice with Children*, International Juvenile Justice Observatory, 2018

### E-learning tools:

- Alternative Ways to Address Youth: available [here](#).