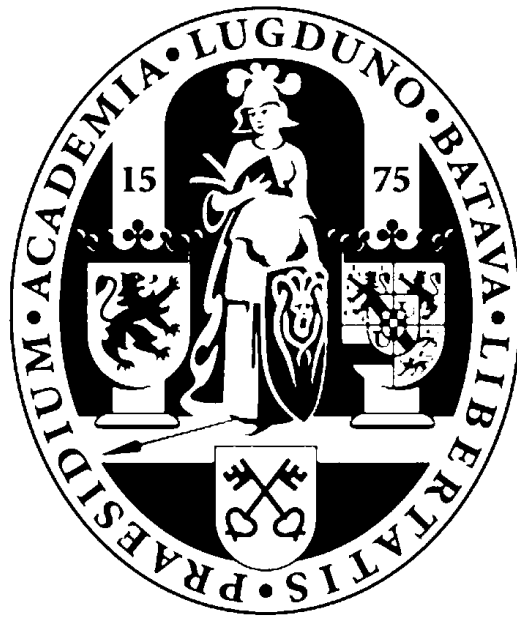


Master of Law: Advanced Studies in International Children's Rights



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**Balancing The Interests of Child Offenders and Child Victims  
through Diversion in Child-on-Child Crime: Evaluation through  
The International Children's Rights Legal Framework  
(In The Context of Indonesia Juvenile Justice System)**

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examination of the Advanced LL.M in  
International Children's Rights



Date: 09-07-2018  
Location: Leiden, the Netherlands

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## Executive Summary

This thesis aims to provide legal analysis on how diversion in a child-on-child crime can balance the interests of child offenders and child victims. Firstly, it explores the diversion regulation at the international level by analysing the CRC, its relevant General Comments, and the Beijing Rules. It highlights the solid position of diversion as an alternative to formal proceedings, not to detention or imprisonment. Furthermore, it explores the interconnection between the diversion and restorative justice and access to justice. Diversion can be used to achieve restorative justice and, at the same time, as a tool to access to justice. It also examines how the diversion is construed in the CRC Committee's Concluding Observation, whether or not it is in line with the international standards.

Second, this thesis narrows the scope on how the diversion takes into account child victims' interest in the context of child-on-child crime. It begins by analysing the child victims' rights to access to justice according to the CRC and the ECOSOC Resolution. It further explores the possibility of the diversion to facilitate child victims' access to justice, including some criticisms and benefits of victim participation in the diversion. Despite some scepticism, this thesis argues that diversion can be beneficial not only for child offenders, but also child victims.

Third, according to a solid international analysis on the role of diversion in a child-on-child crime, this thesis zooms in on the regulation of the diversion under Indonesia Juvenile Justice Law No.11/2012. It examines the extent to which diversion in Indonesia complies with the international legal standards, especially in balancing child offenders and child victims' interests in a child-on-child crime. It affirms that some aspects of the current regulation on the diversion in Indonesia need improvement. Although several drawbacks exist, there is also a positive element as Indonesia's law highly concerns on victim's interests in the decision-making of diversion.

Finally, this thesis analyses the potentiality of the CRC and the CRC Committee to further improve the diversion regulation in a child-on-child crime that can assist Indonesia and the CRC's member states in general. The child's best interest principle and the right to be heard of both child offenders and child victims should be at the centre of the diversion process. The CRC Committee should be consistent in defining the diversion's concept in the countries' concluding observation. It can also establish more provision and guidance concerning the diversion in crime with victims, or more specifically, child-on-child crime, in its revision on General Comment No. 10. Accordingly, this thesis also recommends some solutions to Indonesian authorities for further improvement regarding the diversion at the national level, mainly focusing the need for consistency in the prevailing laws.

Hopefully, this thesis will provide a better understanding on the use of diversion in a child-on-child crime that can be influential for children in conflict (child offenders) and children in contact (child victims) with the law. Thus, diversion can be a preferable solution to deal with juvenile offenders and to facilitate better access to justice for child victims at the same time. From children's rights perspective, it would affect children, not only to prevent adverse impacts of the formal trial, but also for a better development and wellbeing in the long run.

## **Key Words**

Access to Justice; Child Offenders; Child-on-Child Crime; Children's Rights; CRC; Child Victims; Diversion; Restorative Justice;

## Overview of Main Findings

This thesis aims to analyse the compliance of the diversion's regulation in Indonesia with the international children's rights standards, particularly on how to balance the interests of child offenders and child victims in a child-on-child crime. It also presents a solid approach on how the diversion concept intersects with restorative justice and access to justice in dealing juvenile crimes. The general finding from the study is that the diversion in Indonesia has been sufficiently in compliance with the international legal standards. It is a mechanism of resorting young offenders from formal judicial proceedings, it aims to prevent stigma and holds the accountability of child offenders, it requires a free and voluntary consent from the children concerned, and it can be done at each stage of the proceeding. Nevertheless, some drawbacks remain, for instance, the inconsistency of the diversion's legal requirements, consideration of being a recidivist even after the diversion is applied, mandatory parental involvement, and the lack of implementing regulations of the diversion.

Moreover, this thesis provides three main findings and contributions. First, this thesis presents a holistic understanding of the diversion's elements at the international level by analysing the concept determined in the CRC, General Comment, and the Beijing Rules. It reaffirms the diversion as an alternative measure for dealing with juvenile offenders without going to formal judicial proceedings. However, inconsistency remains because the CRC Committee does not sufficiently standardize its concept of diversion. In some countries' concluding observations, it promotes the use of diversion as non-judicial measures of children accused of criminal offences or measures for dealing with children accused of having infringed penal law without resorting to judicial proceedings. However, other concluding observations still define diversion as an alternative measure to detention.

Second, this thesis provides an analysis of the intersection between the diversion, restorative justice, and access to justice at the international level. Such solid paradigm is used to establish the diversion mechanism that is not only benefiting child offenders but also child victims. In a child-on-child crime, diversion is a tool to achieve the primary goal of restorative justice aiming to identify child offenders' obligation to satisfy the needs and promote healing of child victims. However, diversion can be wholly excluded from restorative justice if it is applied in victimless cases where no victims exist (i.e., gambling, drug abuse). Although the diversion is often seen to be more beneficial for child offenders, child victims can use diversion as their attempts to access (restorative) justice to obtain a fair, timely, and just remedy.

Third, this thesis reveals that the diversion under Indonesia Juvenile Justice Law 11/2012 is more progressive compared to the CRC standards when it comes to the consideration of child victims' interest and involvement. Child victims are heard in the decision-making of the diversion, and their approval is required before the diversion is applied. In a child-on-child crime, child victims' consent and participation should be accompanied by their parents/guardian. These considerations are missing in the diversion's regulation at the international level. Instead of regulating the diversion in a child-on-child crime, the regulation of diversion in the General Comment No. 10 is more applicable in the context of victimless crimes. The General Comment No. 10 fails to address victims' consent and their participation as the diversion's requirements. International legal standards are also lacking of provisions on how diversion is applied to a child-on-child crime. This thesis highlights the importance of international guidance on the implementation of diversion in a child-on-child crime. It also contributes by advocating that the guidance can be embedded in the current revision of the General Comment No. 10. The more comprehensive and clearer guidance would enhance a better legal safeguard and protection of the rights of children in the diversion process.



## List of Abbreviations

ATJ	Access to Justice
Beijing Rules	United Nations Standard Minimum Rules for the Administration of Juvenile Justice 29 November 1985
CRC	Convention on the Rights of the Child
CRC Committee	Committee on the Rights of the Child
ECOSOC Resolution	The Economic and Social Council Resolution 2005/20 Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime
Law 11/2012	Indonesia Juvenile Justice Law No.11/2012, 30 July 2012
OHCHR	Office of the United Nations High Commissioner for Human Rights
OPSC	Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social, and Cultural Rights
Indonesia Penal Code	Criminal Code No.1/1946 <i>jo.</i> Law No. 7/1958
MACR	Minimum Age of Criminal Responsibility
RJ	Restorative Justice
The Attorney General's Decree	The Decree No. PER-006/A/J.A/04/2015 regarding Guidelines on the Implementation of Diversion at the Prosecution Level
The Head of Police Institution Decree	The Decree No. Pol.TR/1124/XI/2006 <i>jo.</i> No. Pol. TR/359/DIT.I/VI/2008 regarding Guidelines on Dealing with Children in Conflict with the Law
The Supreme Court's Decree	The Indonesian Supreme Court's Decree No. 4/2014 regarding Guidelines on the Implementation of Diversion in Juvenile Justice System
UN	United Nations
UNDP	United Nations Development Programme
UNICEF	United Nations Children's Fund
UNODC	United Nations Office on Drugs and Crim

## 1. Introduction

### 1.1 Brief Background

UNICEF has estimated that more than 1 million children are behind bars worldwide.<sup>1</sup> During subsequent proceedings in the juvenile justice system, harmful effects may arise, such as the stigma of conviction and sentence.<sup>2</sup> Child offenders are labelled either as a criminal, bad guy or troublemaker throughout the proceedings, and the consequences can last for a lifetime. Severe punishments may also have adverse effects on young offenders, weakening their already fragile links with society, nourishing negative networks, and resulting in an increase of future recidivism.<sup>3</sup> Due to the adverse consequences on children's wellbeing and development, incarceration should be seen as a measure of last resort and, if conducted, for the shortest period of time.<sup>4</sup>

It is thus essential to find alternative measures, not only for an imprisonment but also for formal judicial proceedings. The awareness of diverting minors from formal proceedings has been growing immensely at the international level through the emergence of Beijing Rules, and further strengthened by a legally-binding document—the Convention on the Right of the Child (“**CRC**”).<sup>5</sup>

While the CRC is quite explicit in adopting the concept of diversion, it also embeds the idea of Restorative Justice (“**RJ**”), and Access to Justice (“**ATJ**”) implicitly in some of its provisions. There are various definitions of the concept of RJ and ATJ. For this thesis, the author adopts the meaning of RJ as a process involving the participation from the victim and the offender, or any other parties by the crime committed, to reach an agreement in settling the case, supported by the help of a facilitator.<sup>6</sup> ATJ, on the other hand, is the right to obtain a fair, timely, and effective remedy for violations of rights according to the prevailing national and international standards, through the process that protects children's dignity and promotes their development.<sup>7</sup>

The interrelation between the concept of diversion, RJ, and ATJ is rather complicated because each has its own characteristics in addressing children's rights in the juvenile justice system. However, they could also intersect with each other particularly in balancing the interests of child offenders and child victims. As this thesis aims to analyse the rights and interests of child offenders and child victims in the diversion process in Indonesia, it needs a solid international framework of diversion. Therefore, it is also crucial to examine crosscutting principles between diversion and RJ and ATJ concepts,

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<sup>1</sup> Human Rights Watch, *Children Behind Bars, The Global Overuse of Detention of Children*, available at <https://www.hrw.org/world-report/2016/children-behind-bars> (last accessed 9 May 2018).

<sup>2</sup> United Nations, General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, the commentary of Art.11 (1985) [Hereinafter “Beijing Rules”].

<sup>3</sup> G. Lotti, *Tough on Young Offenders: Harmful or Helpful?*, Warwick Economics Research Papers, at. 2 (2016)..

<sup>4</sup> United Nations, General Assembly, *Convention on the Rights of the Child*, article 37 (b) (1989) [Hereinafter “CRC”].

<sup>5</sup> T. Liefwaard, *Juvenile Justice From An International Children's Right Perspective*, in W. Vandenhoele et al. (Ed.), *Routledge International Handbook of Children's Rights Studies*, at. 237 (2015).

<sup>6</sup> Refer to the definition given by the UNODC, *Custodial and Non-Custodial Measures Alternative to Incarceration*, at. 13 (2006). The complete definition is provided later under subchapter 2.4 of this thesis.

<sup>7</sup> Refer to the definition given by the UNICEF (2008). The complete definition is addressed under subchapter 3.3 of this thesis.

the interrelation among these notions, and their differences in the context of child-on-child crime settlement. Looking at the national context, Indonesia is bound by the CRC since its ratification in 1990, and thus the CRC is applicable across the country.<sup>8</sup> Hence, Indonesia has the international obligation of applying the diversion according to Article 40 (3) (b). In 2012, Indonesia absorbed the diversion concept in the Juvenile Justice Act 2012 (“**Law 11/2012**”), aiming to promote the restorative approach instead of the old concept of retributive justice.

This thesis assesses the diversion thoroughly in child-on-child crimes,<sup>9</sup> since cases such as persecution and violence among children are quite prevalent in Indonesia. According to the data released in 2017, 84% of students in Indonesia experienced violence in schools.<sup>10</sup> In more detail, 75% of students admitted of committing violence against their peers.<sup>11</sup> From UNICEF report, 50% of children suffered bullying at school.<sup>12</sup> With such enormous amount of cases, it may contribute to the increase of juvenile offenders in the criminal justice systems that often result in the imprisonment of children. Therefore, it is encouraging to promote diversion as an alternative measure in child-on-child crimes. In such particular case, the authorities need to consider the interests of child offenders and child victims adequately according to the international and national legal standards.

In Indonesia, diversion can apply both in crimes with or without victims. In the case where a victim exists, diversion requires the victim’s approval whether he is an adult or a child victim.<sup>13</sup> For the latter, approval from his parents/guardian is needed. From a pedagogical perspective, diversion will benefit child offenders and appears to be in ‘the best interest of the child’ as it redirects young persons from formal proceedings. While adult victims could decide fully on their own whether or not to approve the diversion, the case is somewhat different for child victims. In a child-on-child crime, child victim’s parents often argue that channelling the offender from the trial is an unfair treatment in comparison with the offence committed. They want the offender to suffer similar pain (or even worse) as what their child had experienced.

The victim’s approval to enter the diversion in a child-on-child crime can be problematic. On one hand, it hampers the full and effective implementation of diversion because not all victims (or their parents) agree to give their consent. On the other hand, the decision of granting an approval is solely the rights of the victim as he has the right to be heard in the judicial proceedings concerning him.<sup>14</sup> Hence, the use of diversion remains debatable in bridging these conflicting interests.

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<sup>8</sup> Indonesia ratified the CRC on 5 September 1990 through the Presidential Decree of Republic Indonesia Number 36 Years of 1990 regarding The Ratification of the CRC

<sup>9</sup> Here child-on-child crime means every criminal offences committed by a child (person under the age of 18) against a child.

<sup>10</sup> From the report, this percentage is higher than some Asian countries such as Vietnam (79%), Nepal (79%), Cambodia (73%), and Pakistan (43%), available at <http://www.kpai.go.id/berita/indonesia-peringkat-tertinggi-kasus-kekerasan-di-sekolah/> (last accessed 22 May 2018).

<sup>11</sup> The data was released by KPAI (*Komisi Perlindungan Anak Indonesia*) or Indonesian Child Protection Commission in 2017 based on the research conducted by International Center for Research on Women, available at <http://www.kpai.go.id/berita/pers-release-kekerasan-di-sekolah-marak-kpai-menyelenggarakan-fgd-analisis-kebijakan-penanganan-kekerasan-di-pendidikan/> (last accessed 22 May 2018).

<sup>12</sup> UNICEF, *Annual Report Indonesia 2016*, at. 17 (2016).

<sup>13</sup> *Indonesia Law No. 11 years of 2012 regarding Juvenile Justice System*, article 9 and 10 (2012) [hereinafter Law 11/2012].

<sup>14</sup> CRC, *supra* note 4, art. 12.

## 1.2 Aim and Research Questions

This research aims to evaluate the diversion concept in Indonesia from the international children’s right perspectives and how it balances the interests of child offenders and child victims. The study further assesses the possibility of the international children’s rights instruments and the CRC Committee to improve the regulation of diversion. This thesis intends to give constructing critics and suggestions to apply the diversion as a ‘win-win solution’ in child-on-child crimes.

This thesis seeks to answer these twofold questions: To what extent diversion in Indonesia complies with the international children’s rights standards in terms of balancing the interests of child offenders and child victims in child-on-child crimes? And, how could the international children’s right instruments and the CRC Committee contribute to further improving diversion in Indonesia in ways that may benefit both child offenders and child victims?

In order to answer the above queries, this thesis will also address the definition of diversion in light of the international children’s rights legal frameworks, the interconnection between diversion, restorative justice, and access to justice under the international children’s rights standards, and finally assess the regulation of diversion under Indonesia Juvenile Justice System.

## 1.3 Methodology and Framework of Analysis

The research will explore the theoretical perspectives of diversion under the international legal frameworks. A solid concept of diversion is required to avoid misconception with the concept of ATJ and RJ in a child-on-child crime. Those concepts often look similar in some elements but not necessarily the same. Using the features of ATJ and RJ, this thesis seeks how children’s right standards harmonize child offenders and child victims’ interests in the diversion process. The framework used is an analysis of the interconnection between diversion, RJ, and ATJ at an international level. Further, such concept is also used **to evaluate** the compliance of diversion in Indonesia with the international standards. For a better understanding, the author provides the following framework of analysis.

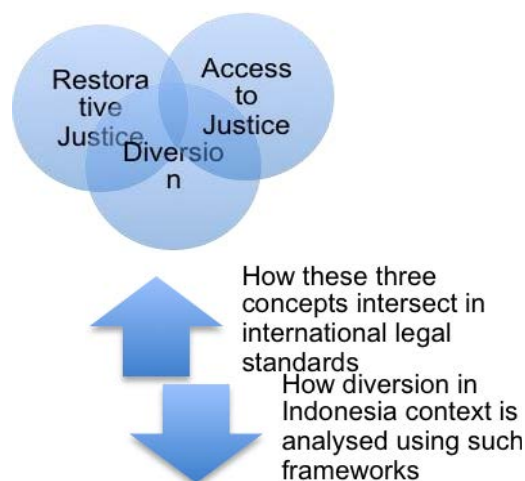


Figure 1. Framework of Analysis

With the above framework, **legal-desk research** is used through the international children's right-related instruments. It includes the UN Documents (CRC, General Comments, Concluding Observations, Beijing Rules), national legislation (Indonesian Law No. 11/2012), related data, NGO reports, and academic literature on the concept of diversion, ATJ, and RJ. Due to time constraint and feasibility, the author did not include field-research for gathering the empirical data. Alternatively, the author made use of related regulations, literature, national case study, and first-hand researches from Indonesian scholars to get the data and information on the use of diversion in practice.

#### 1.4 Scope, Limitations and Definitions

The scope of this thesis is limited to the CRC, Beijing Rules, the CRC Committee's General Comment, the ECOSOC Resolution, and other relevant international standards, which are related to or contain substantial provisions on children's rights in the juvenile justice system, particularly on the use of diversion, ATJ, and RJ. This thesis excludes other international human rights standards such as the ICCPR, ICESCR, and their Committee's General Comment.

At the national level, this thesis only used Indonesia Juvenile Justice Law 11/2012, Indonesia Penal Code, and some relevant institution's decree regarding diversion in the juvenile justice system. This thesis also analysed 2 (two) district court cases concerning the subject matter. This thesis focuses on the legal analysis and exempts the more practical issues regarding the implementation of diversion.

As this thesis focuses on addressing the rights of child offenders and child victims in the diversion, the author uses the definition of a child as every human being below the age of eighteen years unless defined otherwise in the national laws.<sup>15</sup> The CRC does not differentiate the definition of child offenders and child victims, while in Indonesia Law 11/2012 such distinction exists. Child offenders and child victims are those below the age of 18 years.<sup>16</sup> However, for child offenders, the law concerns explicitly that the child should be at least 12 years (as the MACR in Indonesia).<sup>17</sup>

With regard to the three core concepts of this thesis, the author is aware of multiple definitions of diversion, restorative justice, and access to justice. To have a better understanding, the author adopts the definition of diversion stipulated in General Comment No. 10 which is "an intervention without resorting to judicial proceedings, involving removal from criminal/juvenile justice processing and referral to an alternative (social) services for children, alleged as, accused of, or recognized as having infringed the penal law."<sup>18</sup>

The author uses the definition provided by the UNICEF (2008) in defining access to justice as the right to obtain a fair, timely and an effective remedy for violations of rights, as put forth in the national and international norms and standards, through adapted processes that protect children's dignity and promote their development.<sup>19</sup>

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<sup>15</sup> CRC, *supra note 4*, art. 1.

<sup>16</sup> Law 11/2012, *supra note 13*, art. 1 para. 3 and para. 4.

<sup>17</sup> *Id.*, art. 1 para. 3.

<sup>18</sup> The CRC Committee General Comment No. 10, *Children's Right in Juvenile Justice*, CRC/C/GC/10, para. 24 and para. 27 (2007) [Hereinafter GC 10].

<sup>19</sup> Originally refer to UNICEF, *Children's Equitable Access to Justice*, Central and Eastern Europe and Central Asia, at. 13 (2015) and UNICEF, *UN Common Approach to Justice for Children 2008*.

Furthermore, as mentioned before, the author refers to the definition of restorative justice by the UNODC (2006), arguing the concept as any process in which the victim and the offender and, where appropriate, any other individuals or community members affected by the crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator that leads to an agreement.<sup>20</sup>

## 1.5 Outline

This thesis consists of 6 (six) parts. After the introductory chapter, Chapter 2 provides the reader with a general concept of diversion under the international children's right instruments. The chapter distinguishes the differences between diversion and RJ, and argues how diversion aims to be an alternative to formal proceedings not to sentencing or detention. The focus of Chapter 2 is on the diversion's perspective from child offenders.

Chapter 3 briefly examines the concept of ATJ for child victims and elaborates their rights in the juvenile justice systems. Moreover, this chapter explores how diversion can be used as a tool for child victims to access justice in a child-on-child crime. It further argues the need for considering victim's interest in the diversion and the benefits of diversion for child victims. Hence, the focus of Chapter 3 is on the diversion's perspective from child victims.

Pursuant to the international frameworks of diversion from the perspectives of child offenders and child victims as identified in Chapter 2 and Chapter 3, Chapter 4 explores how Indonesia Law 11/2012 sets out the diversion regulation. This part thoroughly assesses the legal requirements, procedures, the role of the parties involved, challenges, and its conformity (or not) with the CRC.

Chapter 5 uses the analysis explored in the previous chapters as the foundation to examine the role of the CRC and the CRC Committee at the international level. Mainly, regarding their future potential in bridging the interests of child offenders and child victims in diversion. This analysis can benefit not only in the context of Indonesia but at the global level.

Lastly, Chapter 6 follows with the conclusions and recommendations.

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<sup>20</sup> UNODC, *supra note* 6, at. 13 (2006).

## 2. Diversion under International Children's Right Standards: A Child Offender Perspective

### 2.1 Introductory Elements

The notion of having a specific juvenile criminal policy begun since the 1960s, while scholars considered the importance of balancing the state's intervention against young offenders by taking into account the principles of subsidiarity and proportionality.<sup>21</sup> However, the supporting instrument was only established in 1985 through the enactment of the Beijing Rules, introducing the general concept of diversion. It involves the removal of juvenile offenders from the criminal trial and redirects them to a formal or informal community support services to avoid negative effects of juvenile justice proceedings.<sup>22</sup> By maintaining the young offender's ties with his family and the community, "diversion avoids the potential effect of a formal delinquent label which could adversely affect his self-image and contribute to subsequent delinquent behaviour."<sup>23</sup> From the state's view, diversion is also more effective for time and money constraints. It reduces the burden of cases in court and appears to be less costly to maintain rather than the formal system that expands the distribution of money to juvenile police, courts, and corrective functions.<sup>24</sup> Dunkel mentions, at least, the following six supporting reasons to justify the diversion practice:

1. Preventing negative stigmatization;
2. Promoting educative measures instead of punishment;
3. Avoiding disproportionate sentencing;
4. Reducing (or limiting) the courts' caseload;
5. Reducing state intervention in the juvenile delinquency;
6. Promoting advantages of less severe punishment.<sup>25</sup>

Pertaining the possible positive outcomes of diversion, it is an alternative measure that is specifically tailored to the child's needs. Thus, it should be legally and sufficiently regulated under the laws, both at the international and national level. This chapter assesses the concept of diversion in the international standards from the perspective of child offenders.

### 2.2 International Legal Frameworks

#### 2.2.1 CRC

As the first legally binding document concerning children's rights, the CRC is the most ratified UN Convention worldwide.<sup>26</sup> Although the CRC itself does not explicitly mention specific articles as its

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<sup>21</sup> F. Dunkel, *Diversion: A Meaningful and Successful Alternative to Punishment in European Juvenile Justice System*, in J. Junger-Tas and F. Dunkel (Eds), *Reforming Juvenile Justice*, at. 147 (2009).

<sup>22</sup> Beijing Rules, *supra* note 2, art. 11.

<sup>23</sup> S.A. Hinshaw, *Juvenile Diversion: An Alternative to Juvenile Court*, *Journal of Dispute Resolution*, Vol. 1993, No. 2, at. 312 (1993). Originally refer to T.S. Bynum and J.R. Greene, *How Wide the Net?*, in Scott H. Decker (Ed.), *Juvenile Justice Policy: Analyzing Trends and Outcomes*, at. 129, 130 (1984).

<sup>24</sup> *Id.*, at. 313.

<sup>25</sup> Dunkel, *supra* note 21, at. 149.

<sup>26</sup> Up to the date of the writing of this thesis, all countries have ratified the CRC except the US. In total, 196 countries are the member states of the CRC. The information refers to the United Nations Treaty Collection,

general principles in the convention, it recognizes 4 (four) core principles in its Reporting Guidelines.<sup>27</sup> It introduces the general principles consisting of the right to equality and non-discrimination (Art. 2 CRC), the best interests of the child (Art. 3 CRC), the right to life, survival and development (Art. 6 CRC) and the right to participation (Art. 12 CRC).<sup>28</sup> The general principles need to be read as horizontal implementation and interpretation principles throughout all the provisions of the CRC.<sup>29</sup> In implementing other articles in the CRC, state parties should provide relevant information on the application of these principles.<sup>30</sup> It aims to guide the interpretation of the convention as a whole and thus guide national programs of implementation.<sup>31</sup> Moreover, the CRC is also the first hard law document concerning children in the justice system, in comparison with some soft laws related to juvenile justice such as Beijing Rules, Havana Rules, Riyadh Guidelines, and Vienna Guidelines.<sup>32</sup>

In the CRC, Article 40 (3) (b) embeds the idea of diversion. It establishes a concept of dealing with children in conflict without resorting to judicial proceedings.<sup>33</sup> Slightly different from the wording in the Beijing Rules, the CRC emphasizes that diversion should not lead to negligence of the child's human rights and legal safeguards.<sup>34</sup>

Children's rights are universal, indivisible, interdependent, and interrelated in nature.<sup>35</sup> When implementing diversion, Article 40 (3) (b) cannot stand alone. It relates to other provisions in the CRC, particularly those concerning children's rights in the juvenile justice.

For instance, Article 37 (b) concerns on children who are deprived of their liberty. A central message from this provision is that the deprivation of liberty should be used only as a measure of last resort and for the shortest period of time.<sup>36</sup> Diversion can relate to the deprivation of liberty if it diverts child offenders from formal proceedings to a closed child protection facility.

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available at [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en) (last accessed 8 June 2018).

<sup>27</sup> OHCHR, CRC Treaty Specific Reporting Guidelines, available at [www2.ohchr.org/english/bodies/crc/docs/treaty\\_specific\\_guidelines\\_2010.doc](http://www2.ohchr.org/english/bodies/crc/docs/treaty_specific_guidelines_2010.doc) (last accessed 8 June 2018).

<sup>28</sup> W. Vandenhoe, Children's Rights from A Legal Perspective, in W. Vandenhoe *et al.* (Ed), *Routledge International Handbook of Children's Rights Studies*, at. 31 (2015).

<sup>29</sup> E. Verhellen, The Convention on the Rights of the Child, Reflections from a Historical, Social Policy, and Educational Perspective, in W. Vandenhoe *et al.* (Ed), *Routledge International Handbook of Children's Rights Studies*, at. 49 (2015).

<sup>30</sup> K. Hanson & L. Lundy, Does Exactly What it Says on the Tin?, *International Journal of Children's Rights*, Vol. 25, at. 291 (2017).

<sup>31</sup> UNICEF & OHCHR, *Judicial Implementation of Article 3 of the Convention on the Rights of the Child in Europe*, at. 11 (2012).

<sup>32</sup> Vandenhoe, *supra* note 28, at. 33.

<sup>33</sup> CRC, *supra* note 4, art. 40 (3) (b).

<sup>34</sup> *Id.*, See also GC. 10, *supra* note 18, para. 10.

<sup>35</sup> The CRC Committee General Comment No. 14, *The Right of the Child to Have His or Her Best Interests Taken as A Primary Consideration (Art.3, para. 1)*, CRC/C/GC/14, para. 16 (2013) [Hereinafter GC 14].

<sup>36</sup> CRC, *supra* note 4, art. 37 (b).



Diversion can also link to Article 40 (1) as it promotes the reintegration of child offenders to the society and the determination of the child's age by using a human-rights-based treatment.<sup>37</sup> The CRC Committee (hereinafter often also referred to as “**the Committee**”) strongly prohibits any treatment that leads to stigmatization, social isolation, or negative publicity of the child.<sup>38</sup> Diversion is useful to avoid stigma and criminal records that may affect the child detrimentally.<sup>39</sup>

Furthermore, diversion can also interact with Article 40 (2) regarding a fair trial. The assessments, procedures, and consequences of the diversion should be undergone in light of fair trial principles. If the diversion failed, child offenders continue to the judicial proceedings. In this case, a fair and just trial principle must be applied.<sup>40</sup> Fair trial principles involve, among others, no retroactive juvenile justice, the presumption of innocence, the right to effective participation in the proceedings, legal or other appropriate assistance, and freedom from compulsory self-incrimination.<sup>41</sup>

Therefore, in implementing the diversion, the authorities shall take into account other articles in the CRC, such as the general principles and the juvenile justice-related articles mentioned above.

#### 2.2.1.1 Diversion in General Comment No. 10

As mentioned previously, no specific term of ‘diversion’ appears in any articles in the CRC. Nevertheless, Article 40 (3) (b) of the CRC provides the concept of diversion as mentioned below.

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.<sup>42</sup>

The wording used in the article reflects Article 11 (1) of the Beijing Rules, stressing that diversion is a method where juvenile offenders are taken away from judicial proceedings. Van Bueren defines diversion as “the utilization of formal or informal means other than the criminal justice system to deal with young offenders.”<sup>43</sup>

The CRC Committee further elaborates a more detailed concept of diversion in its General Comment No. 10 (“**GC 10**”). The CRC’s general comment can be a valuable source for being, at least, a guideline for states’ implementation of rights, and a tool in interpreting the Convention.<sup>44</sup> It provides the interpretation of the content of human right provisions and focuses on the thematic issues or

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<sup>37</sup> CRC, *supra* note 4, art. 40 (1).

<sup>38</sup> GC 10, *supra* note 18, para. 29.

<sup>39</sup> *Id.*, para. 25, 27.

<sup>40</sup> *Id.*, para. 28.

<sup>41</sup> CRC, *supra* note 4, art. 40 (2).

<sup>42</sup> *Id.*, Article 40 (3) point b.

<sup>43</sup> G. Van Bueren, *A Commentary on the United Nations Convention on the Rights of the Child Article 40: Child Criminal Justice*, Brill, at. 27-28 (2006).

<sup>44</sup> D. Weissbrodt *et al.*, The Role of the Committee on the Rights of the Child in Interpreting and Developing International Humanitarian Law, *Harvard Human Rights Journal*, Vol. 24, at. 120 (2011).

methods of work.<sup>45</sup> Although not binding, general comments have a considerable legal weight and are soft laws instruments that interpret and add detail to the expressed rights in treaties.<sup>46</sup>

First of all, the Committee defines diversion as “an intervention without resorting to judicial proceedings involving removal from the criminal/juvenile justice processing and referral to an alternative (social) services for children, alleged as, accused of, or recognized as having infringed the penal law”.<sup>47</sup> The Committee notes, given the fact that child offenders commit relatively minor offences, diversion should be a well-established practice that can and should be used in most cases.<sup>48</sup>

Second, the Committee does not limit the use of diversion only to minor offences and first-time child offenders.<sup>49</sup> Meaning that diverting juvenile offenders from judicial proceedings is also applicable to major offences and a recidivist child offender. According to the Committee, children in conflict with the law, including child recidivists, have the right to be treated in an appropriate way promoting his reintegration and constructive role in society.<sup>50</sup> In dealing with child recidivists, the authorities should be more cautious in using diversion to prevent further recidivism. For example, a boy is caught committing shoplifting continually in a store. The primary motive may be extreme poverty. Hence, the authorities should assess the root causes of the crime and provide an alternative program tailored to the child’s needs. Accordingly, it may reduce the child offender’s possibility of being a recidivist in the future.

Third, the Committee provides some examples of diversion in community-based programs, such as community service, supervision and guidance by social workers or probation officers, family conferencing, restitution to and compensation of victims.<sup>51</sup> Nonetheless, it should not be limited only to these forms. The Committee leaves open to states parties on deciding the nature and the content of diversion in their respective national legislation in so far human rights of children and legal safeguards are respected.<sup>52</sup> The authorities should ensure that the diversion program is tailored to fit the individual therapeutic and developmental needs of the young person.<sup>53</sup> Therefore, state parties are allowed to develop any diversion program that is suitable and feasible to execute in their country, of their specific social and cultural values.

Fourth, the Committee also underlines some requirements to enter into diversion as the followings:

- 1) There is clear evidence that the child committed the suspected crimes;
- 2) He/she freely and voluntarily admits accountability;
- 3) No intimidation has been used to get that admission;
- 4) Such admission will not be used against him/her in any subsequent legal proceedings.<sup>54</sup>

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<sup>45</sup> P. Gerber *et al*, General Comment 16 on State Obligations Regarding the Impact of the Business Sector on Children’s Rights: What is Its Standing, Meaning and Effect?, *Melbourne Journal of International Law*, Vol. 14, at.4 (2013).

<sup>46</sup> *Id.*, at. 8.

<sup>47</sup> GC 10, *supra* note 18, para. 24, 27.

<sup>48</sup> *Id.*, para. 24.

<sup>49</sup> *Id.*, para. 25.

<sup>50</sup> *Id.*, para. 23. See also CRC, *supra* note 4, art. 40 (1).

<sup>51</sup> *Id.*, para. 27.

<sup>52</sup> *Id.*,

<sup>53</sup> The Asia Pacific for Juvenile Justice, *A Voice for the Future of Juvenile Justice in Asia-Pacific*, at. 26 (2013).

<sup>54</sup> GC 10, *supra* note 18, para. 27.

The Committee further states that parental consent may be required when the child is below the age of 16 years.<sup>55</sup> As mentioned in Article 18 of the CRC, parents (or legal guardians) have the primary responsibility for the upbringing and development of the child.<sup>56</sup> Parents have the right to know and assist their child in any decision-making concerning the diversion.

Fifth, the national law shall clarify in which cases diversion is applicable.<sup>57</sup> It means that the CRC Committee also recognizes there are certain cases where diversion is not possible to apply. Moreover, the Committee stresses that the child should have the opportunity to challenge “the appropriateness and desirability of the diversion offered and having a possibility to review the measure.”<sup>58</sup>

Sixth, diversion shall only be deemed complete once it results in “a definite and final closure of the case.”<sup>59</sup> In the case of crime with victims, such as child-on-child crime, the diversion ends once child offenders and child victims agree to divert the case from a formal trial to other alternative measures.

Unlike the formal trial, diversion aims to prevent the issuance of the criminal record of child offenders. Tang and Brown describe that a criminal record has “far-reaching effects on a child, long after their sentence.”<sup>60</sup> It affects their future appearances, employment, obtaining specific licenses, visa applications, insurance, credit loan, among other things. Thus, the Committee expressly mentions that the diversion record should not be considered as a ‘criminal record.’<sup>61</sup> In other words, a child who completes the diversion program should remain clean regarding the child’s criminal status, and not to be recognized as a recidivist.

#### 2.2.1.2 Children Deprived of Liberty

The CRC devotes one particular article concerning children who are deprived of their liberty. Article 37 (b) explicitly affirms “no child shall be deprived of his or her liberty unlawfully or arbitrarily.” Deprivation of liberty against children shall be in a conformity with the law, used only as a measure of last resort and for the shortest appropriate period of time.<sup>62</sup>

Even though Article 37 (b) does not address the concept of diversion, it is still relevant given the existence of diversion programs that redirect the child to a particular child protection system. Such type of diversion can be constituted as a form of deprivation of liberty. In its toolkit, UNICEF mentions

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<sup>55</sup> *Id.*,

<sup>56</sup> CRC, *supra* note 4, art. 18 (1).

<sup>57</sup> GC 10, *supra* note 18, para. 27.

<sup>58</sup> *Id.*,

<sup>59</sup> *Id.*,

<sup>60</sup> A. Tang & L. Brown, Children’s Criminal Record and Convictions, Legal Aid, Children’s Legal Service Conference, available at [https://www.legalaid.nsw.gov.au/\\_data/assets/pdf\\_file/0004/15196/29-Oct-2012-A-Tang-Childrens-spent-convictions.pdf](https://www.legalaid.nsw.gov.au/_data/assets/pdf_file/0004/15196/29-Oct-2012-A-Tang-Childrens-spent-convictions.pdf) (last accessed 26 April 2018).

<sup>61</sup> GC 10, *supra* note 18, para. 27. It explains that confidential records can be kept only for administrative and review purposes and shall remain confidential unless urgently needed by authority. Diversion record shall be used exclusively and only for a limited period. For example, a diversion record can only be accessed for a maximum of one year and made available only to competent authority, not general public.

<sup>62</sup> CRC, *supra* note 4, article 37 (b).

one example of diversion to a closed mental health treatment.<sup>63</sup> The juvenile justice system should be child-friendly and operate within a broader national child protection system.<sup>64</sup> While the vast majority of children in prison are there for petty crimes and/or due to lack of proper support for themselves and their families,<sup>65</sup> it is still a possibility for the young offender to be diverted to a child protection system in the country. Before diverting child offenders to the system that deprives their liberty, the authority should concern on the requirements set out under Article 37 (b).

### 2.2.2 Beijing Rules

Beijing Rules establishes a specific provision regarding diversion in its Article 11. It considers diversion as a method “to dealing with juvenile offenders without resorting to formal trial by the competent authority.”<sup>66</sup> Diversion should not be applied only at the police level, as ‘the main gate’ for the juveniles who enter the criminal justice system, but also at the prosecution or court level or other agencies dealing with juvenile cases. Article 11 of the Beijing Rules distinguishes two different practices of diversion including; referral to community or other services and non-intervention at the outset without any referral to alternative (social) services.<sup>67</sup> The latter shall only be used for non-serious offence and where other stakeholders (family, school or other social institutions) have already reacted, or are likely to react in an appropriate and constructive manner.<sup>68</sup> For instance, in the case of peer fighting in school, diversion in the form of family conferencing may be suitable rather than a formal trial. Once the conference reached an agreement, there is no need to divert the child to a community or any social services.

Predating the CRC, Beijing Rules already raises the concern of ‘the child’s right to be heard.’ Article 11 (3) mentions the importance of having consent from the juvenile (or her or his parents or guardian) before the diversion program takes place. The issue of consent is significant because without the voluntary consent, the diversion in the form of community service would contradict the Abolition of Forced Labor Convention.<sup>69</sup> If the authority, for instance, redirects the child to serve at nursing homes or public libraries without his consent, it may fall under child labor. Moreover, the Beijing Rules also underlines that there should not be any coercion and intimidation at all levels in the diversion process.<sup>70</sup> Therefore, even if the juvenile has given his consent, he can challenge it where the consent was made under pressure.

Beijing Rules explicitly mentions that diversion should not be necessarily limited to petty cases.<sup>71</sup> Therefore, theoretically, it gives a possibility to apply the diversion in major offences such as homicide, rape, or sexual abuse. The Rule determines that the diversion can apply even when more serious

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<sup>63</sup> UNICEF, Toolkit on Diversion and Alternatives to Detention, para. 9, at. 33 (2009), *available at* <http://dag.un.org/bitstream/handle/11176/400572/UNICEF%20Toolkit%20on%20Diversion%20and%20alternati%20detention%282009%29.pdf?sequence=57&isAllowed=y> (last accessed 22 May 2018).

<sup>64</sup> Save the Children, *Why Effective National Child Protection System Are Needed*, at. 9 (2006).

<sup>65</sup> *Id.*,

<sup>66</sup> Beijing Rules, *supra* note 2, art. 11 (1). See also art. 14 (1) that mention the competent authority can be the court, tribunal, board, council etc.

<sup>67</sup> *Id.*, The commentary of art. 11.

<sup>68</sup> *Id.*, The commentary of art. 11.1.

<sup>69</sup> *Id.*, The commentary of art. 11.3.

<sup>70</sup> *Id.*,

<sup>71</sup> *Id.*, The commentary of art. 11.2

offences have been committed, if it is the first offence the young offender made, or he committed the crime under peer pressure.<sup>72</sup> However, it should be determined on a *case-by-case* basis. In the context of high-risk offences, the authorities should give due weight to the interest of the victims and public society. Article 11 (4) of the Beijing Rules encourages the authorities to provide restitution and compensation to the victims where young offenders are diverted from a formal trial. Nevertheless, the Rule has a lack of detail of how such compensation should be given, particularly in a child-on-child crime, where the minor victim is also entitled the right to redress in the justice system.

Diversion should not be seen as merely channelling juvenile offenders from criminal justice processes. It also ought to mean as a diversion into appropriate preventive services to promote future wellbeing.<sup>73</sup> However, Beijing Rules does not provide other examples of diversion programs rather than community services. As earlier discussed, the states can establish other viable alternatives to formal proceedings as 'diversion programs' insofar as it has the same purpose as the diversion concept under the Beijing Rules. Despite Beijing Rules is only a soft law and thus is not legally binding, Article 37 and 40 of the CRC use it as the sources of interpretation and implementation concerning children in the justice system.

### 2.3 Confusion about The Meaning of Diversion

As mentioned in the previous subchapter, the CRC Committee explicitly observes in its GC 10 that diversion is "a measure for dealing with children [...] without resorting to judicial proceedings."<sup>74</sup> This is the definition that is used by the author throughout this thesis. However, it is not the only definition of diversion existed as other scholars claim multiple definitions regarding diversion. Roberts describes diversion as "any process that is used by components of the criminal justice system (police, prosecution, courts, corrections) whereby youths avoid formal court processing and adjudication."<sup>75</sup> Latessa writes "diversion is the process of removing a juvenile from the system all together with or without referral to another social agency [...] minimizing the penetration of a juvenile into the system with referral to a program within the structure or a program closely related to it".<sup>76</sup> Kfoury claims diversion "as a procedure that treats juveniles in an alternative community program rather than adjudicating them in the juvenile court system."<sup>77</sup> Further, Hinshaw argues "just as the juvenile court was created to divert children from the adult criminal courts, alternative diversion programs have been created to divert juvenile offenders from the juvenile courts."<sup>78</sup> These definitions support the notion that diversion is an alternative procedure aiming to divert a young person from formal trials to other alternative programs.

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<sup>72</sup> *Id.*, The commentary of art. 11.4

<sup>73</sup> R. Smith, *Diversion in Youth Justice*, Routledge, at. 3 (2018).

<sup>74</sup> GC 10, *supra* note 18, para. 27.

<sup>75</sup> Hinshaw, *supra* note 23, at. 312. Originally refer to A.R. Roberts, The Emergence and Proliferation of Juvenile Diversion Programs, in Albert R. Robert (Eds.), *Juvenile Justice* 77, at. 78 (1989).

<sup>76</sup> *Id.*, Refer to E.J Latessa *et al.*, Juvenile Diversion: Factors Related to Decision Making and Outcome in Juvenile Justice Policy, in Scott H. Decker (Eds.), *Juvenile Justice Policy: Analyzing Trends and Outcomes*, at. 145, 148 (1984). Quoting A. Rutherford and R. McDermott, National Evaluation Program – Phase I Assessment: Juvenile Diversion (1975).

<sup>77</sup> *Id.*, at. 306. Originally refer to P.R Kfoury, *Children Before the Court: Reflection on Legal Issues Affecting Minors*, at. 69 (1991).

<sup>78</sup> *Id.*, at. 16.

Nevertheless, the idea of diversion as an alternative to formal trials is often distracted by the notion of diversion as an alternative to detention. In 2016, UNICEF produced its report called “Diversion Not Detention: A Study on Diversion and Other Alternative Measures for Children in Conflict with the Law in East Asia and the Pacific”.<sup>79</sup> In this report, UNICEF adopts the definition of diversion presented by the UNICEF Toolkit as the following:

Diversion as the conditional channelling of children in conflict with the law away from formal judicial proceedings towards a different way of resolving the issue that enables many – possibly most – to be dealt with by non-judicial bodies, thereby avoiding the negative effects of formal proceedings and a criminal record, provided that human rights and legal safeguards are fully respected.<sup>80</sup>

From the content, the meaning of diversion adopted is consistent with the notion incorporated in the Beijing Rules, CRC, and GC 10, defining diversion as an alternative to formal judicial proceedings. Nevertheless, the title of this report gives the idea at the first glance that diversion is somewhat a substitute mechanism to detention, to which it is not necessarily true. These conflicting notions of diversion in the global literature can result in a misunderstanding of the concept and implementation of diversion at the country level.

According to the analysis in the previous subchapter, the Beijing Rules and the CRC (and its GC 10) construe the diversion as an alternative to formal proceedings, not merely an alternative to detention or imprisonment. The difference is that diversion can apply at any level of judicial proceedings, such as at the police, prosecutor, or the court before the judges issued its final and binding verdict.<sup>81</sup> If diversion is applied, the authorities cease the proceedings unless the offender failed to complete the diversion program. Because it aims to avoid the formal trial, a diversion is mainly applied before the court found the minor to be guilty. Unlike diversion, other measures could also be ordered by the court after the offender is found guilty, which is known as ‘non-custodial measures.’ UNICEF describes these kinds of measure as follows:

Alternatives to post-trial detention’ or ‘alternative sentences’ that are “alternatives at the post-trial stage (or ‘disposition stage’ and ‘sentencing stage’) that are imposed on children who are being formally processed through the criminal (juvenile) justice system. They provide family-based and community-based options for the reintegration, rehabilitation, and supervision of children rather than sentencing them to any form of detention centre or closed care, treatment or re-education institution.”<sup>82</sup>

From these arguments, a diversion is not necessarily an alternative to detention or imprisonment, or a substitute for the deprivation of liberty in general. As mentioned above, if the court ordered the measure after it found the child to be guilty, the measure does not fall under the category of diversion anymore because the child has gone through the formal proceedings, which is supposed to be avoided as the objective of diversion.

Not only in the literature, but a similar confusion also arises in the way the CRC Committee defines diversion. Rather than providing clarity, the CRC Committee contributes to further distraction of the meaning of diversion. Although in its latest concluding observation the CRC Committee attempts to

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<sup>79</sup> 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* (2016).

<sup>80</sup> UNICEF, Toolkit on Diversion and Alternatives to Detention (2009), available at <http://dag.un.org/bitstream/handle/11176/400572/UNICEF%20Toolkit%20on%20Diversion%20and%20alternative%20detention%282009%29.pdf?sequence=57&isAllowed=y>

<sup>81</sup> Beijing Rules, *supra* note 2, the commentary of Article 11 (2).

<sup>82</sup> UNICEF, *supra* note 79, at. 56.

shift the paradigm of diversion as an alternative to judicial proceedings, some inconsistencies remain.<sup>83</sup> Further examples in some concluding observations are provided below.<sup>84</sup>

No	Countries	Previous Concluding Observation	Recent Concluding Observation
1.	Seychelles	(e) promote <b>alternative measures to detention</b> such as diversion, probation counseling, community service or suspended sentences, wherever possible;	(c) <b>promote non-judicial measures in the case of children accused of criminal offences</b> , such as diversion, mediation and counseling, and wherever possible, use alternative measures at sentencing, such as probation or community service [...]
2.	Mongolia	(e) [...] using <b>alternative measures to detention</b> such as diversion, probation, counseling, community service or suspended sentences, wherever possible;	(c) <b>promote measures for dealing with children accused of having infringed penal law without resorting to judicial proceedings</b> , such as diversion, probation, mediation, counseling or community service [...]

Figure 2. Comparison of Seychelles and Mongolia’s Concluding Observations

The table above shows a change in those two particular countries concerning the diversion concept. In the previous concluding observations (around 2010-2012), the Committee stressed the diversion as one of the examples of alternative measures to detention. However, in its recent concluding observations (2017-2018), the Committee asserts the diversion as “a non-judicial measure” and “a measure without resorting to judicial proceedings” that is more relevant to the diversion concept under GC 10. Even though there is progress in determining the diversion mechanism, the Committee is still lacking of consistency and often remains vague. In some countries’ latest concluding observations, the Committee has conceptualized the diversion as an alternative to the judicial proceeding, but in others, it still depicts the diversion as an alternative to detention.<sup>85</sup>

<sup>83</sup> Ann Skelton, Member of the CRC Committee, *Contemporary Issues in Juvenile Justice: A Committee on the Rights of the Child Perspective*, Presentation at the International Symposium of Children Deprived of Their Liberty (Leiden, 13 April 2018). Ms. Skelton’s visual presentation is on file with the Author and all participants of the symposium.

<sup>84</sup> The UN CRC Committee, Concluding Observation, Seychelles, 23 January 2012, CRC/C/SYC/CO/2-4, para. 69 (e), The UN CRC Committee, Concluding Observation, Seychelles, 5 March 2018, CRC/C/SYC/CO/5-6, para. 38 (c), The UN CRC Committee, Concluding Observation, Mongolia, 29 January 2010, CRC/C/MNG/CO/3-4, para. 76 (e), The UN CRC Committee, Concluding Observation, Mongolia, 12 July 2017, CRC/C/MNG/CO/5, para. 43 (c).

<sup>85</sup> The UN CRC Committee, Concluding Observation, Lebanon, 23 June 2017, CRC/C/LBN/CO/4-5, para. 45 (c), The UN CRC Committee, Concluding Observation, Romania, 13 July 2017, CRC/C/ROU/CO/5, para. 44 (c), The UN CRC Committee, Concluding Observation, Sri Lanka, 2 March 2018, CRC/C/LKA/CO/5-6, para. 46 (f), The CRC Committee also described the diversion as an alternative to detention in The UN CRC Committee, Concluding Observation, Estonia, 8 March 2017, CRC/C/EST/CO/2-4, para. 49 (b).

No	Countries	Recent Concluding Observation (2017 and onwards)
1.	Lebanon	(c) promote <b>alternative measures to detention, [..]</b> such as diversion, probation, mediation, counseling and community, with a view to progressively ceasing all detention of children;
2.	Romania	(c) promote <b>measures for dealing with children accused of having infringed the penal law without resorting to judicial proceedings</b> , such as diversion, probation, mediation, counseling or community service [..]
3.	Sri Lanka	(f) <b>promote non-judicial measures in the case of children accused of criminal offences</b> , such as diversion, mediation and counseling [..]

Figure 3. Comparison of Three Countries' Recent Concluding Observations

Countries' concluding observation is also not binding. However, state parties can use it as a reference in guiding them to make further improvement in certain children's rights area. Also, NGOs can use it for domestic advocacy concerning children's rights issues.<sup>86</sup> Moreover, concluding observation can be used as a supporting document before the court providing factual circumstances in the country.<sup>87</sup> Given the fact that concluding observations will be in the public domain and have several benefits for advocating children's rights, clarity and consistency of the terms used are essential. The inconsistency of the definition of diversion in many countries' concluding observation may send wrong messages and confuse the state parties to implement the diversion that supposedly as an alternative to formal trial. Therefore, the CRC Committee should standardize the diversion concept in its concluding observation in compliance with the CRC, GC 10, and the Beijing Rules.

#### 2.4 Distinction with Restorative Justice

The concept of restorative justice relates closely to the notion of diversion in the juvenile justice system. In the context of diversion in 'crime with victims,' a diversion can be used to achieve the primary goal of restorative justice. The reason behind this is because restorative justice aims to identify obligations to satisfy the needs and promotion of healing to which the process involves the victims, the offenders, and the community.<sup>88</sup> By diverting minors from the formal trial, the offender and the victim can discuss a more appropriate settlement that may benefit both parties. Since such

<sup>86</sup> J. Krommendijk, The Domestic Effectiveness of International Human Rights Monitoring in Established Democracies, The Case of the UN human rights treaty bodies, *The Review of International Organizations*, Vol. 10, Issue 4, at. 499 (2015).

<sup>87</sup> M. Fera Tinta, The CRC as a Litigation Tool before the Inter-American System of Protection of Human Rights, in T. Liefwaard and J. Doek (Eds), *Litigating the Rights of the Child*, at. 241 (2015). For instance, in Vargas Areco case, the domestic court uses Paraguay's Concluding Observation as factual statements that describe the situation of children in Paraguay (the requirement of the underaged child soldier). It used to substantiate the fact of systematic violations of children's rights in a particular jurisdiction in the Americas.

<sup>88</sup> H. Zehr, Restorative Justice: The Concept, *Justicia Para Crecer (Specialized Magazine in Restorative Juvenile Justice in Latin America and Caribbean)*, No 23, at.7 (2018).



process may focus on the damage and encourages the involvement of the interested parties, it includes restorative justice elements to some extent.<sup>89</sup>

On the other hand, diversion can also be bigger than restorative justice because not all types of diversion fall under the restorative justice concept.<sup>90</sup> There are also other forms of diversion focusing only on the child offender as long as no victim is involved (victimless crimes). For such kind of diversion, restorative justice concept is not necessarily relevant. This subchapter discusses the former type of diversion that intersects with restorative justice.

Some believe that the primary 'driver' of juvenile correction system shall be a focus on rehabilitation rather than punishment.<sup>91</sup> It diverts the conventional concept of justice, which is punitive, authoritarian or mean-spirited, to a more restorative-focus under the idea of *so-called* a restorative justice.<sup>92</sup>

Braithwaite conceptualizes restorative justice as "a process where all the stakeholders affected by an injustice have an opportunity to discuss how they have been affected by the injustice and to decide what should be done to repair the harm."<sup>93</sup> Moreover, Silvia and Lambert point out "restorative justice advocates believe that the first-justice related need is for the offenders to acknowledge their guilt and make efforts to repair harms to victims physically [...] and metaphorically [...]."<sup>94</sup> The UNODC adopts the concept as below:

Restorative process means any process in which the victim and the offender and where appropriate, any other individuals or community members affected by the crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator that leads to an agreement. Such agreement may include reparation, restitution and community service, aimed at meeting the individual and collective needs and responsibilities of the parties and achieving the reintegration of the victim and the offender.<sup>95</sup>

Even though there is no single universally agreed definition, some underlying points are recognized. Zehr and Gohar introduce 3 (three) main principles of what constitutes a restorative justice:

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<sup>89</sup> *Id.*, at. 6.

<sup>90</sup> International Bar Association, *The Role of the Universal Periodic Review in Advancing Children's Rights in Juvenile Justice*, the Report of the International Bar Association's Human Rights Institute, at. 61 (2018). In this report, it says that diversion can include restorative justice programs (including victim-offender mediation or family group conferencing) or community service orders or treatment or skills-building programs. The last two instances can be imposed in victimless crimes.

<sup>91</sup> S. Bilchik, *Redefining the Footprint of Juvenile Justice in America* in N. E. Dowd (Ed.), *Justice for Kids, Keeping Kids Out of the Juvenile Justice System*, at. 31 (2011).

<sup>92</sup> G. Bazemore & M. Schiff, *Juvenile Justice Reform and Restorative Justice, Building Theory and Policy From Practice*, Routledge, at. 27 (2011).

<sup>93</sup> J. Braithwaite, *Restorative Justice and De-Professionalization*, *The Good Society*, Vol.13, No.1, at. 28–31 (2004).

<sup>94</sup> S.M Sliva & C.G Lambert, *Restorative Justice Legislation in the American States: A Statutory Analysis of Emerging Legal Doctrine*, *Journal of Policy Practice*, Vol.14, Issue 2, at. 79 (2015). According to this source, the reparation of harm towards the victim include should be done physically (through reparations and restitutions) and metaphorically (through listening, acknowledging, and apologizing). By this, victim's needs are better met and offenders have the opportunity to fulfill their obligations to both victims and the community.

<sup>95</sup> UNODC, *supra note* 6, at. 13.

- 1) Crime is a violation of people and of interpersonal relationships;
- 2) Violations create obligations; and
- 3) The central obligation is to put right the wrongs.<sup>96</sup>

According to the above, restorative justice brings all the relevant stakeholders (offender, victim, state, community) into the table. Child offenders are held accountable to repair the harm, and the victim's voice is heard and empowered for the resolution of matters.

O'Neil highlights that restorative justice practices may be incorporated into the juvenile justice system either before sentencing, part of sentencing, or after sentencing, while restorative justice that is done before the sentencing refers to a diversion.<sup>97</sup> Furthermore, UNODC further explains the following:

Restorative justice programs may be used at any stage of the criminal justice system, subject to national law. When used before a case comes to trial or during the trial process, they can lead to the diversion of the case from criminal procedure, provided that an agreement is reached between victim and offender.<sup>98</sup>

According to UNODC, diversion shall be used before the parties bring the case before the court. It is thus relevant with the aims of diversion in Article 40 (3) (b) of the CRC, which is to deal with a juvenile case without going to formal trial. Unlike diversion, restorative justice can be imposed during or after the offender entered into the trial.

Under the CRC, neither the term of 'diversion' nor 'restorative justice' appears. Nonetheless, both words are incorporated in the GC 10. The CRC Committee recognizes that diversion and restorative justice as the two examples of alternative measures to respond to children in conflict with the law that take into account the child's best interest principle as well as the interest of society.<sup>99</sup> Through the spirit of protecting the best interest of the child, the CRC Committee emphasizes the promotion of rehabilitation and restorative justice in dealing with child offenders rather than the traditional objectives of criminal justice.<sup>100</sup> The Committee further explains that measures for dealing with children in conflict with the law without resorting to judicial proceedings can be in the form of diversion or "other forms of restorative justice."<sup>101</sup>

Through the lens of the CRC Committee, there is a distinction between diversion and restorative justice. Although both serve the child's best interest principle in dealing with children in conflict with the law, the CRC Committee sees diversion as a form of restorative justice and restorative justice as a more prominent goal to be achieved in the juvenile justice system. In a child-on-child crime, diversion can be a part of the restorative justice, since it diverts child offenders from the trial and seeks other settlement by taking into account child victims' interest. If both parties agreed to enter diversion, formal proceeding is no longer needed. Nevertheless, not all diversion programs involve restorative justices. In victimless cases, diversion can apply without victim's involvement.

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<sup>96</sup> H. Zehr & A. Gohar, *The Little Book of Restorative Justice*, Good books Intercourse, at. 17 (2002).

<sup>97</sup> C.M. O'Neil, *Advanced Policy Analysis, Restorative Justice as Diversion in California's Juvenile and Criminal Justice Systems: Potential Impacts and State Policy*, Master Thesis, The Goldman School of Public Policy, University of California, at. 6 (2016).

<sup>98</sup> UNODC, *supra* note 6, at.7.

<sup>99</sup> GC 10, *supra* note 18, para. 3.

<sup>100</sup> *Id.*, para. 10.

<sup>101</sup> *Id.*, para. 27.

## 2.5 Concluding Remarks

Diversion aims to divert young offenders from formal judicial proceedings and provide alternative programs tailored to children's needs. The concept is initially derived from Article 11 of the Beijing Rules. Nevertheless, the first legally binding provision on the diversion in the juvenile justice system is set out under Article 40 (3) (b) of the CRC. The CRC Committee elaborates the diversion further in its GC 10, underlining the diversion as a measure for dealing with children without resorting to judicial proceedings. It also stresses some particular requirements and elements to implement the diversion programs effectively.

As explained in this chapter, diversion is an alternative to formal trial and not necessarily an alternative to imprisonment. Diversion can be a form of deprivation of liberty if it redirects the child to a particular child protection system.

Diversion is applied before the trial at any level of judicial proceedings. A diversion can be a part of RJ in 'crime with victims.' It is also possible to have the diversion that is not necessarily related with RJ in 'victimless crimes.'<sup>102</sup> In the context of a child-on-child crime, a diversion is a part of RJ where the program takes into account the child victim's interest for settlement. RJ is a bigger concept in the criminal justice system and does not only cover the diversion. While the diversion is supposed to be done before the trial, RJ may include other non-custodial measures imposed by the judges after the trial ends, for example, an alternative to sentencing (i.e., vocational programs, community services).

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<sup>102</sup> For example: drug abuse, gambling.

### 3. Diversion: A Child Victim Perspective

#### 3.1 Introductory Elements

The previous section has shown that the international legal standards provide some guidance concerning the usefulness of the diversion for young offenders. Nevertheless, little discussion arises at the international level regarding the diversion concept in a child-on-child crime. This chapter further assesses the concept of diversion from the perspective of child victims thoroughly and argues whether the diversion could also benefit child victims to some extent.

The CRC mentions numerous articles regarding the protection of a child from violence.<sup>103</sup> Nonetheless, only in the General Comment No. 13, the specific notion of violence among children slightly arises. Violence among children can fall under the definition of child-on-child crime because both have the same characteristic; the offender and the victim are underage minors.<sup>104</sup> The Committee notices that violence also occurs among children.<sup>105</sup> A child can be a victim of violence committed by proxy, caregivers and/or by others, including their peers.<sup>106</sup> However, the Committee maintains their absence to address the types of, reasons for, and how to deal with peer violence, or in other terms, child-on-child crime. Due to the lack of guidance, the administration of juvenile justice in the case of child-on-child crime becomes somewhat obscure.<sup>107</sup>

As an alternative to formal proceedings, diversion should be an option to settle the case of peer violence. In such process, the authorities need to consider child victim's interest in any decision-making regarding the diversion.

Supposedly, the criminal justice system is more oriented toward the needs-rights of a child victim.<sup>108</sup> As Gal argues "even a trial which ends with the imprisonment of the offender may, in fact, conflict with the victim's interests, as it may make the offender unable to compensate them."<sup>109</sup> For example, in the case of peer fighting in school, a child victim who suffered harm may only expect for the offender to apologize and promise not to do re-offending in the future since they are friends. Child victim's parents may want the offender (and his parents) to pay for all medical costs for the victim's hospitalization. If the case is going through formal trial without the possibility of diversion, the offender may end up in prison, and the victim gets nothing from the process.

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<sup>103</sup> For example, Article 19 regarding protection from any kind of violence, Article 32 regarding protection from economic exploitation, and Article 34 regarding protection from sexual exploitation and sexual abuse.

<sup>104</sup> The determination of the age refers to Article 1 of the CRC, "every human being below the age of eighteen years unless majority is attained earlier".

<sup>105</sup> The CRC Committee General Comment No. 13, *The Right of the Child to Freedom from All Forms of Violence*, CRC/C/GC/13, para 19 (2011) [Hereinafter GC 13].

<sup>106</sup> *Id.*, para. 36.

<sup>107</sup> T. Gal, *Victims to Partners: Child Victim and Restorative Justice*, PhD Thesis, The Australian National University, at. 84 (2006).

<sup>108</sup> *Id.*,

<sup>109</sup> *Id.*, at.99.

### 3.2 Child Victims: Access to Justice in the Juvenile Justice System

As the victim of the crime, child victims are entitled the right to obtain a fair, timely, and effective remedy.<sup>110</sup> The CRC does not explicitly mention the right of child victims to an effective remedy. Instead, Article 39 entitled child victims a physical and psychological recovery and social integration that fosters the health, self-respect, and dignity of the child.<sup>111</sup> Linking to the CRC's general comment, child victims also have the right to be heard in any judicial and administrative proceedings, and for having their best interests taken as a primary consideration in decision-making.<sup>112</sup>

In its General Comment No. 12 ("**GC 12**"), the CRC Committee particularly mentions the right to be heard applies to "child victims of physical or psychological violence, sexual abuse or other crimes, health care, social security, unaccompanied children, asylum-seeking and refugee children and victims of armed conflict and other emergencies."<sup>113</sup> Further, the Committee emphasizes the need for consulting with child victims on the relevant matter concerning them so that they can express their views regarding their involvement in the judicial process freely.<sup>114</sup> Hence, the full implementation of the right to be heard can encourage the effective Access to Justice for child victims.

Predating the CRC, the UN issued a Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power in 1985. Even though the document is more than 30 (thirty) years old and not necessarily binding to state parties, it is still worth to refer to it as one of the UN documents that especially concerns on the rights of the victim of crime. Victims should be treated with compassion and respect for their dignity. The need for formal or informal procedures that are expeditious, fair, inexpensive and accessible is crucial in strengthening victims' access to obtain redress.<sup>115</sup> Victims of crime should be able to exercise their right to be heard concerning their concern and interest in the judicial process.<sup>116</sup> Even though it does not explicitly mention the diversion, Article 7 of the Declaration stresses:

Informal mechanism for the resolution of disputes, including mediation, arbitration, and customary justice or indigenous practices, should be utilized where appropriate to facilitate conciliation and redress for victims.<sup>117</sup>

According to the above provision, the UN Declaration has considered the notion of using a more informal mechanism to ensure the victim's interest is given due weight throughout dispute resolution process. Furthermore, the Declaration mentions 2 (two) types of remedies for the victims, namely restitution and compensation. Article 8 sets that "the offender is responsible for making fair restitution to the victim [...] such restitution should include the return of property or payment for the harm or loss

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<sup>110</sup> See Chapter 2.

<sup>111</sup> According to Article 39 of the CRC, child victims are those suffered from any neglect, exploitation or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment or armed conflict.

<sup>112</sup> CRC, *supra* note 4, art. 3, art. 12.

<sup>113</sup> GC 12, The CRC Committee General Comment No. 12, *The Right to be Heard*, CRC/C/GC/12, para. 32 (2009) [Hereinafter GC 12].

<sup>114</sup> *Id.*, para. 63.

<sup>115</sup> United Nations, General Assembly, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, art. 4 *jo.* art. 5 (1985) [Hereinafter The Declaration].

<sup>116</sup> *Id.*, art. 21.

<sup>117</sup> *Id.*, art. 7.

suffered, reimbursement of expenses incurred as a result of the victimization [...]”<sup>118</sup> In the case where “compensation is not fully available from the offender to the victim, states should endeavour to provide financial compensation to victims who suffered significant bodily injury or impairment of physical or mental health or to the family if the victim died or become physically or mentally incapacitated following the crime occurred.”<sup>119</sup> There is no specific age requirement of victims mentioned in the Declaration. It can thus apply in the context of child victims of crime.

### 3.3 Diversion and Access to Justice

As explored in Chapter 2, diversion can serve as a tool to achieve restorative justice when it comes to child-on-child crime. It can benefit child offenders and child victims at the same time. However, children need adequate access to achieve the restorative justice’s goal. The concept is *so-called* Access to Justice (“**ATJ**”). UN Common Approach in Justice for Children provides that the justice system should ensure children are better served and protected through the full application of international norms and standards for all children who come into contact with justice systems as victims, witnesses, and alleged offenders.<sup>120</sup> The concept shall consider, among others, the child’s best interest principle, non-discrimination, right to be heard, protection from violence, right to be treated with dignity, respect for legal guarantees and safeguards, and deprivation of liberty as a measure of last resort and for the shortest period of time.<sup>121</sup>

In a child-on-child crime, diversion can be a part of ATJ for children. It makes sure that equitable access to justice is available for child offenders and child victims.<sup>122</sup> On one hand, diversion aims to seek an alternative measure that takes into account juvenile offender’s wellbeing and proportionate to both his circumstances and the offence.<sup>123</sup> Diversion is channelling young offenders from the criminal justice system into programs that make them accountable for their action.<sup>124</sup>

On the other hand, in diversion, child offenders take responsibility for their actions that often involve, providing restitution to the victims of offence.<sup>125</sup> To some point, it provides child victims a redress following the violation occurred. Restitution and compensation to the victims can be part of ‘recovery to the victim’ that is mandated by Article 39 of the CRC.<sup>126</sup>

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<sup>118</sup> *Id.*, art. 8.

<sup>119</sup> *Id.*, art. 12.

<sup>120</sup> United Nations, Guidance Note of the Secretary General, *UN Common Approach to Justice for Children*, at. 4 (2008).

<sup>121</sup> *Id.*, at 5-6. It should also take into account the child’s specific characteristics (age, lesser culpability, conditions and needs of the child) and long-term needs of the society.

<sup>122</sup> UNICEF, What We Do Access to Justice, available at <https://www.unicef.org/eca/what-we-do/access-to-justice> (last accessed 24 May 2018). The source says “equitable access to justice is for all children, whether they are offenders, victims or witnesses.”

<sup>123</sup> CRC, *supra* note 4, art. 40 (4). According to Article 40 (4) of the CRC, any measures dealing with children should be done in an appropriate manner considering their wellbeing and proportionate both to their circumstances and the offence.

<sup>124</sup> UNICEF Malawi, Diversion of Children in Conflict with the Law, available at [https://www.unicef.org/malawi/MLW\\_factsheet\\_diversion.pdf](https://www.unicef.org/malawi/MLW_factsheet_diversion.pdf) (last accessed 24 May 2018).

<sup>125</sup> K.E. Waitherero, *Strengthening Access to Justice for A Child in Conflict with The Law: A Case for Law Reform*, LL.M Thesis, University of Nairobi, at. 53 (2011).

<sup>126</sup> CRC, *supra* note 4, art. 39. It mentions the child victim’s right to physical and psychological recovery and social reintegration.

The UN High Commissioner for Human Rights defines ATJ as “the ability to obtain a just and timely remedy for violations of rights as put forth in international norms and standards (including the CRC).”<sup>127</sup> It applies to civil, administrative, and criminal spheres of laws, either nationally or internationally, and covers all relevant judicial proceedings affecting children without limitation.<sup>128</sup> In particular, ATJ for children includes the rights to pertinent information, an adequate remedy, fair trial, right to be heard and to enjoy the rights without discrimination.<sup>129</sup> It derives from the concept that children are now seen as active agents in judicial proceedings according to the emancipatory approach embedded in the CRC.<sup>130</sup>

Likewise but not literally the same, UNDP interprets ATJ as “the ability of people to seek and obtain a remedy through formal and informal institutions of justice, in conformity with human rights standards.”<sup>131</sup> As a child-specific UN agency, UNICEF introduces a more child-centric approach regarding ATJ. It emphasizes ATJ as “the right to obtain a fair, timely and an effective remedy for violations of rights, as put forth in national and international norms and standards, through adapted processes that protect children’s dignity and promote their development.”<sup>132</sup> By this definition, UNICEF not only focuses on the child’s right to an effective and fair remedy as the goal but also underlines how to achieve such particular goal. One of them is through the protection of child’s dignity. The CRC Committee underscores “the concept of dignity requires that every child is recognized, respected and protected as a rights holder and as unique and valuable human being with an individual personality, distinct needs, interests, and privacy.”<sup>133</sup>

The concept of ATJ closely links to the importance of ‘due process of law’ because it refers to the minimum standards applied almost universally for any criminal defendant.<sup>134</sup> Article 7 (1) of the Beijing Rules affirms the most basic procedural safeguards representing valuable elements for a fair and just trial, providing a foundation of ATJ for children. It involves the presumption of innocence, the right to be notified of the charges, right to remain silent, right to counsel, right of the presence of a parent or guardian, right to confront and cross-examine witnesses and the right to appeal to a higher authority.<sup>135</sup> Article 40 (2) of the CRC includes some of these legal safeguards, which are often known

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<sup>127</sup> UN Common Approach to Justice for Children, *supra* note 120, at. 4.

<sup>128</sup> UN High Commissioner for Human Rights, *Access to Justice for Children*, UN Doc. A/HRC/25/35, 16 December 2013, at.3 (2013). The source asserts that access to justice shall apply to children without limitation. It includes children alleged as, accused of, or recognized as having infringed the penal law, victims and witnesses or children coming into contact with the justice system for other reasons, such as regarding their care, custody or protection.

<sup>129</sup> *Id.*, at.5.

<sup>130</sup> L. Graziani, *Access to Justice: A Fundamental Right for All Children*, in T. Liefaard and J. Sloth-Nielsen (Eds), *The United Nations Convention on the Rights of the Child. Taking Stock After 25 Years and Looking Ahead*, Brill/Nijhoff, at. 133 (2017).

<sup>131</sup> UNDP, *Programming for Justice: Access for All*, at. 5 (2005).

<sup>132</sup> T. Liefaard, *Access to Justice for Children Deprived of Their Liberty*, in Centre for Human Rights & Humanitarian Law Anti Torture Initiative (Ed), *Protecting Children Against Torture in Detention: Global Solutions For a Global Problem*, at. 61 (2015). [Hereinafter Liefaard 2015]. Originally refer to UNICEF, *Children’s Equitable Access to Justice*, Central and Eastern Europe and Central Asia, at. 13 (2015) and UNICEF, *UN Common Approach to Justice for Children* 2008.

<sup>133</sup> GC 13, *supra* note 105, para 3 (c).

<sup>134</sup> Beijing Rules, *supra* note 2, The commentary of art. 14.

<sup>135</sup> *Id.*, art. 7 (1).

as “the child’s right to a fair trial.” If these rights are violated during the proceeding or the measures are against the child’s wellbeing and not proportionate, child offenders can claim for an infringement of their access to justice.<sup>136</sup>

UNDP mentions some of the barriers concerning ATJ. One of them is the lack of adequate information on the operation of the laws and the limitation of knowledge on children’s rights.<sup>137</sup> Children have lack of understanding regarding the criminal justice system, what the procedures entail, and what the rights they have. To engage active child participation in the system, access to information is fundamental.<sup>138</sup> Linking to the diversion mechanism, Article 40 (3) (b) of the CRC encourages state parties to promote measures for dealing with children in conflict with the law without resorting to judicial proceedings. Thus, information about this procedure should be available for the children concerned.

The state has the obligation to safeguard ATJ, prevent the denial of children rights in the system, and provide adequate protection for them.<sup>139</sup> For example, by ensuring the availability of legal assistance since the very beginning of the proceeding, providing precise information on the judicial process, and taking into account children’s voices in any decision-making concerning them.<sup>140</sup> The authorities should make the information on diversion be available and accessible to children in conflict or in contact with the law. It should include a clear briefing of diversion procedures and its consequences in a child-friendly language.<sup>141</sup> By that, child offenders and also child victims can decide whether or not they agree to the diversion mechanism.

### 3.3.1 The UN Guidelines on Child Victims and Witnesses

As mentioned earlier, the definition of ATJ includes 3 (three) main points; ‘to obtain a just and timely remedy,’ ‘for violations of the rights,’ and ‘regulated under international norms and standards.’<sup>142</sup> The UN High Commissioner for Human Rights explicitly mentions that ATJ should not only be applied to children alleged as, accused of, or recognized as having infringed the penal law, but also children as victims and witnesses.<sup>143</sup> It strengthens the right of child victims to demand justice following the occurred offence.

At the international level, the UN established the ECOSOC Resolution regarding the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (“**The ECOSOC Resolution**”). Although the Guideline is less binding to the state in comparison with the CRC, still it can be a source of reference that gives definition, principles, and the rights of child victims who are in contact with the

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<sup>136</sup> Personal Interview with Prof. Jaap Doek, ex-Chairman of the UN CRC Committee, in the World Congress Justice on Children, Paris, 29 May 2018.

<sup>137</sup> UNDP, *Access to Justice Practice Note*, at. 4 (2004).

<sup>138</sup> Defence for Children, *Children’s Right to Participation and The Juvenile Justice System*, at. 15 (2016).

<sup>139</sup> Liefwaard 2015, *supra* note 132, at. 76.

<sup>140</sup> Article 37 (d) of the CRC specifically mentions the child’s right to legal and other appropriate assistance and Article 12 of the CRC concerns the child’s right to be heard, including in judicial proceedings.

<sup>141</sup> GC 12, *supra* note 113, para. 25. The CRC Committee stress that the right to information is essential as the precondition of the child’s clarified decisions. Further, in GC 12 para. 34, the Committee confirms the need to provide child-friendly information to enable child’s participation.

<sup>142</sup> UN Common Approach to Justice for Children, *supra* note 120, at. 4.

<sup>143</sup> UN High Commissioner for Human Rights, *supra* note 128, at.3.



law.<sup>144</sup> The ECOSOC Resolution does not mention its applicability explicitly in the diversion concept. However, it can be applied to processes in informal and customary systems of justice such as restorative justice.<sup>145</sup> The ECOSOC Resolution acknowledges such informal system of justice as part of “justice process” where the rights of child victims are valid and thus should be safeguarded.<sup>146</sup>

Pertaining to the argument presented in Chapter 2, diversion in ‘crime with victims’ falls under restorative justice concept thus the ECOSOC Resolution is relevant to be applied.<sup>147</sup> In a child-on-child crime where child victims exist, the implementation of diversion should take into account the interests of child victims and their rights as guaranteed in the ECOSOC Resolution.

Furthermore, more specific than the CRC, the ECOSOC Resolution defines child victims as follows:

Child victim or witness denotes children and adolescents, under the age of 18, who are victims of crime or witnesses to a crime, regardless of his or her role in the offence or in the prosecution of the alleged offender or group of offender.<sup>148</sup>

There are 4 (four) key principles in the ECOSOC Resolution, namely dignity, non-discrimination, the best interest of the child (protection and harmonious development), and right to participation. These principles are in line with the general principles specified under the CRC. The enactment of the CRC has shifted the paradigm of recognizing children as a right holder rather than a mere object of care and special protection because of their particular vulnerability.<sup>149</sup> Therefore, child victims are entitled to the rights as stipulated further below:

1. The right to be treated with dignity and compassion;
2. The right to be protected from discrimination;
3. The right to be informed;
4. The right to be heard and to express views and concerns;
5. The right to effective assistance;
6. The right to privacy;
7. The right to be protected from hardship during the justice process;
8. The right to safety;
9. The right to special preventive measures;
10. The right to reparation.<sup>150</sup>

Child victims’ rights as mentioned above should be effective in practice to access justice. In judicial proceedings, too much attention has been paid to the legal rights of defendants.<sup>151</sup> Hence, it is vital to give centrality to heal, promote wellbeing or rehabilitate victims, either a child or an adult.<sup>152</sup>

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<sup>144</sup> United Nations, The Economic and Social Council, *Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime*, ECOSOC Resolution 2005/20 (2005) [Hereinafter ECOSOC Resolution].

<sup>145</sup> *Id.*, para. 6.

<sup>146</sup> *Id.*, para. 9 (c).

<sup>147</sup> See Chapter 2.

<sup>148</sup> *Id.*, art. 9 (a).

<sup>149</sup> T. Liefwaard, *Child-Friendly Justice: Protection and Participation of Children in The Justice System*, *Temple Law Review*, Vol. 88, at. 906 (2016). [Hereinafter Liefwaard 2016].

<sup>150</sup> UNODC & UNICEF Guideline, *Justice in Matters involving Child Victims and Witnesses of Crime*, at. 3 (2009).

<sup>151</sup> M. Groenhuijsen, *Conflict of Victims’ Interests and Offenders’ Rights in the Criminal Justice System: A European Perspective*, in C. Sumner *et al.* (Eds), *International Victimology*, at. 164 (1996).

<sup>152</sup> Gal, *supra* note 107, at. 97-98.

### 3.3.2. Barriers to Access to Justice

ATJ is also problematic for children due to the following reasons. At the international level, less legally binding documents or guidelines are provided concerning child victims' rights in the judicial proceedings. The position of child victims appears only in Article 39 of the CRC and the ECOSOC Resolution.

In GC 10 concerning children's rights in juvenile justice, the objective is more on the administrative of children in conflict with the law, while the provision regarding child victims' right in juvenile justice is completely missing.<sup>153</sup> In 2000, The CRC issued the OPSC to address more comprehensive protection, interest, and rights of child victims. However, as the OPSC concerns explicitly on the sale of children, child prostitution, and child pornography, child victims from other criminal offences (such as child-on-child crime) are relatively exempted.<sup>154</sup>

Child victim's right is elaborated further in the context of the right to be heard under GC 12. The CRC Committee concerns that child victims should be consulted and given the opportunity to express their views freely regarding their involvement in the judicial process.<sup>155</sup> The Committee also argues for the child victim's rights to information, support mechanisms, protective measures, appeal, and possibilities of receiving remedies.<sup>156</sup> However, nowhere in the CRC or its General Comments explicitly address child victim's rights in an alternative to judicial proceedings. In the case of the diversion in a child-on-child crime, guidelines on victim involvement and participation are missing. The lack of guidelines on child victim's involvement in judicial proceedings and its alternative mechanism can impede child victim's access to justice.

While the ATJ for child offenders aims to ensure they get a proportionate measure of punishment, ATJ is relevant for child victims to obtain sufficient remedy due to the rights violation.<sup>157</sup> In the criminal proceeding, child victims often face barriers to access justice, such as the difficulty of victim's identification, lack of reports, the arrest of the victims, and poor treatments against them as they are treated as offenders.<sup>158</sup> Once they access the justice system, sometimes child victims are still at high risk of the other rights' violations namely the lack of child-friendly procedures, shortage of adequate services and assistance, and denial of the child's best interest principle.<sup>159</sup>

Children's access to justice often depends on the support of adults, the extent to which they receive the information regarding their rights, to approach and understand remedies, and to access justice for and mechanisms.<sup>160</sup> According to the General Comment No. 5, "children's special and dependent

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<sup>153</sup> GC 10, *supra* note 18, para.4.

<sup>154</sup> Article 2 of the OPSC explicitly mentions the purpose of the protocol is to address the issue of sale of children, child prostitution and child pornography.

<sup>155</sup> GC 12, *supra* note 113, para. 63.

<sup>156</sup> *Id.*, para. 64.

<sup>157</sup> From the offenders' perspective, ATJ can constitute as safeguarding principles and ensuring fair trial elements during the judicial proceedings. For the victims, ATJ can be beneficial to obtain remedy and redress.

<sup>158</sup> ECPAT, *Barriers to Access to Justice for Child Victims of Sexual Exploitation*, at. 14 (2017). Regarding victim's identification, for example in a gang violence, sometimes it is not so clear who is the offender and who is the victim as the situation often becomes so chaotic. It can hamper ATJ for child victims.

<sup>159</sup> *Id.*,

<sup>160</sup> M. Leskoviku & M. Prence, Access to Justice for Children, an Evolving Concept, *Mediterranean Journal of Social Sciences*, Vol. 6, No. 3, at. 108 (2015).

status creates real difficulties for them in pursuing remedies for breaches of their rights [...] there should be appropriate reparation, including compensation, [...], measures to promote physical and psychological recovery, rehabilitation and reintegration [...]”.<sup>161</sup> Hence, adequate protection should be in place.

Grandjean divides 2 (two) levels of enabling more accessible ATJ for children; a child-sensitive justice system and the need for empowerment to all children involved. For a better understanding, the following diagram is provided.



Figure 4. The Scheme of ATJ for children.<sup>162</sup>

On one hand, it is substantial to have a child-sensitive justice system. It involves the availability of trained professionals (i.e., police, prosecutor, judges, lawyer, social workers), child-friendly procedures within the system (considering children's dignity and their rights as elaborated in the ECOSOC Resolution), and possibility for child victims to receive reparation for full redress, reintegration, and recovery.<sup>163</sup> On the other hand, it is also significant to empower child victims by providing necessary information and support, so they become more aware of their rights.

After all, one clear message from the international standards is that child victims should be heard in all decision-making concerning their case. In a child-on-child crime, child victim's right to be heard needs to be considered in deciding whether or not diversion should apply.

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<sup>161</sup> The CRC Committee General Comment No. 5, *General Measures of Implementation of the Convention on the Rights of the Child*, CRC/GC/2003/5, para 24 (2003).

<sup>162</sup> A. Grandjean, *No Rights Without Accountability: Promoting Access to Justice for Children*, *International Development Law Organization*, at. 8 (2010). Professionals can involve police, prosecutor, judges, lawyer, social workers and etc.

<sup>163</sup> *Id.*, at. 9.

### 3.4 Involvement in Diversion

Some may argue that diversion is mainly established for the interest of child offenders. However, as explored in Chapter 2, diversion is a tool to achieve a more significant purpose of restorative justice, and it can also benefit child victims to some extent.

In victimless cases, diversion for young offenders could be applied without a victim's involvement.<sup>164</sup> However, the approach will be different in the case of 'crime with victims,' especially in a child-on-child crime. While diversion has a more pedagogical approach that is preferable for child offenders,<sup>165</sup> it may be in the contrary to the interest of child victims whom the rights are violated. In other words, what others see as the best approach for the child offenders may not in the best interest of child victims or *vice-versa*.<sup>166</sup> The decision whether to apply the diversion in a child-on-child crime should be analysed thoroughly and on a *case-by-case* basis.

In a child-on-child crime, the CRC guarantees both the rights of the child offenders and child victims. Therefore, the authorities need to consult the child victims before diverting young offenders from formal judicial proceedings. Whether or not child victims give their permission, their voice should be given due weight. Because of the severe impacts suffered by the child victims, victim involvement is often important in finding a solution to the case. McElrea argues "the greater the psychological impact of the crime on the victim the greater is the need for healing [...]."<sup>167</sup> Concerning their vulnerability, the impact may be detrimental to the child victims' future development and wellbeing.

#### 3.4.1. Criticisms Against Diversion from Victim's Perspective

Chapter 2 explains that the diversion in a child-on-child crime is a form of restorative justice. It enables the child victims to access a different (or often additional) kind of justice from that offered by the conventional system.<sup>168</sup> Nevertheless, victim participation in restorative justice processes (such as diversion) is not easily acceptable, since some scepticism arises. Even though the following factors do not exclusively address child-on-child crime, they are still relevant because the diversion in peer violence falls under the restorative justice process.<sup>169</sup>

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<sup>164</sup> Such as drug abuse, gambling or any other "crime without victims" or "victimless crimes" that refers to the types of crimes where there is no victim rather than the offender himself.

<sup>165</sup> As mentioned in Chapter 2, diversion provides more educational measures to correct child offender's behavior and prevent recidivism.

<sup>166</sup> According to the CRC Committee's General Comment No. 14, one of the many elements in best-interest determination is "child's views". Therefore, in decision-making concerning children, either child offender or child victim should be consulted.

<sup>167</sup> F.W.M McElrea, *Twenty Years of Restorative Justice in New Zealand – Reflections of a Judicial Participant*, *Journal of Commonwealth Criminal Law*, at. 49 (2011). It finds that "the greater the harm the greater the need for healing and the greater the potential for restorative justice."

<sup>168</sup> J. Boliitho & K. Freeman, *The Use and Effectiveness of Restorative Justice in Criminal Justice System Following Child Sexual Abuse or Comparable Harms*, Report for the Royal Commission into Institutional Responses to Child Sexual Abuse, University of New South Wales, at. 57 (2016).

<sup>169</sup> Diversion in peer violence or child-on-child crimes falls under the restorative justice because it involves the offender's obligation towards the victim to repair the harm.

First, the restorative justice measures (such as diversion) are often seen as a method to get away with crime. In other words, it is deemed as “a leeway” from the complex judicial process.<sup>170</sup> Second, there is also a concern if child offenders ‘make up’ their apology without really engaging with empathy towards the victims.<sup>171</sup> Third, lack of willingness of the child victims to cooperate in the case of sexual offences.<sup>172</sup> Fourth, lack of adequate trained professionals to operate the program, and lastly, the issue of compensation frequently arises during restorative justice procedures.<sup>173</sup>

According to GC 10, one of the requirements to enter into diversion is the admission of responsibility made by the child offender voluntarily and freely.<sup>174</sup> The Committee even explicitly reminds that no coercion or pressure has been used to get the admission. Child offenders should apologize sincerely and intend to change their behaviour. The Committee emphasizes that child victims have the right to be heard in the cases that concern them.<sup>175</sup> The assistance and support for children to access information is thus crucial during the legal process.<sup>176</sup> Before exercising their right to be heard concerning the diversion decision, child victims need to receive all necessary information and advice.<sup>177</sup> Hence, victim participation in the diversion is on a voluntary basis as it depends on the child victim’s decision.

#### 3.4.2 Benefits of Victim Participation in Diversion

As argued by most scholars, “the criminal process has been notoriously known as being re-victimizing or causing ‘a secondary victimization’ for many child victims.”<sup>178</sup> Child victims need to go through an unfamiliar process where they meet many officers in the different stages of the process, they often feel intimidated and fearful, and they have limited knowledge on how the entire proceedings might work. To some extent, formal procedures do not really help the victims. Rather than seeking for a mere judicial reparation, child victims demand the truth and the offender’s accountability towards them.<sup>179</sup> In a child-on-child crime, diversion gives a possibility for child victims to communicate with child offenders, find the motives behind the crime, and ask the remedies that can heal their broken feeling as a result of the crime.

Diversion can be an effective solution to counter delay in formal judicial proceedings. As Gal mentions, “waiting for the testimony prevents children from being able to move on with their lives and forces

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<sup>170</sup> A. van der Merwe, *A New Role for Crime Victims? An Evaluation of Restorative Justice Procedures in the Child Justice Act 2008*, *De Jure Pretoria University Law Press*, Vol. 4, No. 46, at. 1035 (2013).

<sup>171</sup> *Id.*, at. 1036.

<sup>172</sup> *Id.*,

<sup>173</sup> *Id.*, at. 1037.

<sup>174</sup> GC 10, *supra* note 18, para. 27.

<sup>175</sup> GC 12, *supra* note 113, para. 63.

<sup>176</sup> Graziani, *supra* note 130, at. 135.

<sup>177</sup> GC 12, *supra* note 113, para. 16.

<sup>178</sup> Gal, *supra* note 107, at. 88. Originally refer to J. Morgan and L. Zedner, *Child Victims: Crime, Impact and Criminal Justice*, Clarendon Press (1992), J. Fortin, *Children’s Rights and the Developing Law*, Butter-worths (2003), J. L Herman, *The Mental Health of Crime Victims: Impact of Legal Intervention*, *Journal of Traumatic Stress*, Vol. 16, No. 2 (2003), L. Zedner, *Criminal Justice*, Oxford University Press (2004).

<sup>179</sup> Personal Interview with Dr. Kattiya Ratanadilok, Director of Research and Development Institute, Department of Juvenile Observation and Protection, Ministry of Justice of Thailand, in the World Congress on Justice for Children, Paris, 29 May 2018.

them to maintain their memory of what happened [...]”.<sup>180</sup> Due to children’s vulnerability, such waiting period can be awful as their memory may fade throughout the time but they are, in such a way, are forced to remember it. Eastwood and Patton further stress that children reported of having nightmares, feeling depressed or great fears, not being able to concentrate at school, as well as self-hatred and suicidal behaviour because of being worry about the upcoming trial.<sup>181</sup>

Moreover, child victims may suffer the anxiety of having to face the accused, discussing personal events in public, the formality and unfamiliarity of the process, and the need for testifying and being interviewed multiple times.<sup>182</sup> Children may be afraid of being accused of lying when giving their statement.

Either the offender is ended with an acquittal or found to be guilty can cause a significant emotional burden on the victim. Gal explains further below.

If the offender is acquitted, then the message is one of disbelief of the victim’s report. If the offender is found guilty (and consequently has to endure punishment), then the victim might suffer self-blame.<sup>183</sup>

Self-blaming on victims is prevalent in some peer violence such as sexual assault, particularly if it is against girls. It is derived from Freud’s 1924 theory which inappropriately justifies that women enjoy rape.<sup>184</sup> It often happens in sexual abuse cases among teenagers where people speculate that the victim’s involvement in such crime is a result of the victim’s own acts.<sup>185</sup>

According to the above, looking for other alternatives to formal trial such as diversion can be one of the options to reduce victim’s trauma during the judicial proceedings. Skelton argues two positive outcomes of diversion for child victims.<sup>186</sup> First, it exempts child victims to testify in the court where in some cases is so problematic. Second, it may ensure the offender’s accountability and responsibility to child victims compared to the formal trial. In the formal trial, there is a possibility of the acquittal of the offender thus results in nothing to the victim.

Diversion can offer a better outcome as it is tailored to child victim’s needs and interests in the case of violence among children. Consequently, it can benefit both child offenders and child victims.

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<sup>180</sup> Gal, *supra* note 107, at. 89.

<sup>181</sup> *Id.*, at. 115. Originally refer to C. Eastwood and W. Patton, *The Experiences of Child Complaints of Sexual Abuse in the Criminal Justice System*, Technical Report, Report to the Criminology Research Council (2002).

<sup>182</sup> *Id.*, at. 88. Originally refer to J. Cashmore, *The Evidence of Children*, Technical Report, Judicial Commission of New South Wales (1995/9, S. Ghetti *et al.*, *Legal Involvement in Child Sexual Abuse Cases: Consequences and Interventions*, *International Journal of Law and Psychiatry*, Vol. 25 (2002), L. Malloy *et al.*, *Running Head: Balancing Children’s Needs and Defendants’ Rights*, Chapter to Appear in D. Read, S. Lindsay and M. Togila (Eds.) (2005).

<sup>183</sup> *Id.*, at. 84-85.

<sup>184</sup> L.K. Thacker, Rape Culture, Victim Blaming, and the Role of Media in the Criminal Justice System, *Kentucky Journal of Undergraduate Scholarship*, Vol.1, Issue. 1, at. 93 (2017). Originally refer to J. Allison and L. Wrightsman, *Rape: The Misunderstood Crime Newbury Park, CA: Sage Publications* (1993).

<sup>185</sup> *Id.*, at. 89. Thacker refers to the case in Ohio where teenagers sexually assaulted a 16 year-old girl after the party. The defense lawyers representing the offenders argued the victim’s credibility because she was intoxicated at the time of the assault and questioned the victim’s past sexual history to discredit her claims.

<sup>186</sup> Personal interview with Prof. Ann Skelton, Member of the UN Committee on the CRC, in the International Symposium of Deprivation of Liberty of Children in the Justice System, Leiden, 13 April 2018.

### **3.5 Concluding Remarks**

Just like child offenders, child victims are entitled the rights and interests to be considered in the decision-making concerning their case in judicial proceedings. Due to the harm they suffered, child victims have an opportunity to access justice, allowing them to obtain a timely and just remedy. Justice can be accessed either through a conventional (formal system) or restorative approach.

In a child-on-child crime, one of the many restorative justice measures that can be an option is a diversion. It aims to repair the harm and relation between child offenders and child victims. Diversion attempts to bridge the interests of both sides and establish a program that gives positive outcomes to the parties involved. Despite some scepticisms, diversion can benefit the child victims to express their interests. It enables them to explain what they really want and what the offenders need to do to repair the harm. Moreover, it prevents child victims from giving testimony before the court that often affects them negatively.

Before the authorities agree to apply diversion, they need to consider fairly the interests of both child offenders and child victims. If the measure is against the victim's will, diversion cannot be forced to prevail. The authorities should refer the case to formal proceedings if the child victims rejected the option of diversion. To some extent, diversion could accommodate the rights and the interests of child victims better than the formal trial.

## 4. Diversion in Indonesia Juvenile Justice System

### 4.1 Introductory Elements

From the analysis at the international level in Chapter 2 and Chapter 3, diversion in a child-on-child crime intersects with the concept of ATJ and RJ. While a formal trial may affect both child offenders and child victims detrimentally, diversion can bridge the interests of both sides to achieve restorative justice without going to formal proceedings. However, as diversion should be on a voluntary basis, any coercion is not allowed to get the children's consent. The authority may inform the children regarding the diversion procedures and its consequences, but the children should decide whether or not they agree to the diversion.

Based on the legal frameworks in the previous chapters, this chapter will first address the regulation of the diversion under Indonesia Law 11/2012. Further, it analyses the application of the law in the national court's case, and lastly, it examines the compliance of the diversion in Indonesia with the international legal standards.

Diversion is a notable issue in Indonesia. In the latest Indonesia's concluding observation, the CRC Committee mentioned the following problems of "1) a large number of children sentenced to jail even for petty crimes 2) young offenders who are often detained in adult prison with poor facilities, and 3) lack of social reintegration measures for children in conflict with the law."<sup>187</sup> The Committee addressed the following recommendation:

Further promote alternative measures to detention, such as diversion, probation, mediation, counselling or community service and provide for access to adequate rehabilitation and reintegration programmes.<sup>188</sup>

Aiming to reform the law in the administration of juvenile justice system, as a member state of the CRC, Indonesia adopts the diversion mechanism in its Law 11/ 2012 to which it sets out specific legal requirement, process, and variety of the diversion programs. It brings a new paradigm compared to the former law where the diversion concept was completely missing.<sup>189</sup>

### 4.2 Indonesian Law on the Juvenile Justice System

According to the definition provided in Law 11/2012, diversion is "redirecting juveniles' cases from criminal trial proceedings to out-of-court settlements."<sup>190</sup> It is applicable for young persons under the age of 18 (eighteen).<sup>191</sup> Diversion helps juveniles to learn from their mistake through early intervention, provides trauma recovery for victims and family, allows children to take responsibility for their action, and prevents recidivism.<sup>192</sup> The diversion in Indonesia promotes an amicable settlement by involving child offenders (and their parents/guardian), victims (and/or parent/guardian), probation officer, and

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<sup>187</sup> The UN CRC Committee, Concluding Observations, Indonesia, 10 July 2014, CRC/C/IDN/CO/3-4, para. 77.

<sup>188</sup> *Id.*, para. 78 (e).

<sup>189</sup> Indonesia Law No. 3/1997 on *Juvenile Court*. No concept of diversion appears in this law.

<sup>190</sup> Law 11/2012, *supra* note 13, art. 1 para. 7.

<sup>191</sup> *Id.*, art. 1 para. 1. The definition of the child under this law is in compliance with the definition of the child under Art. 1 of the CRC.

<sup>192</sup> D. Listyarini, Juvenile Justice System Through Diversion and Restorative Justice Policy, *Diponegoro Law Review*, Vol. 2, at. 14 (2017).



professional social worker.<sup>193</sup> Social welfare personnel and/or community may also be involved in case they are needed. Under Law 11/2012, diversion aims to achieve the following 5 (five) objectives:

1. To achieve an amicable settlement between the victims and child offenders;
2. To settle juvenile's case outside the formal court system;
3. To prevent deprivation of liberty of child offenders;
4. To encourage community's participation and;
5. To internalize the value of accountability and responsibility to child offenders.<sup>194</sup>

There are several types of diversion under Law 11/2012, such as an amicable settlement with or without compensation, the return of child offenders to their parents/guardian, and child participation in education institution or training for maximum 3 (three) months or community services.<sup>195</sup> Once the parties agreed on the type of diversion, the parties need to make a written agreement and disseminate the document to the relevant stakeholders (police officers, prosecutor, the judges, and community counsellor) no later than 3 (three) days after the issuance of such agreement. Based on the agreement for the diversion among the parties, the authorities can terminate the case.<sup>196</sup> Nevertheless, if the diversion process failed or the child offender does not comply with the agreement made before, the offender will be sent back to formal judicial proceedings.<sup>197</sup>

#### 4.2.1 Legal Requirements

The requirements of applying diversion are set out in Article 7 of Law 11/2012. The authorities can apply the diversion throughout each stage of the formal system, ranging from the investigation, prosecution, and case-examining process before the district court. In other words, there is no limitation regarding the phase of the justice system where diversion is applicable. If the police, in such way, do not apply diversion at the very beginning, the prosecutors can intervene and order the police to do so.<sup>198</sup>

Under Law 11/2012, diversion can be applied in 'victimless cases' or 'crime with victims.' Moreover, there are 2 (two) layers of the diversion's requirements. First, Article 7 (2) sets the general requirements that a diversion is only applicable if the suspected juvenile is a first-time offender and the charge of criminal offences committed is below seven years of imprisonment. Rather than alternatively, these two conditions should be fulfilled cumulatively.<sup>199</sup> The first rule excludes the possibility of the diversion for young offenders who have committed crime more than once. It is also exclusively limited only to a particular type of offences. Under the Indonesian Penal Code, diversion can be applied in the cases of, among others, persecution, theft, extortion or threatening, fraud,

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<sup>193</sup> L. Hardjaloka, *Criminal Justice System of Children: An Overview Restorative Justice Concept in Indonesia and Other Countries*, *Jurnal Dinamika Hukum*, Vol. 15, at. 75 (2015).

<sup>194</sup> Law 11/2012, *supra* note 13.

<sup>195</sup> *Id.*, art. 11.

<sup>196</sup> *Id.*, art. 12 (5).

<sup>197</sup> *Id.*, art. 13.

<sup>198</sup> *Id.*, art. 7 (1).

<sup>199</sup> *Id.*, art. 7 (2). The article uses the conjunction "and" instead of "or" in between the two requirements. Hence, diversion can only prevail if these two conditions are wholly fulfilled. These regulations are applicable both in the diversion in 'victimless cases' or in 'crime with victims.'

destruction of goods or property,<sup>200</sup> Criminal offences such as murder and sexual abuse are relatively excluded.<sup>201</sup>

Second, in crime with victims, an additional requirement exists. Even if the offender fulfilled the two conditions in Article 7 (2), victim approval is needed. Article 9 (2) explicitly determines that the diversion mechanism should obtain the victims' consent and/or their family and the willingness of child offenders and their family to participate in the diversion. As an exemption, diversion can only apply without victim approval in victimless cases, light crimes, infringement, and if the victim's loss is below the provincial minimum wage in the province where such crime is committed.<sup>202</sup>

According to Article 9 (1), before implementing diversion, the authorities shall consider the category of the offences, the age of the child, social inquiry report from probation officers, and support from family and community. Concerning the age, the younger the child offender is, the higher possibility to apply the diversion.

The law further emphasizes "diversion is not purposed for serious crimes such as murder, rape, drug dealer and terrorism that charged above 7 (seven) years".<sup>203</sup> Some Indonesian judges raise the concern that the limitation of the minimum charge of crime has been the problem itself because it restricts the probability of diversion for minor offenders.<sup>204</sup> In case the crime's charge is precisely seven years or slightly more, it becomes the discretion of the judge to decide whether diversion can apply or not, pursuant to the Supreme Court's Decree.<sup>205</sup>

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<sup>200</sup> Under Indonesia Penal Code, the maximum years of imprisonment for persecution are 2 years 8 months, if the crime caused major harms to victims, the maximum charge is 5 years, and if it leads to the victim's death, the maximum charge is 7 years (Art. 351). For theft, the maximum years of imprisonment are 5 years (Art. 362) while for extortion or threatening the maximum is 9 (nine) months (Art.368). For fraud, the maximum is 4 (four) years (Article 378) and for the destruction of goods/property is 2 years 8 months (Art. 406). If a child commits the crime, the maximum years of imprisonment are reduced by 1/3. (Art.47).

<sup>201</sup> Under Indonesia Penal Code, the maximum years of imprisonment for murder are 15 years (Art. 338). If a child commits the crime, the maximum charge will be 10 years) and for a planned murder, the maximum charge is life imprisonment or 20 years (Art.340). If a child commits the crime, the maximum will be 15 years. For sexual abuse against children, according to Law 25/2014, the imprisonment for adult offenders ranging for 5 – 15 years (Art.76 D, 76 E, 81, and 82) and for child offenders the maximum sentence can be reduced by 1/3.

<sup>202</sup> The examples of crime without victims are drug abuse or gambling where no other victim but the (child) offender himself. Art. 205 (1) of the Indonesia Penal Code define "light crimes" as every crime that is charged with 3 (three) months of maximum imprisonment. In comparison, "infringement" under this code should not result in imprisonment of the offender. For example, being drunk in public areas. Regarding the amount of victim's loss, for instance, in DKI Jakarta province, the provincial minimum wage is IDR 3,800,000. In the case where a child committed theft in Jakarta the extent to which the stolen good worth less than IDR 3,800,000, diversion can be enforced even if the victim does not give his/her approval.

<sup>203</sup> Law 11/2012, *supra* note 13, the commentary of Article 9 (1).

<sup>204</sup> Statement made by Justice Rahmawati, a Judge in Banda Aceh District Court as quoted in C. Rogers, UNICEF Indonesia, Justice for Kids in Banda Aceh, available at <http://unicefindonesia.blogspot.nl/2017/08/justice-for-kids-in-banda-aceh.html> (14 June 2018).

<sup>205</sup> Statement made by Cahyono, a Judge in Banda Aceh District Court as quoted in C. Rogers, UNICEF Indonesia, Justice for Kids in Banda Aceh, available at <http://unicefindonesia.blogspot.nl/2017/08/justice-for-kids-in-banda-aceh.html> (last accessed 14 June 2018). The discretion refers to the Supreme Court Decree No. 4/2014.

In light of the diversion procedures, the Supreme Court's Decree stipulates 2 (two) essential concepts that are missing in the Law 11/2012. First, it emphasizes that diversion can be applied to children who are in conflict with the law with the minimum age of 12 years old but not yet attains the age of 18, even if the child has married. This emphasizing provision is essential given the fact that child marriage prevalence in Indonesia remains high.<sup>206</sup> The Supreme Court's Decree thus prevents discriminatory treatment of the diversion against child offenders according to their marital status as stressed implicitly in Article 2 of the CRC.<sup>207</sup> Second, the judges can apply the diversion in more severe crimes if only the offender is also charged with the crime that is below 7 (seven) years of imprisonment in one indictment (in the form of a subsidiary, alternative, cumulative or combination of the indictment).<sup>208</sup> Hence, the diversion can still apply if the child committed a crime that is charged either below or above 7 (seven) years of imprisonment depending on the circumstances of the case.<sup>209</sup> However, because it is a Supreme Court's Decree, it is only applicable for the judges to decide, not to the police and prosecutor.<sup>210</sup>

In a prosecution process, prosecutors can apply diversion to the alleged offender under 18, even if he is already married according to the Attorney General's Decree.<sup>211</sup> The requirements to impose the diversion are similar as stated in the Law 11/2012. It is only applicable to first time offenders and if the crime charged below 7 (seven) years of imprisonment.<sup>212</sup>

Furthermore, at the police level, diversion is explicitly regulated under The Head of Police Institution Decree.<sup>213</sup> It defines diversion as returning child offenders to their parents, either with or without

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<sup>206</sup> *Indonesia Supreme Court's Decree No. 4/2014 regarding Guidelines on the Implementation of Diversion in Juvenile Justice System*, art. 2 [Hereinafter Supreme Court's Decree]. Art. 2 emphasizes that child brides are still categorized as children. It derives from the fact child marriage remains a serious problem in Indonesia. According to UNICEF, Indonesia is part of the top countries with the highest absolute numbers of child marriage, ranking seven globally. Available at [https://www.unicef.org/indonesia/UNICEF\\_Indonesia\\_Child\\_Marriage\\_Reserach\\_Brief\\_.pdf](https://www.unicef.org/indonesia/UNICEF_Indonesia_Child_Marriage_Reserach_Brief_.pdf), (21 May 2018).

<sup>207</sup> CRC, *supra* note 4, art. 2. It determines that the state should not discriminate a child according to his, among others, other status. This can refer to marriage status.

<sup>208</sup> Supreme Court's Decree, *supra* note 206, art. 3. In the Indonesian criminal justice system, the prosecutor can issue an indictment in many forms either single, subsidiary, alternative, cumulative or combination. Each of them has their own characteristics.

<sup>209</sup> For instance, the prosecutor suspects the offender had prosecuted the victim to die. However, it is still unclear whether it falls under the classification of 'a planned homicide,' 'murder' or 'persecution.' According to the Law 11/2012 and the Penal Code, the diversion cannot apply to the first two categories. However, the diversion can apply to the latter due to its lower charges. When the prosecutor is not sure, he charges the offender with more than one category of crime with the idea of giving less possibility for the acquittal of the offender. In his indictment, he can charge the offender with those three categories in order, starting from the category that charged with the longest years of imprisonment to the shortest. If the judges believed the first category is not suitable with the facts of the case, they can analyze the suitability of the second category and so on. If based solely on Law 11/2012, the diversion is not applicable. But according to the Supreme Court's Decree, the judges can still divert the case because the child is charged with more than one category of crimes in one indictment the extent to which one of them fulfills the diversion's condition.

<sup>210</sup> It regards to the distribution of powers between the judicial institutions.

<sup>211</sup> *The Attorney General's Decree No. PER-006/A/J.A/04/2015 regarding Guidelines on the Implementation of Diversion at the Prosecution Level*. [Hereinafter Attorney General's Decree].

<sup>212</sup> *Id.*, at. 4.

<sup>213</sup> *The Head of the Police Institution's Decree No. Pol. TR/1124/XI/2006 jo. No. Pol. TR/359/DIT.I/VI/2008 Guidelines on Dealing with Children in Conflict with the Law*. Further, Article 7 (1) point j of Indonesia Penal

formal/informal warning, mediation, an amicable settlement between child offender's family and victim's family or other proper arrangements following the local cultures.

In a child-on-child crime, child victims and their parents'/guardian's approval to the diversion is a mandatory requirement besides the two requirements under Article 7 (2) of Law 11/2012. Moreover, although it restricts the use of diversion in crimes with more than 7 (seven) years of imprisonment, the possibility of diverting young person still exists according to the Supreme Court's Decree and the discretion of the authorities.

#### 4.2.2 Child Offenders and Child Victims

In the context of Indonesia, Article 8 (3) of Law 11/2012 tries to balance the interests of child offenders and victims of crime. On one hand, it notices that diversion can prevent negative stigmatization against child offenders and empower more child welfare and responsibility.<sup>214</sup> On the other hand, it explicitly addresses that diversion should take into account victim's interest.<sup>215</sup> The law does not distinguish between the interests of adult victims or child victims. Thus, the diversion should consider child victim's interest if a child-on-child crime occurred. It should also take into account the harmony in the community and protect propriety, decency, and general public interest.<sup>216</sup>

In a crime with victims, diversion can only be applied with 1) the consent of child offenders and their family, and 2) the consent of victims.<sup>217</sup> Article 9 (2) strongly emphasizes that in the case where child victims are involved, the approval from their family is also needed. Law 11/2012 mentions explicitly that parental involvement is mandatory regarding their consent and participation in the diversion.<sup>218</sup> To some extent, Law 11/2012 concerns the interests of child offenders and child victims in a child-on-child crime. It provides the opportunity for both sides to be heard fairly in decision-making concerning the diversion of the case matter.

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Code points out that police investigators have the authority to carry out "other actions" according to the prevailing laws. Article 18 (1) of *the Law No.2/2002 regarding The Police of the Republic of Indonesia* affirms that for the interest of public, police investigators could act according to their own discretion in performing their duty and authority. Those two Police Institution's Decrees (*Telegram Rahasia Kabareskrim Polri No. Pol. TR/1124/XI/2006 and No. Pol. TR/359/DIT.1/VI/2008*) give further guidance to enforce diversion during the investigation process

<sup>214</sup> Law 11/2012, *supra* note 13, art.8 (3) point b.

<sup>215</sup> *Id.*, art. 8 (3) point a.

<sup>216</sup> *Id.*, art. 8 (3) point f.

<sup>217</sup> *Id.*, art. 9 (2).

<sup>218</sup> Parental consent for both child offender and child victim in a child-on-child crime is applicable for children under the age of 18 years old without restriction. It refers to the definition of child offender in Article 1 (3) of Law 11/2012 states that "children in conflict with the law is those who have attained the age of 12 years old but not yet attain the age of 18 and are suspected to commit a crime". Article 1(4) mentions "children as victim of crime is those minors under the age of 18 who suffered physical, mental and/or financial loss as a result of a criminal offence".

#### 4.2.3 The Role of Parents, Community, and the State

According to Article 8 (1) of Law 11/2012, an amicable settlement through diversion process should involve the parents (or guardian) of the child, both for child offenders and child victims.<sup>219</sup> Some child victim's parents are reluctant to approve the idea of diversion, saying that it is an unfair treatment or suspecting the offender's family has bribed the authority.

Referring to the Karanganyar's case,<sup>220</sup> the diversion process failed because the child victim's parents denied of forgiving the 15-year-old offender who persecuted their child. Even though the offender had fulfilled the diversion requirements, apologized, agreed to pay compensation, and promised to not committing further crime, the victim's parents felt unfair if the formal trial did not apply.

If deemed necessary, the representative from the community can also be involved in the diversion process under Law 11/2012.<sup>221</sup> The community can refer to, among others, religious leaders, teachers, and community leaders.<sup>222</sup> For example, in a sexual abuse case among children in Bandar Lampung, the Head of the Village (*Lurah*) and the Head of Neighbourhood Association (*Rukun Tetangga*) were engaged in the diversion process.<sup>223</sup> The case resulted in a successful diversion at the police level, and the case was ceased.

Community involvement in a case settlement is not necessarily new in Indonesia. Long before the national law entered into practice, traditional Indonesian community used to apply amicable settlement to solve the problem.<sup>224</sup> Usually, it involves community/religious or tribe's leader who has the power in the neighbourhood.

Despite some positive remarks, the requirement of parental and community involvement in the diversion process in Indonesia leads to further queries. How the international legal standards address these topics? To what extent could their involvement benefit the diversion process for child offenders and child victims? These questions are explored later in this chapter.

In the diversion in Indonesia, the state is represented by the authorities; police, prosecutors, judges and probation officers. The first three stakeholders have a role in facilitating the discussion between child offenders and child victims regarding the diversion. As facilitators, they need to hear both sides during the meeting.<sup>225</sup> The facilitators should ensure the parties are fully informed about the diversion

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<sup>219</sup> The commentary of Article 8 (1) of Law 11/2012 clearly affirms that parents or guardian of the child should be involved in the diversion process if the victim is a child.

<sup>220</sup> It refers to the case Number 01/2014/Pn.Krg, Karanganyar District Court, 29 September 2014. More detail regarding the case can be found in A. Zulfiani, *Diversion in Court (Case Studies in Karanganyar District Court), The 2<sup>nd</sup> Proceeding "Indonesian Clean of Corruption in 2020"*, at. 968 (2016).

<sup>221</sup> Law 11/2012, *supra* note 13, art. 8 (2) *jo.* art. 93 point d.

<sup>222</sup> *Id.*, the commentary of Article 8 (2).

<sup>223</sup> A.D. Asri, *Pelaksanaan Tindakan Diversi dalam Penanganan Perkara Anak di Bandar Lampung (Implementation of Diversion in the Juvenile Cases in Bandar Lampung)*, *Keadilan Progresif*, Vol. 8, No. 2, at. 8 (2017). The case is registered under No. Reg: LP/4574/X/2012 involving child offender and child victim in a sexual abuse case.

<sup>224</sup> Y. Ernis, *Diversi dan Keadilan Restoratif dalam Penyelesaian Perkara Tindak Pidana Anak di Indonesia (Diversion and Restorative Justice in Juvenile Cases Settlement in Indonesia)*, *JIKH*, Vol. 10, No. 2 at. 173 (2016).

<sup>225</sup> Asri, *supra* note 223, at. 88.

mechanism, legal requirements and its consequences, and let the parties decide later. Probation officers, on the other hand, should analyse the condition of children concerned and recommend the way of settlements.<sup>226</sup> Police, prosecutors, and judges should consider social inquiry reports submitted by probation officers in the process.<sup>227</sup> Probation officers are also in charge to assist, guide, and monitor child offenders from the commencement until the end of the diversion process.<sup>228</sup>

#### 4.2.4 Drawbacks in the National Laws

Although Law 11/2012 attempts to balance the interests of child offenders and child victims, it also has a number of drawbacks. First, there is inconsistency in the regulations regarding the diversion's requirement. As mentioned earlier, Law 11/2012 limits the use of diversion only to the crime below 7 (seven) years of imprisonment.<sup>229</sup> However, the Supreme Court's Decree gives the possibility to allow the diversion for the crime with or more than 7 (seven) years of imprisonment.<sup>230</sup> Such inconsistency may confuse the authorities in dealing with juvenile cases.

Second, there is lack of regulation on exercising the diversion programs. Article 11 of Law 11/2012 provides some example of diversion programs, such as community service and education or training in an institution.<sup>231</sup> However, the law provides no detail regulation on what kind of education/training should be offered, which institution should be engaged, and what precisely the type of community services should be imposed. Moreover, although the diversion needs victim approval as the requirement, the law does not specify any programs that may benefit child victims personally, such as medical and psychological rehabilitation.

Third, as discussed before, parental consent and involvement can be an issue. The authority should ensure that children's interests are at the heart of the diversion.<sup>232</sup> Parental interests should not dominate as it may impede the effectiveness of the diversion process.<sup>233</sup>

Fourth, in a child-on-child crime, victim approval to enable diversion is decisive. Even if child offenders had fulfilled the requirements under Article 7 (2) of Law 11/2012, the authorities could not apply the diversion if the victims rejected the proposal. Although it is a positive element to give due weight

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<sup>226</sup> *Id.*,

<sup>227</sup> Law 11/2012, *supra* note 13, art. 9 (1).

<sup>228</sup> *Id.*, art. 14 (2).

<sup>229</sup> *Id.*, art. 7 (2).

<sup>230</sup> Supreme Court's Decree, *supra* note 206, art. 3.

<sup>231</sup> Law 11/2012, *supra* note 13, art. 11.

<sup>232</sup> The objective of the diversion under Law 11/2012 is to achieve amicable settlement between the child offender and the victim.

<sup>233</sup> Due to the lack of knowledge of the parents on the objectives of diversion in a child-on-child crime, victim's parents think that the diversion aims to expel child offender from his accountability. They believe that the offender has bribed the officer so that he is not tried in the formal judicial system. While the authority offers the diversion mechanism for the best interest of the child (either offender or victim), parents (and community) often assume that the authority defends the offender or has a family relationship with the offender. This information refers to the first-hand research by Widodo in *Diversi dan Keadilan Restoratif dalam Sistem Pidana Anak di Indonesia: Urgensi dan Implikasinya* (Diversion and Restorative Justice in Indonesian Juvenile Justice System: Urgency and its Implication), *RechtIdee Law Journal*, Vol. 10, No. 2, at. 179 (2015). The researcher interviewed the police officer and the prosecutor for that research.

victims' opinion, victim approval may hamper the full implementation of the diversion that supposed to benefit child offenders and child victims as explained in Chapter 2 and Chapter 3.

### 4.3 Study Cases of Diversion

#### 4.3.1 The Jambi's Case

In analysing the law implementation in practice, the author provides 2 (two) case studies, namely the Jambi's case and the Sukoharjo's case. The author chooses these particular cases because both addressed the same type of crime (peers fighting) but different consequences for child victims. In the former case, the victim is still alive while in the latter the victim died. Moreover, these two cases occurred in two different districts in Indonesia. Thus, the author intends to analyse the implementation of the diversion to which these cases have similarities (regarding the offence, child-on-child crime), but also different characteristics regarding the location and the different category of harms suffered by the victims.

The Jambi's case<sup>234</sup> concerns the persecution conducted by a child (18 years old) against another child (15 years old).<sup>235</sup> Because of such crime, the victim suffered bruises all over his body. At the police level, the authorities attempted to conduct the diversion but failed due to the unwillingness of the victim and his parents to forgive the offender.<sup>236</sup> The victim's parents believed that a diversion would have no deterrent effect to prevent reoffending in the future. The diversion could not be applied because of the rejection from the victim. Subsequently, the prosecutor took over the case.<sup>237</sup>

According to Article 7 (1) *jo.* Article 42 of Law 11/2012 *jo.* the Attorney General's Decree,<sup>238</sup> prosecutors should review the case and seek whether or not diversion is possible. In this case, the victim and his parents were still not keen to forgive the offender. Instead, the victim's parents asked the offender to be prosecuted before the court. Where diversion failed at the prosecution level, the prosecutor should continue the case to the formal proceeding.<sup>239</sup>

Likewise, before starting the trial, the judges should examine the possibility of diversion according to Article 52 of Law 11/2012. In this case, the appointed judge determined a day to conduct the diversion in the court. The prosecutor presented all the relevant parties before the court and the diversion held in the mediation room in the court. The judge took his role as the facilitator who introduced all the parties and briefly explained the purposes of the diversion. Probation officer informed the parties concerning the behaviour and social circumstances of the child offender and recommended

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<sup>234</sup> The Jambi's case is name after the province of where the case happened. It refers to the case no. 04/Pid.Sus-Anak/2015, Jambi District Court, 24 February 2015.

<sup>235</sup> The case is described in L.P. Yudaningsih, *Tahap-tahap Diversi terhadap Anak sebagai Pelaku Tindak Pidana (Anak yang Berkonflik dengan Hukum) di Wilayah Hukum Pengadilan Negeri Jambi* (Diversion Procedures on Child Offender Who are in Conflict with the Law in Jambi District Court), *Jurnal Ilmu Hukum*, Vol.7, No. 2, at. 85-89 (2016).

<sup>236</sup> If the requirements set out under Art.7 (2) had been fulfilled, the police should conduct diversion no later than 7 (seven) days since the investigation begins (with the victim's consent). Once the victim rejected the diversion, then the police shall continue the case to the prosecutor (Art. 29 (4) of Law 11/2012).

<sup>237</sup> Law 11/2012, *supra* note 13, art. 9. In a child-on-child crime, victim's approval is a mandatory requirement to enter the diversion.

<sup>238</sup> Attorney General's Decree, *supra* note 211.

<sup>239</sup> Law 11/2012, *supra* note 13, art. 42 (4).

suggestions for settlement. The facilitator then allowed the offender to present his opinion on the indictment. Child offender's parents explained their child's behaviour and proposed the settlement they expected. On the other hand, the facilitator provided the child victim and his family the opportunity to respond. The professional social worker submitted the information regarding the victim and his social circumstances and recommendations for settlement. If necessary, the facilitator may summon the representative from the community or any other supporting parties to give the required information for settlement. However, in this case, there was no representative from the community. The diversion process resulted in an agreement to cease the case. The agreement was made in writing, signed by the parties, and reported to the Chair of the Court to obtain the diversion order.

In this particular case, the offender apologized to the victim, promised not to re-offense and would obey his parents. In response, the victim forgave the offender and did not demand any compensation. After all, the Court terminated the case and released the offender from pre-trial detention.

#### 4.3.2 The Sukoharjo's Case

The Sukoharjo's Case<sup>240</sup> concerns the persecution in the school committed by a child of 12 years old against the victim on the same age. Because the victim died, the authorities charged the offender with the category of crime that has the imprisonment order of more than 7 (seven) years.<sup>241</sup> Legally, referring to the diversion's requirement in Article 7(1), diversion cannot be applied in this case.<sup>242</sup> However, the police used their discretion. The police opined that Article 7 (2) of Law 11/2012 only provides the requirements to the cases where diversion is mandatory to be applied. They held the view that diversion can still be applied alternatively for other crimes charged with 7 (seven) years of imprisonment or more.<sup>243</sup> The probation officer also substantiated the possibility of diversion in this case through social inquiry reports. The report concluded that the offender and the victim's parents had reached an agreement to diversion, the offender was still in his school ages, and considering the diversion benefits for the child's best interest thus the diversion should apply.<sup>244</sup> Accordingly, the victim's parents forgave the offender and agreed to the diversion of the offender from the formal trial.

In this case, the diversion applied at the police level. A police investigator was appointed as the facilitator. The process involved the victim's parents, the offender and his family, officer from the Integrated-Service Centre of Sukoharjo District, the Head of Klumprit Village, Probation officer, advocates, and the representatives from SD Negeri Klumprit I (Where the offence was committed in the local elementary school). Because the process resulted in an agreement, the facilitator made a diversion minute and asked a diversion order from the Chair of Sukoharjo District Court. The case was then terminated.

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<sup>240</sup> It refers to the case No.1/Pid.Sus-Anak/2014/PN.Skh, Sukoharjo District Court.

<sup>241</sup> The case is described in Sutardi, *Aplikasi Diversi dalam Tindak Pidana Penganiayaan yang Dilakukan oleh Anak di Tinjau dari Perspektif Undang-undang No. 11 Tahun 2012 tentang Sistem Peradilan Pidana Anak* (Diversion in the Juvenile Persecution Case from the Perspectives of Law No. 11/2012 regarding Juvenile Justice System), at. 10-13, available at <http://jurnal-mahasiswa.unisri.ac.id/index.php/fakhukum/article/download/54/47>. (last accessed 21 May 2018).

<sup>242</sup> Law 11/2012, *supra* note 13, art. 7 (1). It affirms that the diversion is only applicable for the crime that below 7 (seven) years of imprisonment.

<sup>243</sup> Taken from statement made by Fran Dalanta Kembaren, a police officer in Sukoharjo Police Office. The statement is cited from Sutardi, *Id.*,

<sup>244</sup> Taken from statement made by Sutomo, a probation officer in Surakarta Probation Office. The statement is cited from Sutardi, *Id.*,



These two cases confirm several points regarding the diversion implementation in Indonesia, while the victims' opinion is decisive to allow the diversion. Furthermore, diversion can be applied at any level of proceedings. The authorities can be flexible in imposing the legal requirements of the diversion, particularly regarding the severity of the crime. These remarks raise further questions on how the international legal standards regulate these issues. How should the authorities treat victims' opinion in the diversion? Is victims' approval always decisive? Do the authorities need to use the diversion at every stage of the proceedings? Should the authorities be flexible on the diversion's requirements?

#### 4.4 The Compliance through the Lens of the CRC and the Beijing Rules

According to the above analysis, several issues remain outstanding the extent to which they comply with the international standards. Regarding parental involvement, the requirement of having parents' consent and participation to enter the diversion can be seen as positive signs that parents do not release their responsibilities towards their children.<sup>245</sup>

Article 5 *jo.* Article 18 (1) of the CRC affirms that the state shall respect parental responsibilities to guide the child because parents have the primary responsibility for the upbringing and development of the child. When their child is involved in the criminal justice system, either as an offender or a victim, parents can support and assist their child in light of the child's best interest. However, parental involvement can also be a drawback. It means that Law 11/2012 still considers children as dependent who are in general incompetent to make rational decisions.<sup>246</sup> This concept may be in contrary with the CRC's notion that sees children as right-holders. They should be able to express their views to be taken into account with respect.<sup>247</sup> A problematic issue may arise if the children's decision somewhat clashes with their parents' decision concerning the diversion process.

The CRC Committee specifically mentions the need of parental consent for children below the age of 16 in family conferencing (as one example of the diversion).<sup>248</sup> Rather than mandatory, involving child offender's parents in the process is an alternative. However, the CRC and GC 10 remain obscure concerning parental involvement and consent for child victims.

In comparison with Law 11/2012, the Law states that parental consent and participation are needed if the child is below the age of 18.<sup>249</sup> The Law further stipulates that the diversion agreement can involve the return of child offenders to their parents.<sup>250</sup> It strengthens parental position as the holder of the primary responsibility for the upbringing and development of their child.

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<sup>245</sup> CRC, *supra* note 4,

<sup>246</sup> K. Hanson, Schools of Thought in Children's Rights, *Children's Right Unit, University Institute Kurt Bosch*, at. 12 (2008).

<sup>247</sup> J. Tobin, Justifying Children's Right, *International Journal of Children's Rights*, at. 434 (2013).

<sup>248</sup> GC 10, *supra* note 18, para. 27. It refers to family conferencing as an alternative solution. Family conferencing is a forum between child offender (and his family) the victim (and his family) to find agreement of settling the case instead of going to formal trial.

<sup>249</sup> Law 11/2012, *supra* note 13, art. 8 (1). This article clearly stipulates that diversion should involve parents of child offender and if the victim is minor, parents of the victim.

<sup>250</sup> *Id.*, art. 11 (b).

While Law 11/2012 explicitly addresses the role of community (religious/community leader, teacher, etc.) during the diversion process,<sup>251</sup> the CRC Committee remains silent on this matter. The CRC Committee refers to community service as one of the varieties of diversion programs,<sup>252</sup> but it does not say anything about the involvement of community representatives during the meetings of the diversion.

There is no explicit regulation in the CRC stating that the diversion can apply at any stage of the judicial proceedings. The Committee only mentions “state parties should take measures for dealing with children [...] without resorting to judicial proceedings as an integral part of their juvenile justice system”<sup>253</sup> and “the law has to contain specific provisions indicating [...] the powers of the police, prosecutors and or other agencies to make decisions [...]”.<sup>254</sup> Instead, the Beijing Rules determines that the police, the prosecution or other agencies can dispose of juvenile’s case without recourse to formal hearings according to national law in the country.<sup>255</sup> In its commentary, the Beijing Rules also emphasizes the use of diversion “at any point of decision-making by the police, the prosecution or other agencies such as the courts [...]”.<sup>256</sup> The possibility to apply the diversion at each stage of the proceedings under Law 11/2012 complies with the international standards.<sup>257</sup> Moreover, the Beijing Rules provides the possibility for the authorities to dispose juvenile’s cases at their discretion.<sup>258</sup> In the context of Indonesia, while there is a clash between Law 11/2012 and the Supreme Court’s Decree, the authorities can still apply the diversion in the more severe crimes according to the Supreme Court’s Decree and the discretion of each authority.

Regarding children’s consent as the diversion’s requirement, it complies with GC 10 and GC 12. On one hand, diversion needs a voluntary consent from child offenders that should be based on adequate and specific information on the nature, content, duration and the consequences of diversion programs.<sup>259</sup> On the other hand, it also concerns child victims’ rights to be consulted in the process.<sup>260</sup>

Both Beijing Rules and The CRC Committee do not limit the use of diversion only to minor offences and first-time child offenders.<sup>261</sup> However, the Committee allows the states parties to decide the nature and the content of diversion in which cases diversion is possible [...].<sup>262</sup> Beijing Rules specifically mentions “the merits of individual cases would make diversion appropriate, even when more serious

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<sup>251</sup> *Id.*, art. 8 (2), art. 93 (d).

<sup>252</sup> GC 10, *supra* note 18, para. 27.

<sup>253</sup> *Id.*, para. 26.

<sup>254</sup> *Id.*, para. 27.

<sup>255</sup> Beijing Rules, *supra* note 2, art. 11 (2).

<sup>256</sup> *Id.*, The commentary of Article 11 (2).

<sup>257</sup> See subchapter 4.2.1. Under Article 7 (1) of Law 11/2012, diversion is possible at any stage of the proceedings. Also, in the Jambi’s case above, the authorities attempted to apply the diversion in the police, prosecutor up to the court’s level. Later, it was accepted at the court’s level.

<sup>258</sup> Beijing Rules, *supra* note 2, art.11 (2).

<sup>259</sup> GC 10, *supra* note 18, para. 27.

<sup>260</sup> *Id.*, para. 63.

<sup>261</sup> *Id.*, para. 25 General Comment No. 10, and see also Beijing Rules, *supra* note 2, the commentary of Article 11 (2).

<sup>262</sup> *Id.*, para. 27.

offences have been committed".<sup>263</sup> It gives the notion that diversion could also be applicable in more serious crimes pertaining to individual assessment of the case.

Whether or not the diversion's requirements in Law 11/2012 comply with the international standards remain obscure. It restricts the use of diversion only to certain offences below 7 (seven) years of imprisonment (strongly exclude murder, rape, drug dealers, and terrorism)<sup>264</sup> and merely for first-time offenders to which it is against the international standards' intention. Nevertheless, at the same time, the Committee allows the state to decide in which cases diversion is applicable.<sup>265</sup>

Further, the Committee strongly emphasizes that "a child who has been previously diverted must not be seen as having a previous conviction".<sup>266</sup> Reversely, Law 11/2012 exempts the diversion for child offenders who ever committed previous offences, either in a similar or different type of crimes, including the offences that were settled through diversion.<sup>267</sup> It is contrary to the CRC Committee's idea. The diversion should not lead to criminal records that label a child to have committed a crime.<sup>268</sup>

The CRC and GC 10 do not explicitly address the issue of diversion in the context of crime with victims, or more specific, child-on-child crime. However, as mentioned in Chapter 3, child victims are entitled the right to be consulted and their interests to be taken into account in the case concerning them. In this matter, Law 11/2012 moves a step further than the CRC. Not only it concerns on child offenders' consent and participation, but it also recognizes child victims' interests to be given due weight.<sup>269</sup> Rather than merely diverting juvenile cases from the formal trial, the diversion in Indonesia system intends to achieve an amicable settlement between child offenders and the victims. Instead, the law uses the strong word such as 'must' when determining the importance of considering both interests of child offenders and the victims in the diversion process.<sup>270</sup> Even though deemed as decisive, the authorities should respect child victims' opinion for not approving the diversion. The authorities should adequately inform the victim on the nature, content, procedures, and consequences of the diversion before the victim made the decision.<sup>271</sup>

#### 4.5 Improvement at The National Level

Despite some compliance with the international standards, the diversion rules in Indonesia still have several shortages that need further improvements. Due to the clash between Law 11/2012 and the Supreme Court Decree in determining the type of the offences in which diversion is possible,

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<sup>263</sup> Beijing Rules, *supra* note 2, the commentary of Article 11 (4).

<sup>264</sup> Law 11/2012, *supra* note 13, the commentary of Article 9 (1) a.

<sup>265</sup> GC 10, *supra* note 18, para. 27.

<sup>266</sup> *Id.*,

<sup>267</sup> Law 11/2012, *supra* note 13, the commentary of Article 7 (2) (b).

<sup>268</sup> GC 10, *supra* note 18, para. 27. Paragraph 27 General Comment No. 10

<sup>269</sup> Law 11/2012, *supra* note 13, art. 9 (2). It explicitly requires victims' approval to enter the diversion in crime with victim cases.

<sup>270</sup> *Id.*, art. 3.

<sup>271</sup> GC 10, *supra* note 18, para. 27. The CRC Committee allows the state to establish the exact content of the diversion in its domestic laws. For making the law effective, detail information on the diversion should be informed to the parties involved, including child victims and their parents (or guardian).

inconsistency remains.<sup>272</sup> Hence, a revision to the Law 11/2012 is needed to clarify whether or not the diversion can apply to the crime with or more than 7 (seven) years of imprisonment. According to the analysis in Chapter 2 and Chapter 3, diversion should be made flexible and tailored to a case-by-case basis, taking into account evolving capacity and individual circumstances of the child. More importantly, the national law and the implementing guideline (such as the Supreme Court Decree) should not contradict each other.

Furthermore, Article 15 of Law 11/2012 stresses that a more detail regulation on the implementation, procedures, and coordination regarding the diversion will be set out under Government Rules. Likewise, further regulations on the rights of child victims (and child witnesses) will be stipulated in a Presidential Regulation. However, up to today, those implementing regulations are still missing. The state needs to establish the necessary guideline so that the diversion can be effective. It should concern on the child victims' needs such as medical and psychological rehabilitation or other relevant reparations. Moreover, even though parental involvement is mandatory, the authorities should ensure that children's opinion would matter most in the diversion process, not dominated by their parents' interest.

#### **4.6 Concluding Remarks**

Law 11/2012 regulates the use of diversion in victimless or 'crime with victim' cases at any stage of formal proceedings as promoted by the Beijing Rules. For the latter, victim approval is mandatory before diverting young offenders from the formal trial. If the case involves minor victims, their parental consent is needed.

Under the international legal standards, it remains vague whether the limitation of Law 11/2012 concerning the use of diversion only to certain type of offences is acceptable or not. The inconsistency also remains at the national level regarding the diversion's requirement since the contradiction arises between Law 11/2012 and the Supreme Court's Decree.

The CRC Committee explicitly argues that the diversion should not be limited to first-time offenders only. Reversely, Law 11/2012 restricts the use of diversion for child offenders who ever been diverted from their previous cases. Meaning that the diversion leads to criminal records in which the CRC against to.

Concerning child victim's participation, Law 11/2012 is more progressive than the CRC, GC 10, and the Beijing Rules. At the international level, there is no specific regulation on how diversion is applied to child-on-child crime. It seems to be more focused on the diversion in victimless cases. The CRC, General Comments, and the ECOSOC Resolution recognize child victims' rights in criminal justice systems, but not specifically their rights in an alternative to formal proceedings, such as diversion. Conversely, Law 11/2012 strongly identifies child victim's interest in the diversion process and determines victim approval as a vital requirement to enter the diversion. It also adopts the CRC and ECOSOC Resolution on child victim's right to be heard, to be informed, and to be treated with dignity and compassion.

The mandatory requirement of involving parents in Law 11/2012 can be both positive and negative at the same time. The international standards do not regulate parental involvement in the diversion, except the need of parental consent if the offender is under the age of 16 years. However, still, such parental consent is an alternative. It can be useful for strengthening parental responsibility towards

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<sup>272</sup> See Subchapter 4.2.4.

their child but can be a drawback if parental interests dominated the diversion process, instead of children's interests.

Victim's decisive approval to enter diversion may hamper the full implementation of settling child-on-child crime without going to formal judicial proceedings. Nevertheless, such approval requirement is still needed to give the opportunity for child victims to be heard in the decision-making concerning their case.

## 5. Bridging The Interests of Child Offenders and Child Victims in Diversion

### 5.1 Introductory Elements

In the previous chapters, the findings show that the interests of child offenders and child victims play a role in the diversion process. Where victims exist, the diversion can serve as a tool to achieve restorative justice. Rather than a violation of the law (with the state as the victim), restorative justice framework sees the offence as a violation or damage inflicted on people and relationship.<sup>273</sup> Diversion can provide teaching for young people in conflict with the law on one hand, and address the need of victims to resolve the underlying conflicts than formal justice better on the other hand.<sup>274</sup>

As explored in Chapter 2 and Chapter 3, diversion relates closely with RJ and ATJ concepts. These three core notions intersect each other in the rules of diversion in a child-on-child crime. Diversion in this context falls under RJ concept because of the existence of child victims. The decision of diverting young offenders should give due weight the interests, rights, and participation of child victims. Through diversion from formal proceedings, child offenders can seek a better settlement to repair the harm and hold accountable towards the victims.

Diversion also interconnects with ATJ concept the extent to which it provides an alternative mechanism for child victims to access a fair and just remedy, not necessarily through the formal trial but through restorative approach. Hence, the diversion of child offenders could benefit child victims in their access to justice in a child-on-child crime accordingly.

Referring to the analysis of the interconnection between these three fundamental concepts, diversion in a child-on-child crime could be helpful both for child offenders and child victims in the juvenile justice system. Such idea then used to assess the compliance of diversion in Indonesia through the lens of the international frameworks.

Following the exploration in Chapter 4, the diversion regulation under Indonesia Law 11/2012 is partially in compliance with the international children's rights standards mentioned in Chapter 2 and Chapter 3. Nevertheless, due to some shortages, some elements need to be strengthened. Based on the observations in the previous chapter, this chapter aims to examine the possibility of improvement through the role of the CRC and the CRC Committee in addressing diversion in a child-on-child crime. A better improvement on the diversion regulation at the international level may further benefit both child offenders and child victims in a child-on-child crime, not only in Indonesia but also in other countries.

### 5.2 The CRC's General Principles Potential to Bridge the Gaps

As the most ratified international instrument on children's rights, the CRC promotes the use of an alternative mechanism to the judicial proceeding in Article 40 (3) (b). Under the GC 10, it clarifies that such measures can be in the form of diversion.<sup>275</sup> Referring to Chapter 2, in interpreting the diversion, the authorities need to take into account other relevant juvenile justice provisions and the CRC's

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<sup>273</sup> Zehr, *supra* note 88, at. 7.

<sup>274</sup> R. Winter, Recover and Supervise, Diversion, an Effective Instrument for Recovering Adolescents in Conflict with the Criminal Law, *Justicia Para Crecer (Specialized Magazine in Restorative Juvenile Justice in Latin America and Caribbean)*, No 23, at. 33 (2018).

<sup>275</sup> GC 10, *supra* note 18, para. 24.

general principles.<sup>276</sup> In the context of child-on-child crime, the use of the CRC's general principles is promising to guarantee the interests and participation of children concerned. The CRC is beneficial as a common ground because it is legally binding and it applies to both children, either as offenders or victims of crime.

### 5.2.1 The Child's Best Interest Principle

Article 3 (1) of the CRC stresses that the best interest of the child shall be a primary consideration in all actions concerning children.<sup>277</sup> Being a primary consideration means that the authorities should consider the child's best interest at a higher level than other interests, pertaining to the distinctive characteristics of the child: dependency, maturity, legal status and, often, voiceless.<sup>278</sup> Where a decision would have a significant impact on a child, it is appropriate to give a greater level of protection and detail procedures that concern the child's best interest.<sup>279</sup>

The decision of whether or not to divert young persons from formal judicial proceedings falls under this classification, as it profoundly affects the lives of children and because sending minors to formal trial is likely to result in adverse impacts. Not only child offenders' best interest should be concerned, but also the child victims'. As discussed in Chapter 3, due to the offence committed, child victims are entitled the right to a fair, timely and just remedy or *so-called* "Access to Justice."<sup>280</sup> According to Chapter 2, providing an access to restorative justice is a better option to repair the harm suffered by the victims in comparison with the retributive justice. As a tool to achieve restorative justice, the diversion should take into account children's best interests (child offenders and child victims), for the benefit of the parties both now and in the long run.

More explicitly, The CRC Committee suggests the best interest principle shall apply to children 'in conflict' or 'in contact' with the law.<sup>281</sup> It means that the promotion of rehabilitation and restorative justice objectives should override the traditional goals of criminal justice such as repression or retribution.<sup>282</sup> From the victims' side, the diversion process may also be in their best interest. If the offender is diverted from the formal proceeding, there is no need for the victims to appear before the court in the evidence-gathering process. Chapter 3 has further explored the adverse consequences of child victims' participation in court. In short, diversion can be an alternative procedure that is in the best interest of both children.

### 5.2.2 The Right to Participation

Furthermore, Article 12 (2) of the CRC determines "the child shall be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child [...]." Article 12 (1) explicitly mentions that "the views of the child being given due weight in accordance with the age and maturity

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<sup>276</sup> Juvenile justice provisions related to diversion are Article 37 (b), Article 39, Article 40 (1), and Article 40 (2).

The CRC's general principles that are quite relevant to this context are the child's best interest principle and the right to be heard.

<sup>277</sup> CRC, *supra* note 4, art. 3 (1).

<sup>278</sup> GC 14, *supra* note 35, para. 37.

<sup>279</sup> *Id.*, para. 20.

<sup>280</sup> Liefwaard 2015, *supra* note 132.

<sup>281</sup> GC 14, *supra* note 35, para. 28.

<sup>282</sup> GC 10, *supra* note 18, para. 10.

of the child.”<sup>283</sup> The CRC Committee flexibly interprets this condition. It does not set a minimum age to which children can be heard. Children’s opinion need to be assessed on a case-by-case basis because the level of understanding is not linked in uniform with their biological age, and other external factors matter.<sup>284</sup>

There are two main strands under Article 12 of the CRC: the right to express a view and the right to have opinions given due weight. Lundy identifies four separate factors regarding the child’s right to be heard: space, voice, audience, and influence.<sup>285</sup> Children must be given the opportunity (space) to express their view in the decision-making of the diversion. The state should ensure that children receive all necessary information to decide before they express their opinion.<sup>286</sup> Diversion should not be coerced and the decision left open to child offenders and child victims whether or not they agree to the diversion.

Once children had the space or the opportunity to speak, they need adequate facility to express their views. They should be able to provide their opinion freely without any pressure. A conducive environment should be in place so that they could elicit views that encourage a two-way dialogue between children and the authorities. As the CRC Committee argues in GC 12, “a child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for his or her age.”<sup>287</sup>

Moreover, the audience is essential. Lundy mentions that children have a ‘right of audience’ where they are “guaranteed opportunity to communicate views to an identifiable individual or body with the responsibility to listen.”<sup>288</sup> In this case, the individual or responsible bodies refer to the authorities at any level of proceeding, parents or guardian (if applicable), and other relevant parties related to the matter.

Finally, the responsible authorities should give due weight to children’s opinion. They should not only listen to children but also take children’s views seriously.<sup>289</sup> The authorities need to inform why and how they regard children’s views in the decision-making process. Accordingly, the CRC Committee opines as follows:

In case of diversion, including mediation, a child must have the opportunity to give free and voluntary consent and must be given the opportunity to obtain legal and other advice and assistance in determining the appropriateness and desirability of the diversion proposed.<sup>290</sup>

The CRC Committee also encourages the authorities to enable child victims expressing their views freely. It further states that “a child victim should be consulted on the relevant matters regarding his

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<sup>283</sup> CRC, *supra* note 4, art. 12 (1).

<sup>284</sup> GC 12, *supra* note 113, para. 29. External factors can include, among others, personal experience, social and cultural expectations and levels of support that contribute to the development of a child’s evolving capacity to form a view.

<sup>285</sup> L. Lundy, ‘Voice’ is Not Enough: Conceptualizing Article 12 of the United Nations Convention on the Rights of the Child, *British Educational Research Journal*, Vol. 33, at. 932 (2007).

<sup>286</sup> GC 12, *supra* note 113, para. 6.

<sup>287</sup> *Id.*, para. 34.

<sup>288</sup> Lundy, *supra* note 285, at. 937.

<sup>289</sup> *Id.*, at. 939.

<sup>290</sup> GC 12, *supra* note 113, para. 59.



involvement in the case under scrutiny and enabled to express freely, and in her or his own manner, views and concerns regarding her or his involvement in the judicial process.”<sup>291</sup> In a child-on-child crime, the child’s right to be heard in the diversion should be applied both to the child offenders and child victims. Because diversion is an alternative to (fair) formal trial, the decision of applying the diversion should also be made relatively by giving due weight to both sides’ opinion.

Both child offenders and child victims could exercise their right to be heard in the form of voluntary participation and, if needed, an approval. However, as earlier suggested, the right to information is crucial before children express their views. Even if the parents are involved, their interest should not dominate the diversion process. The authorities should acknowledge children’s agency and capability to exercise their rights in so far it is consistent with their evolving capacities.<sup>292</sup>

No coercion shall be imposed to obtain children’s consent to the diversion.<sup>293</sup> It should apply not only to child offenders as recognized in GC 10 but also child victims as mentioned in GC 12.<sup>294</sup> If child victims rejected the diversion’s proposal for any reasons in so far they had received sufficient information, the authorities should respect and continue the process with the formal trial.

### 5.3 The Role of the CRC Committee

The finding in Chapter 2 shows that the CRC Committee is not consistent at promoting the diversion measure in some countries’ concluding observations. Under Article 40 (3) (b) *jo*. GC 10, diversion is recognized as an alternative to formal judicial proceedings. However, in some countries’ concluding observations, the Committee still retains a restrictive definition of the diversion as limited to substitute to detention.<sup>295</sup> For better consistency and clarity, the Committee should unify its definition on the diversion in the member states’ concluding observation to comply with the CRC. It matters most as concluding observation is often referred to as reference or guidance for the state in implementing children’s rights. To keep the diversion up on the national agenda, the Committee should persistently recommend the diversion in countries’ concluding observation.<sup>296</sup> Not only recommending the use of diversion, but the Committee should also be able to construe the definition of diversion correctly and consistently.

The regulation of the diversion in GC 10 is more on child offenders centric. It provides less consideration regarding the interest of victims, and no provision specifically addresses the interests of child victims in the diversion process.<sup>297</sup> In other words, diversion under GC 10 is more suitable for victimless cases rather than for crime with victims. The CRC Committee needs to provide more guidance on the diversion in the context of child-on-child crime since it involves the interests of both children to be considered, one as the offender and another as the victim. The Committee could, for example, embed some guiding paragraphs in its revision on GC 10 that is currently in the process.

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<sup>291</sup> *Id.*, para. 63.

<sup>292</sup> Liefwaard 2016, *supra* note 149, at. 926.

<sup>293</sup> GC 10, *supra* note 18, para. 27.

<sup>294</sup> GC 12, *supra* note 113, para. 59.

<sup>295</sup> International Bar Association, *supra* note 90, at. 62. For instance, the CRC Committee still depicts diversion as alternative measures to detention in some countries’ concluding observations. See Chapter 2.

<sup>296</sup> *Id.*, at. 63.

<sup>297</sup> Only in GC 10, *supra* note 18, para. 27 did the provision mention on “restitution to and compensation of victims”.

It could be shaped in many ways; the present model serves only as an illustration of what elements should be included.

### 5.3.1 Elements of Revision in General Comment No. 10

Besides harmonizing its definition of diversion in countries' concluding observation, the CRC Committee has another role in bridging the gaps through the revision of GC 10. Under the chapter of 'intervention without resorting to judicial proceedings' in GC 10, the Committee can firstly raise the existence of 2 (two) different types of diversion; in victimless cases and crime with victims. In the context of 'crime with victims', the Committee could narrow the scope by mentioning how diversion should be regulated in a child-on-child crime. It can strengthen the notion that child victims have the right to be heard, give voluntary consent, and necessary advice and assistance in determining the appropriateness and desirability of the diversion proposed.<sup>298</sup> The provision should encourage the right of child victims to adequate information before they decide whether to accept or refuse the idea of diversion. If child victims rejected the proposal, the Committee can provide further guidance, for instance, that the formal trial should continue. This will give clarity to the parties concerned on how to proceed with the case if the diversion failed.

As earlier discussed, the child's best interest principle is vital in the diversion process. The Committee can explicitly mention this provision so that the authorities are aware of taking into account the interests of children concerned at the same time.<sup>299</sup> The Committee may refer the best interest assessment provided in General Comment No. 14<sup>300</sup> and note that in a child-on-child crime, several specific elements should be considered, among others, child's age, conditional reports from probation officer/social worker and wellbeing of the child.

The Committee can also raise the issue of parental involvement in the revision of GC 10, particularly how far could the parents of child offenders and child victims involve in the diversion process. In a child-on-child crime, the Committee should draw the line between parental dominance and children's autonomy with regards to consent and participation. It should ensure that the diversion focuses on bridging the interests of both children concerned, not the parents.

In the current GC 10, the Committee opines that diversion should not be limited to children who commit minor offences and first-time child offenders.<sup>301</sup> It gives the assumption that diversion can also be applied to more severe offences because the Committee allows the state to indicate in its national laws in which case diversion is possible.<sup>302</sup> Nevertheless, other arguments state that diversion can only be granted on the commission of a minor or mid-level offence to which such offences do not constitute a threat or a real danger to society and not a repeat offence.<sup>303</sup> The Committee should be clear concerning the diversion's requirements as its opinion can be referred to by member states for further implementation in the field. The Committee can suggest explicitly whether or not the diversion can be applied to more severe crimes in its GC 10.

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<sup>298</sup> GC 12, *supra* note 113, para. 59.

<sup>299</sup> More specifically, it can refer to the context of child-on-child crime.

<sup>300</sup> GC 14, *supra* note 35, para. 52-79.

<sup>301</sup> GC 10, *supra* note 18, para. 25.

<sup>302</sup> *Id.*, para. 27.

<sup>303</sup> Winter, *supra* note 274, at. 35.

Moreover, it would also be helpful if the Committee provides some examples of the diversion's programs in a child-on-child crime. It should not be limited to family conferencing, but can also, for example, an order of physical or mental rehabilitation or the necessary assistance for child victims if they suffered harm because of the crime. In one of her articles, Renata Winter<sup>304</sup> provides an example concerning a teenager who punched his peer whom later was injured severely, but the offender agreed to help the victim in his university work since he missed the class.<sup>305</sup> The offender also agreed to visit the victim in hospital and spent his free time with him for two months. This kind of programs may give a better opportunity for the offender to learn the lesson rather than in the formal court. For the victim, it is also more helpful as the offender takes the responsibility and endeavours to repair the harm he made by taking action that benefits the victim directly. It is more positive instead of sending young offenders to the court that often results in nothing for child victims' needs.

#### 5.4 Concluding Remarks

At the international level, the three key notions of diversion, restorative justice, and access to justice interconnect each other in safeguarding children's rights in the juvenile justice system. As previously mentioned, diversion in a child-on-child crime falls under the idea of restorative justice because it should address not only the rights and interests of child offenders but also the child victims'. In the settlement of a child-on-child crime, diversion can serve as a process providing child victims a possibility to access a fair, just, and an adequate remedy. Diversion can also be an alternative to ensure the punishment given against child offenders for their misbehaviour is proportionate to the circumstances and the offence. Nevertheless, as explored in the previous chapters, the regulation of diversion in the Beijing Rules, CRC, and General Comment have not yet provided clear rules regarding the diversion in the context of child-on-child crimes. Such process should balance the interests of children concerned, the offender and the victim.

As the most legally binding instrument on children's rights in the juvenile justice matter, the CRC, its General Comment and the CRC Committee can actively contribute to better implementation of children rights in the member states. Not only limited in the context of Indonesia, such improvement in the regulation of diversion in child-on-child crimes could also benefit other countries.

The principles of the child's best interest and the right to be heard are essential in all decision-making regarding the diversion because it affects child offenders and child victims directly. Implementing diversion in a child-on-child crime means that the authorities should adequately give due weight the interests of both children as the parties.

The CRC Committee could improve the clarity of the diversion's concept by harmonizing its definition in the member states' concluding observation. Further, it could provide more guidance on the diversion of child-on-child crime in its revision on GC 10. Some notable elements that can help for better guidance are, among others, clarification on the different types of diversion, position, rights, and interests of child victims in the diversion in crime with victims, follow-up measures if the diversion failed, necessity to concern both children's opinion fairly pertaining to their best interests, and the importance of the best interest assessments. It also needs clarity on parental consents and participation, the diversion's requirements for more severe crimes, and examples of the diversion in child-on-child crimes. These could guide member states to better regulating the diversion in their national legislation and using the diversion more effectively to bridge the interests of child offenders and child victims in child-on-child crimes.

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<sup>304</sup> Renata Winter is the current Chair of the UN Committee.

<sup>305</sup> Winter, *supra* note 274, at. 35.

## 6. Conclusion

Although almost 30 (thirty) years since the enactment of the CRC, still, some drawbacks remain regarding the fulfilment of children's rights in the juvenile justice system. Millions of children are still caged behind the bars worldwide<sup>306</sup> and numerous children may have experienced the adverse effects of formal trial, either acting as the offender or the victim of crimes. Formal trial often results in the imprisonment of children, denying the existence of other alternative measures that are more tailored to children's specificity, vulnerability, and wellbeing. One of the alternatives to formal trial proposed by the Beijing Rules and CRC is called 'diversion'. The concept initially aims to deal with children in conflict with the law without resorting to formal judicial proceedings. The analysis shows that diversion can be an option of dealing with juvenile crimes because it is more child-friendly and child-centric solution both for the short and long-term.

This thesis has discussed the broad concept of diversion at the international level, its intersection with restorative justice and access to justice, the compliance of the diversion in Indonesia with the international standards, and the potentiality of the CRC and the CRC Committee to further improve the diversion regulation in its member states, including in Indonesia.

As the three key concepts throughout this thesis, there are various definitions in the international standards and literature concerning diversion, restorative justice, and access to justice. Although there is no universally agreed definition for each concept, the author has used the definition provided by the CRC and General Comment No. 10 (for diversion), the UNODC (for restorative justice), and the UNICEF (for access to justice). Likewise, there is also no single comprehensive instrument that explicitly addresses the interrelation between these three concepts and their possible benefits for children in the juvenile justice system, especially when it comes to child-on-child crimes.

First of all, the analysis depicts that inconsistency still arises regarding the definition of diversion at the international level both filed by the literature and the CRC Committee. There is still confusion whether diversion supposed to be an alternative to formal trial or a substitute to detention. Pursuant to the CRC and General Comment No. 10, it is quite explicit that diversion should serve as a measure to channelling children away from formal judicial proceedings.

The analysis also shows that the regulation of diversion at the global level is more 'child-offenders centric'. The provisions mentioning the diversion in General Comment No. 10, for example, addresses several requirements that safeguard the rights of child offenders. Only a few considerations are given to the interests of the victims in general while attention to the rights, participation, and interests of child victims is completely missing.

The analysis further affirms the existence of 2 (two) types of diversion, which is applicable to 'victimless crimes' and 'crimes with victims'. The guidelines of diversion in General Comment No. 10 seems to be more suitable for the diversion of victimless cases, which is not necessarily related to restorative justice concept.

Child-on-child crimes fall under the category of 'crime with victims'. Hence, the decision of whether or not to divert young offenders should also consider the interests of child victims. Because of the existence of the victims, diversion in child-on-child crimes is classified as a part of restorative justice. It serves as a tool to achieve the primary goals of restorative justice, which is to repair the harm, hold the child offender accountable, and provide the settlement that considers the needs of child victims.

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<sup>306</sup> Human Rights Watch, *supra* note 1.

These ultimate objectives of restorative justice also relate to the possibility of access to justice for child victims.

In the diversion in child-on-child crimes, child victims are entitled the rights to obtain a fair and just remedy. This can be achieved if child victims have proper access to justice. Such redress can be accessed not necessarily through a conventional (formal) system in courts but also through restorative justice approach, to which diversion is one of its methods. Hence, diversion can benefit child victims the extent to which their voice is better heard in the decision-making process, in comparison with the punitive approach in formal judicial proceedings.

Therefore, the analysis indicates that diversion can be beneficial both for child offenders and child victims in the resettlement of a child-on-child crime. From the child offenders' perspective, diversion is useful to prevent stigma, promote educative measures for a better reintegration to society, and ensure that the measure is appropriate to the child's wellbeing and proportionate to the circumstances and the offence. From the child victims' perspective, diversion can be helpful to find the truth, guarantee the offender's accountability towards the victim, and prevent the adverse consequences of (delayed) judicial proceedings.

Under the solid concept of diversion and its interconnection with restorative justice and access to justice at the international level, this thesis has examined the compliance of diversion in Indonesia in terms of balancing the interests of child offenders and child victims in child-on-child crimes. The diversion in Indonesia complies with the international standards because; 1) it is a mechanism of resorting young offenders from formal judicial proceedings 2) it aims for the child's accountability following the crime committed and to prevent stigmatization 3) it applies at each stage of the proceeding and 4) it is possible only with a free and voluntary consent from the children concerned. Nevertheless, some shortages remain. Those involved, among others, the inconsistency of legal requirements to enter diversion, restriction on the use of diversion for those who ever been diverted in their previous cases, mandatory parental involvement, and lack of implementing regulations.

However, the CRC and its General Comments as the children rights' legal framework are also not perfect. It needs to be strengthened, specifically about victim participation and interest in the diversion process. Here, Law 11/2012 is more progressive than the international legal standards. It explicitly promotes child victims' right to be heard and to be consulted regarding their involvement in the process. It further determines that victim approval is mandatory. In so far the authorities have fully equipped child victims with all the relevant information, they should always respect the decision of child victims whether or not to accept the diversion. Diversion should give due weight child victims' interest, and if child victims rejected the proposal or the offender failed to complete the diversion programs, the formal proceeding shall continue.

Law 11/2012 endeavours to balance the interest of child offenders and child victims in the diversion process. On one hand, it concerns on the child offenders' social inquiry reports regarding their circumstances, voluntary participation, possibility to be diverted at each stage of judicial proceedings, child's age, and the adverse consequences child offender may suffer throughout the formal trial. These elements are in line with the requirements under the CRC, General Comment No.10, and Beijing Rules. On the other hand, diversion takes into account child victims' interest by giving them the opportunity of whether or not to approve the diversion. Victim participation is thus voluntarily, and no force should be imposed to obtain their approval. It also considers social worker's reports on child victims' condition and regards the child's right to be heard. These characteristics comply with the CRC, General Comments No.12, and the ECOSOC Resolution.

Moreover, the CRC and the CRC Committee can maximize their potential to accommodate child victims' rights and interests in the diversion process. It can provide more guidance on the diversion in a child-on-child crime, for instances, in its revision on the current General Comment No.10.

The Committee can distinguish different approaches regarding diversion in the context of victimless crimes and crime with victims. In the case where victims exist, the Committee may provide its opinion about considering victims' interests before diverting juvenile offenders from the formal system. It can include the elements such as child's age, social report, the issue on mandatory/voluntary parental involvement, provisions regarding in which cases the diversion can apply, follow-up measures if the diversion failed and the examples of diversion programs in a child-on-child crime.

In light of the above, the author proposes these followings suggestions:

1. The CRC Committee to embed the provision of diversion in 'crime with victims', or more specifically, child-on-child crimes in its revision on General Comment No. 10;
2. The CRC Committee to clarify its definition of diversion in the member states' concluding observations and standardize it in compliance with the CRC and General Comment No. 10;
3. At the national level, the Indonesian authorities need to establish a guideline on the detailed nature of the diversion;
4. Indonesian stakeholders to synchronize the contradictive provision of the diversion requirement in its Law 11/2012 and the Supreme Court's Decree. It should also reconsider the limitation of 'first-time offenders only' and the possibility of criminal records after the diversion.

After all, the more solid international guidance on diversion in child-on-child crimes could better safeguard the rights of children who are 'in conflict' (the offender) and 'in contact' (the victim) with the laws. It could be beneficial for preventing more children in formal judicial proceedings and provide them with a better settlement of crimes. The potential role of the CRC and the CRC Committee can benefit the regulation of diversion in Indonesia and other countries worldwide.

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