

Overview of measures applied to children in conflict with the law in post-Soviet countries: Non-custodial measures and diversion programmes

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Abstract: *This article seeks to identify where non-custodial measures are applied in the post-Soviet space and where, in particular, diversion is used as a non-custodial measure in child justice systems. To this end, the article reviews the legal contexts and practices of 12 post-Soviet countries based on existing theoretical frameworks. As such, the article first defines the goals and needs of applying non-custodial measures to children in conflict with the law. Second, it addresses definitions, principles and the types of diversion directing children away from criminal justice proceedings. An analysis of the best practices in the region revealed that only two of the countries reviewed (Georgia and Kyrgyzstan) apply diversion programmes. Consequently, the article specifically considers these diversion programmes according to their general principles, criteria and the type of diversion applied. Given the fact that children in the regions are often detained in various types of facilities, mostly for rehabilitation purposes, the article highlights the serious need for post-Soviet states to urgently develop non-custodial measures in order to divert children away from the criminal justice system.*

Key words: *children; non-custodial; diversion; deprivation; justice*

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1 Introduction

International human rights law urges states to use custodial measures only as a last measure. The Global Study on Children Deprived of Liberty (Global Study) highlights that worldwide 7,2 million children are deprived of liberty in many forms of detention; 1,4 million of these children are exclusively detained in the context of the criminal justice system – a million of which, in turn, routinely find themselves in police custody. Additionally, 5,4 million children are deprived of liberty per year in various types of institutions (Nowak 2019). The latter figure is highly relevant, as this article will illustrate the non-custodial practices in the context of post-Soviet countries. Paulo Sergio Pinheiro (the Independent Expert leading the Global Study on Violence Against Children) notably refers to the countries of Central and Eastern Europe and the Commonwealth of Independent States as the region with the highest occurrence of institutions (Pinheiro 2006). In addition, the World Prison Brief provides that the regional imprisonment rate of children in Central and Eastern Europe is 5,81, while in Central and Southern Asia the rate stands at 4,78 (Walmsley 2018).¹ While on the service, this rate may not appear to be high, which is due to the fact that children are first placed in other types of institutions before considering any form of non-custodial solution. In its recommendations, the Global Study urges countries to prioritise non-custodial solutions and diversion in order to protect children from the criminal justice system and, as the paper argues, by extension also other forms of deprivation (Nowak 2019).

Article 2000 and – more actively since 2006 – the European Union (EU) and the United Nations Children's Fund (UNICEF) have promoted a number of initiatives for reform in the region starting with harmonising legislation with international standards. While most post-Soviet countries followed the recommendations by amending their criminal legislations, practical implementation was halted for various reasons. The findings of the Global Study clearly highlight that within the administration of justice in the post-Soviet space, more research is needed in order to understand the obstacles to effective implementation. Overall, diversion is considered a crucial non-custodial measure in order to direct children away from the criminal justice system. The preliminary review revealed that generally there exists a positive political will to apply diversion mechanisms in the post-Soviet region. Yet, practical implementation of these measures in national justice programmes remains sorely lacking.

From this perspective, the article isolates and reviews the non-custodial measures and diversion programmes applied in 12 former USSR states

1 The rate is calculated for the imprisonment of children in pre-trial detention and prisons per 100 000 children ranging from 60,00 to 0,00.

in Eastern Europe and Central Asia. In Eastern Europe, the focus falls on Armenia, Azerbaijan and Georgia, while in Central Asia five countries are selected for a comparative reflection, namely, Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan. Despite the common legislative heritage and practices among these countries, their criminal laws and proceedings have been developing in very diverse ways. To understand the main directions and strategies applied in relation to various child justice systems in these countries, an analysis of the provisions concerning children in criminal legislation is a focal point of this study. First, the article considers the minimum age of criminal responsibility, while also identifying the types and nature of the measures applied to situations where children find themselves in conflict with the law. The article considers the detail as well as the application procedures of diversion cases in the region before ending with a number of recommendations for more effective application of diversion measures. The measures are analysed according to the principles, thresholds and minimums standards as stipulated in international human rights law. Moreover, diversion programmes are reviewed in light of theoretical frameworks, specifically considering the nature, type and the underlining principles informing these programmes.

2 Research methodology

The article seeks to identify where non-custodial measures are applied in the post-Soviet space and where, in particular, diversion is used as a non-custodial measure in child justice systems. To this end, the article reviews the legal contexts and practices of 12 post-Soviet countries based on existing theoretical frameworks. As such, the article first defines the goals and needs of applying non-custodial measures to children in conflict with the law. Second, it addresses definitions, principles and the types of diversion directing children away from criminal justice proceedings. The research applied both qualitative and quantitative methods. The overview of the 12 selected countries is predominantly conducted via desk research, while the analysis of specific diversion case studies is focused on evaluating reports published by UNICEF, the EU and other international and/or local organisations. The desk review additionally includes an analysis of the legislations, criminal codes as well as the criminal procedural codes of the 12 selected countries in order to understand the various provisional approaches to children in conflict with the law. The desk review also identified which countries actively apply diversion in their child justice systems, the results of which are further augmented by two diversion-specific case studies informed by ten expert interviews (five in Georgia and five in Kyrgyzstan).

The study uncovers which post-Soviet states demonstrate the best application of non-custodial measures through existing diversion procedures. The overview of all 12 criminal systems revealed that only

two countries apply diversion measures, namely, Georgia and Kyrgyzstan. The effective application in these two countries was assessed in the study through an analysis of both national legal provisions and practical provisions. The other case studies were based on an analysis of the respective constitutions and legislations. Where they exist, the various laws on children were considered, which included government decrees, national strategies (with a focus on diversion programmes) and the criminal justice system in general. Additionally, the recommendations and special reports issued by the UN Committee on the Rights of the Child also informed the study, while shadow reports of the selected countries were studied as far as they connect to the topic of non-custodial measures and diversion. The case studies also consider various institutional frameworks of diversion programmes and describe key actors, programmes and services (both on a governmental and non-governmental level). Data was collected through desk reviews, taking into consideration statistics, ombudsperson reports, cases and reports of local civil society organisations (CSOs). Moreover, diversion programmes were studied and evaluated through research and expert reviews. Independent expert interviews with social workers, specialised prosecutors and inspectors in child justice system, as well as anonymous interviews were conducted through questionnaires considering the principles described above. Several representatives of civil society organisations were also consulted during the course of this regional study.

3 Theoretical framework

3.1 Use of non-custodial measures

Article 37(b) of the UN Convention on the Rights of the Child (CRC) limits children's deprivation of liberty, stipulating that the arrest, detention or imprisonment of a child is to be used only as a measure of last resort and for the shortest appropriate period of time. This means that, in light of the nature of the offence committed by children, states should apply non-custodial measures and that deprivation of liberty of children should only occur in exceptional cases. The UN Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules) stipulate that the goal of these measures is 'to provide other options, to reduce the use of imprisonment, and to rationalise criminal justice policies, taking into account the observance of human rights, the requirements of social justice and the rehabilitation needs of the offender' (Tokyo Rules para 1.5). The rules are to be applied without any discrimination, including age (Tokyo Rules para 2.2). These measures have to be prescribed by law, and in order 'to provide greater flexibility with the nature and gravity of the offence, with the personality and background of the offender and with the protection of society and to avoid unnecessary use of imprisonment, the criminal justice system should

provide a wide range of non-custodial measures' (Tokyo Rules para 2.3). Furthermore, the Guidelines of Action on Children in the Criminal Justice System (Vienna Guidelines) highlight the importance of preventing the overreliance on criminal justice measures, and suggest the development, application and constant improvement of non-custodial measures and reintegration programmes (Vienna Guidelines para 42). Article 40(4) of CRC additionally provides a list of non-custodial measures to be available for children to make sure that the nature of measures applied complies with the circumstances of the offence and the well-being of the child. Thus, CRC recommends to keep children in conflict with the law out of the criminal justice system (Nowak 2019). Non-custodial measures should also be applied 'to pregnant woman or a child's sole or primary caretaker' (Bangkok Rules para 9), where it relates to both preventive detention and sentencing detention (UNGA Res.64/142, 2009, para 48). The Global Study reemphasises that the detention of children should occur only after all other options, including all non-custodial measures, have been exhausted (Nowak 2019). The Global Study regards the lack of non-custodial measures as one of the principal reasons for children's deprivation of liberty – especially in dysfunctional and repressive justice systems (Nowak 2019: 33). Diversion is considered a highly effective measure to channel children out of the criminal justice system – as is evidenced by the fact that it forms a core part of the Global Study's recommendations (Nowak 2019).

3.2 Diversion and its types

There is no universally-recognised definition of diversion or diversion programmes. A brief description, however, is provided in the UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules, Rule 11). According to Rule 11 measures should be taken by any agency to avoid the enrolment of child offenders into formal child justice proceedings. The rule promotes community engagement 'such as temporary supervision and guidance, restitution, and compensation of victims. Diversion, involving removal from criminal justice processing and, frequently, redirection to community support services, is commonly practised on a formal and informal basis in many legal systems' (UNGS Res 40/33, 1985 Rule 11.4). The Commentary on rule 11 further explains that diversion is a formal and informal intervention, or no intervention, meaning that the children remain outside of the child justice system. It further emphasises that it is to be applied with the consent of the child and his or her legal representatives 'to minimise the potential for coercion and intimidation at all levels in the diversion process' (Commentary). Byrum and Thompson define diversion as an attempt to channel children out of the child justice system (Byrum 1996). Meanwhile, it should be noted that diversion programmes still hold the child responsible for the offence, but grant possibilities to avoid the negative consequences of entering the

formal justice system. According to labelling theory, diversion primarily helps children to avoid being labelled as 'delinquents' and, thus, also the consequences of such labelling in society (Klein 1986).

According to social learning theories, diversion may expose children to more children who are in conflict with the law (Cressy 1952). Therefore, it is argued that diversion programmes should have a very specific goal 'to prevent youth with minimal delinquent involvement from becoming more heavily involved in delinquency due to their association with and learning from peers with greater justice system involvement' (Farrell 2018). In this sense, negative aspects of diversion are deemed to be (a) the widening of a net of children who are in conflict with the law; and (b) an unintentional increase of recidivism and other negative consequences arising from unequal access and use of diversion programmes (Mears et al 2016). However, diversion programmes are mostly viewed positively as ways of channelling children out of the child justice system. The Global Study considers diversion as an early intervention before the child may associate with formal legal proceedings (Nowak 2019). Early interventions are considered the most effective approach of diverting children away from the justice system. Yet, applying diversion at the various other stages of the process (pre-arrest, pre-trial and post-trial) also prevents children from entering the criminal justice system (Vienna Guidelines para 15). The Vienna Guidelines further point out that among the goals of diversion programmes are the prevention of recidivism, promoting social rehabilitation, strengthening social assistance and improving the application of non-custodial measures (Vienna Guidelines paras 15 & 42). From this perspective, pre-arrest diversion best complies with the goal of diversion, since children in conflict with law will be prevented from further exposure to the formal justice system. Post-arrest or pre-trial diversion takes place after the arrest, but the child is still prevented from progressing further into the formal proceedings based on the assumption of not constituting a threat to public safety (Farrell 2018).

The types of diversion measures vary from country to country. However, the most popular are informal warnings by the police, community service, trainings, education programmes, medical and psychological treatment, counselling, community programmes, and so forth (Nowak 2019). Broadly, diversion can be divided into two categories, namely, (i) non-interventional or unconditional diversion; and (ii) diversion with conditions.

Non-interventional or unconditional diversion considers the gravity and circumstances of the offence, thus formally or informally cautioning the child after he or she admits to the crime (Goldson 2016). Depending on the gravity and circumstances of the crime committed by a child, *diversion with conditions* is used as an alternative to detention and is employed specifically for rehabilitation purposes (Nowak 2019). When

non-interventional or unconditional diversion measures are not feasible or have been exhausted, the Global Study considers *diversion with conditions* as the best alternative to custodial approaches, for instance, police warning instead of detention in police custody, no charges in cases of minor criminal offences and non-custodial solutions instead of prison sentences (Nowak 2019).

Based on the responsible actors, the nature of the crime and the services provided, the following types of diversion may be identified:

Police-led
<p>Caution and warning programmes: formal caution (generally at the pre-trial stage), further referral to service and restorative caution</p> <p>Civil citation programmes: avoiding arrest records usually by community service hours or in intervention services</p>
Service coordination
<p>Case management: linking children to external services, eg, social work, NGO services</p> <p>Wraparound services: a team of experts and stakeholders is gathered to best comply with families' and children's needs</p>
Counselling/skill-building
<p>Individual-based treatment</p> <p>Family-based treatment</p> <p>Mentoring: pairing the child and an adult who will serve as a positive role model</p> <p>Skill-building programmes: employment training, truancy interventions and other educational services</p>
Restorative justice
<p>Victim-offender mediation</p> <p>Family group conference: including other important family members, friends of the victim and the offender, can be led by school officials, police officers and other experts</p> <p>Teen court: simulation of courts carried out by volunteer youth to utilise positive peer influence</p>

Table 1: Types of youth diversion programmes (Farrell 2018)

When applying diversion, various aspects need to be considered. These include gender sensitivity, accessibility without discrimination to minority children, children with fewer socio-economic opportunities as well as children with disabilities and developmental issues (Ericson 2016). In its Toolkit on Diversion and Alternatives to Detention, UNICEF brings an expanded list of criteria to be fulfilled when applying diversion

programmes.² Although the list is non-exhaustive, these criteria convey the most general principles applied in all types of diversion programmes:

- the inclusion of the child in diversion programmes does not result in a criminal record;
- elements of caution or warning, an apology to the victim or survivor are included for rehabilitation purposes;
- a non-residential approach as a must of diversion programmes, avoiding any forms of institutionalisation and deprivation of liberty (including rehabilitation schools and special schools);
- competent multi-expert committees, or any other mechanisms to ensure the intensity, duration and compatibility of the crime with the programme;
- activities considering the needs of the child to obtain new knowledge and skills;
- compatibility with the religious and cultural background to prevent further offence;
- consideration of social, psychological and other needs of the victim (element of restorative justice);
- monitoring mechanisms should be in place to assess both the quality of the programme as well as follow up on drop-out children who fail the diversion programme.³

4 Administering justice for children in post-Soviet countries: Popularity of non-custodial measures

Generally, the post-Soviet space may be described as following a conventional justice system rather than developing innovative justice responses. The criminal codes and criminal procedural codes of 12 post-Soviet countries were studied for the purposes of this article in order to assess the measures taken in the criminal justice system when it comes to children and the use of non-custodial measures. Out of the countries investigated, only half of the civil citation programmes applied to children (Armenia, Georgia, Kazakhstan, Kyrgyzstan, Moldova and Ukraine). Arrest, restrictions and deprivation of liberty are not exercised in relation to status offences for children, but are only applied to criminal cases.

4.1 Minimum age of criminal responsibility

All countries designate a separate chapter in their criminal codes to the criminal liability of children (except Tajikistan, which nevertheless

2 UNICEF, Toolkit on Diversion and Alternative to Detention, 2010, available at https://sites.unicef.org/tdad/index_56037.html.

3 As above.

includes specific provisions on children in their Criminal Code). The lowest minimum age of criminal responsibility among the countries is 14 years of age, with Moldova not specifying a minimum age. Moldova developed a detailed procedural code on engagement of children in legal proceedings, and their criminal code specifies paragraphs of general application where the measures are mentioned for those under 18 years of age. The Criminal Code of Ukraine points out the lowest criminal responsibility age for each crime and preventative measure (Criminal Code of Ukraine article 100).

As mentioned above, none of the countries has a lower age threshold than 14 years. However, for some countries the age of the child may be lowered with consideration of the crime committed. For instance, article 111 of the Criminal Code of Belarus mentions that repeated minor offences (that is, those that do not inflict harm on life, physical well-being and health) are not sentenced to detention. Repeated offences, however, which include at least one murder, can result in a prison sentence. For children aged between 14 and 16 years such a sentence may not exceed more than 12 years, while children between the ages of 16 and 18 years can receive a maximum sentence of 17 years (the latter rule being similar in Georgia).

Correlation of the gravity of the crime and age in criminal offences also varies. Article 79 of the Criminal Code of Kazakhstan states that children may only be deprived of liberty for 10 years if the offences involve aggravated circumstances, while the sentence may be higher (12 years) in the event that one of the offences is murder. For all other offences (that is, minor or medium offences) that are committed for the first time, detention should not be applied. In Moldova, in turn, there are two categories that determine whether a child can be deprived of liberty, notably offences that are extremely grave (10 years) and offences that are exceptionally grave (12,5 years). Article 60 of Moldova's Criminal Code further prohibits the imprisonment of children for more than 15 years regardless of the crime committed. In Russia, imprisonment is applied only to children older than 16 years (Criminal Code of Russia article 88 para 6).

4.2 Measures applied for children in conflict with the law

The main types of measures exercised in the region are fines, community service, correctional labour, restriction of certain activities, restriction of liberty (in some legislations including a transfer of the child under the strict supervision of the caregiver) and imprisonment/detention for a determined period of time. The language of legislations varies from country to country, which makes it difficult to draw similarities between legal provisions. Pre-trial detention is not exercised in any of the countries with the exception of Ukraine, where child suspects over the age of 16 can be isolated in a special institution for a period of 15 to 45 days (Criminal Code of Ukraine article 101). Fines are imposed on children who have their own sources of income. Belarus underlines the need to cover the

damage in a way that fits the children's capabilities. Thus, if the child does not have an income, the fine should be converted into community work (Criminal Code of Belarus article 111).

Life imprisonment is not applied to children in any of the selected countries. Revocation practices are also indicated in most legislations. However, these cases are rather dependent on the attitude of individual police officers or other specialists involved. The procedures of revocation thus remain self-led and do not entail argumentation or specific characteristics.

All legislations specify a fixed time and frequency of community service for children. In official Russian translations these services are often referred to as 'correctional labour' (*ispravitelnie raboty*) which are deemed to emphasise the rehabilitative nature of the measure, although the term 'correctional labour' in itself may lead to misunderstanding. Analysing the criminal codes of each country, it is clear that the average length of community service varies significantly, with 30 and 120 hours (Ukraine and Kyrgyzstan); 160 hours (Azerbaijan, Kazakhstan, Tajikistan and Turkmenistan); 180 hours (Belarus); 240 hours (Uzbekistan); and 320 hours (Georgia). In Georgia, community service is the measure most frequently applied. 'Correctional labour' may have a duration of up to three years with four hours of work per day for those under 15 years of age, while the daily hours may go up to six hours for children above the age 15 of years (article 86 para 1). In the case of Moldova, community service for children is the same as for adult offenders (two hours). In Uzbekistan, it is possible to replace 'correctional labour' with a prison sentence – for instance, three days of correctional labour can be replaced with one day's imprisonment (Criminal Code of Uzbekistan article 83). Most legislations stipulate that the nature of the labour should comply with the capacities of the child, including their physical and health condition as well as their psychological and mental development. It should also take place in hours free of education, main employment or hours required for rest. The shortest term for this measure is two months and the longest may take up to three years (Armenia and Georgia).

The least frequently applied measures in the region are (a) offering an apology to the victim; and (b) requiring the offender to attend sessions with specialists (such as psychologists or psychiatrists). The most common measures include warnings; placement under the supervision of parents or caregivers; repair of damage; participation in educational programmes (Moldova, Georgia, Kazakhstan); as well as custodial measures.

4.3 Use of custodial and non-custodial measures

In most legislations, custodial measures result in the child being placed in an institution. Although the average length of prison sentences differs only

slightly among the examined countries, the reasons for depriving a child of liberty vary (that is, placement in special educational or correctional institutions). Restriction of liberty usually is defined as a correctional measure, limiting the child's movements (for instance, in relation to visiting places, driving vehicles, restrictions on out-of-house hours and restrictions on leisure). Such restrictions may take no longer than four years. In some cases these restrictions are realised by placing children in special institutions. The mechanisms and monitoring bodies for the aforementioned restrictions are poorly or not at all defined. Generally, the restriction is applied only to children who committed minor crimes for the first time and to children who do not pose a danger to society. The restrictions are envisaged to take place in institutions, so-called 'reformatory institutions' (Ukraine and Armenia); 'open type institutions' (Belarus); 'institutions of general type' (Kazakhstan and Russia); or 'educational colonies' (Uzbekistan). Data on children residing in these institutions is stored on a database that is used by the police. The child can only be placed in these institutions until the age of maturity (that is, 18 years). The average duration in each country is as follows (Table 2):

Country	Duration	
	Minimum	Maximum
Armenia	None	3 years
Azerbaijan	None	10 years
Belarus	6 months	3 years
Georgia	None	4 years
Kazakhstan	None	10 years
Kyrgyzstan	6 months	10 years
Moldova	None	None
Russia	2 months	2 years
Tajikistan	None	None
Turkmenistan	None	none
Ukraine	6 months	10 years
Uzbekistan	6 months	10 years

Table 2: Duration of the placement of children in institutions referred as other than prison

The deprivation of a child's liberty strongly depends upon the individual decisions of courts. However, detaining a child upon court order cannot always be interpreted as a measure of last resort, while the duration of sentences vary from country to country (Table 3):

Country	Categories of Offences				
	A minor criminal offence committed for the first time	Repeated minor offences	A medium grave offence	A grave offence	An especially grave offence
Armenia	1 year	Not defined	3 years	>7years	> 10 years
Azerbaijan	1 year	Not defined	3 years	>7years	> 12 years
Belarus	No deprivation	Not defined	3 years	>7years	> 10-12 years
Georgia	No deprivation	Not defined	Not defined	Not defined	> 10-12 years
Kazakhstan	No deprivation	Not defined	Not defined	Not defined	> 12 years
Kyrgyzstan	No deprivation	1-6 months	Not defined	Not defined	> 8-10 years
Moldova	1 year	Not defined	2.5 years	>7.5 years	10-12.5 years
Russia	2 months - 2 years	No deprivation	Not defined	>6 years	> 10 years
Tajikistan	No deprivation	Only for male offenders	Not defined	>7 years	> 10 years
Turkmenistan	No deprivation	Not defined	>10 years	> 15 years	-
Ukraine	No deprivation	1-6 months	>4 years	>7 years	> 15 years
Uzbekistan	No deprivation	Not defined	6 months – 2 years	>6/7years	> 10 years

Table 3: Duration of prison sentences for offences in 12 states of the post-Soviet region

The Criminal Code of Moldova does not define certain terms for children who committed crimes in a special provision. Article 60 of the Criminal Code defines the terms of offences in all categories of crimes to be applied to children with half of the term. However, article 93(1) indicates the importance of exempting children from imprisonment 'if the goal of the sentence can be achieved in special educational or re-educational institutions or by applying other coercive measures of an educational

nature'. In some of the cases, such as those in Turkmenistan, no deprivation of liberty is considered. However, it is mentioned only 'if appropriate', thus relying on the decision of the authority (Criminal Code of Turkmenistan article 88). Meanwhile, article 87(6b) of the Criminal Code of Tajikistan envisages criminal liability only for young male offenders who committed repeated crimes. Article 85 of the Criminal Code of Uzbekistan separated the criminal liability for two age groups: offenders of 13 to 15 years of age and 16 to 18 years of age. In the case of particularly grave offences, the terms are the same (10 years), whereas for medium grave offences the maximum term is six years for the 13 to 15 age group and seven years for the 16 to 18 age group.

As mentioned above, the majority of countries allow for the institutionalisation of children in special closed facilities since these are deemed distinct from prisons. Article 90 of the Criminal Code of Russia reads that such measures might be used 'if it is found that this reformation can be achieved by applying compulsory measures of educational influence'. In Russia, during the first half of 2019, 8 285 children were found guilty and convicted for committing criminal offences. Among those, obligatory educational measures were applied to 340 cases and 140 children were placed in closed educational institutions. According to official statistics in 2019, 37 953 cases of criminal offences where children were considered suspects were detected by the police in Russia (Ministry of Internal Affairs of Russian Federation 2019). Placement in special schools (compulsory educational measures) is a measure provided for by Part 2 of article 92 of the Criminal Code. It is used 'to correct a child who needs special conditions for education and training and requires a special pedagogical approach'. As these institutions are closed, there are no opportunities to receive more information about the conditions inside. The placement of a child in a special institution can be decided after applying the compulsory educational measures provided for in Part 2 of article 90 of the Criminal Code, as mentioned above. It can also be applied instead of the above measures, if the court comes to the conclusion that it is necessary to place a child in a special institution (for instance, by repeatedly committing criminal acts before the age of criminal responsibility, a lack of control by parents, ignoring generally accepted rules of behaviour, consumption of alcoholic beverages or drugs, and so forth).

Article 91 of the Criminal Code of Republic of Armenia provides that a child is exempted from criminal liability if the court finds that 'correction is possible by employing coercive educational measures' (Criminal Code of the Republic of Armenia article 91). The same article recalls the importance of applying non-custodial measures where possible. Article 37 of the Code of Criminal Procedure of Republic of Armenia provides for discretion to renounce prosecution in some cases set out by articles 72, 73, and 74 of the Criminal Code, including the victim's consent, regret, and the prosecutor's

belief that 'the accused or the suspect is capable of correction without imposing any measure'. Children are also exempted from prosecution if the offence causes insubstantial damage and/or when pre-trial measures 'seem to be sufficient in terms of having the guilt redeemed'. This article applies regardless of the age of the accused. Investigators may also take this decision in certain cases, subject to the approval of the prosecutor, while the police may also decide not to proceed with the investigation 'in the event of reconciliation of the injured party and the suspect' (Code of Criminal Procedure of the Republic of Armenia 1998 articles 35(1)(5), 35(3) & 36). Based on separate provisions in the legislations of countries in the post-Soviet space, one may observe the general inclination to apply non-custodial measures. However, the understanding on non-custody is viewed in a narrower meaning, that is, custody is viewed only for prisons or incarceration facilities under the administration of justice. In contrast, the terms 'correctional' and 'educational' institutions are not viewed as such.

Status offences are not indicated as causes of detention. With the exception of Moldova and Russia (Title 2), minor criminal cases are neither considered for detention or imprisonment. However, concerns arise when considering different types of institutions. As explained, they come as alternatives to prisons for children in conflict with the law. However, these institutions deprive children of their freedom of movement and engagement in certain activities. It also often results in children being labelled 'delinquents', due to the fact that the data of children mostly remains stored in particular databases.

Georgia and Kyrgyzstan committed themselves to fostering the implementation of justice reforms. Since 2010, for example, Georgia developed separate legislation on child justice, which specifically establishes diversion mechanisms. In 2012, as a result of criminal code reforms, Kyrgyzstan undertook the responsibility to develop a child-friendly justice system through probation mechanisms. However, Georgia and Kyrgyzstan were the only two among the 12 selected countries that have child justice reform programmes, which were first launched in the region in 2000 and then implemented since 2006 (UNICEF 2015). The EU and UNICEF have initiated a number of reforms in the region starting with harmonising legislation processes with international standards. No other countries in the region have a specially structured strategy on child justice or particular provisions to divert children in conflict with the law. The alternatives to charges and custodial measures are compulsory educational measures, community services or the like.

5 Application of diversion in post-Soviet countries: Overview of best practices in Georgia and Kyrgyzstan

5.1 Georgia

In 2015 UNICEF published a study on the equitable access to justice for children in countries including Albania, Georgia, Kyrgyzstan and Montenegro. The study raises a number of obstacles for children accessing justice, such as children depending on adults to receive information about their rights, to navigate and understand available remedies and to access justice forums and mechanisms (UNICEF 2015). One of the major recommendations of the study on Georgia was to support children in the realisation of their rights – specifically their rights to freedom, decisions concerning the deprivation of liberty and participation in legal proceedings (UNICEF 2015).

As of 1 January 2016, the Juvenile Justice Code entered into force, regulating the various child justice mechanisms contained in articles 38 to 48. This change allows programmes in Georgia to come close to the principles of restorative justice, therefore paving the way to apply diversion between the ages of 18 and 21. Consequently, the number of diversion programmes has significantly increased, thereby following a recommendation of the 2013 EU report *Georgia in Transition* (Hammarberg 2013).

In its 2017 Observations the CRC Committee expressed concern about the report of arbitrary detention, torture and ill-treatment of children at police stations, including child participants of the diversion programmes (CRC Committee CRC/C/GEO/CO/4 para 20). In this Observation the Committee recalls the necessity to –

- investigate all allegations of torture and ill-treatment of children committed by public officials and police officers so as to bring them to justice;
- provide essential reparation, rehabilitation and recovery for the victims of abuse;
- strengthen monitoring mechanisms in the detention centres, secure the accessibility of existing mechanisms for receiving complaints on behalf of children (CRC Committee CRC/C/GEO/CO/3 para 30).

In 2019 the follow-up report of UNICEF on Georgia highlighted the necessity of introducing certain amendments in order to fully apply a child-friendly justice approach. The observations include the importance of –

- the establishment of specialised units and professionals who work with children in conflict with the law;

- the need to sensitise mid-level management on child rights to assist professionals in applying the child-friendly approach;
- providing all child witnesses of crime with legal assistance at any stage of contact with the justice system (Georgia 2019).

It is worth noting that the Juvenile Justice Code directly highlights the fact that the detention of children who committed a crime should be applied only as a measure of last resort. It specifically stipulates that '[t]he arrest, detention, and imprisonment of a child shall be admissible only as a measure of last resort which must be applied for the shortest term possible and be subject to a regular review' (Law of Georgia: Juvenile Justice Code article 9 para 2).

If there is reasonable evidence indicating that a child has committed a less grave criminal offence without having a prior criminal record, the prosecutor may decide to divert the child from criminal prosecution. The prosecutor should take decisions on diversion prior to pre-trial hearings. Diversion may also be applied after the court hearings. When applying diversion, the court may deliver a reasoned decision at a pre-trial hearing or at a hearing on the merits in a court of first instance and return the case to the prosecutor. The court can do this on its own initiative or on the basis of the reasoned motion of a party. The prosecutor would then offer diversion to the accused child and shall decide on applying diversion in the event of the child's consent (Law of Georgia: Juvenile Justice Code article 38).

Article 40 of the Juvenile Justice Code reads:

Diversion may be imposed on a minor if all the following circumstances apply:

- (1) there is sufficient evidence for probable cause that the child has committed a minor or serious crime;
- (2) the child has no previous convictions;
- (3) the child has not participated in a diversion-mediation programme before;
- (4) the child confesses to the crime;
- (5) in the belief of the prosecutor/judge and taking into account the best interests of the child, there is no public interest in initiating criminal prosecution or continuing an already initiated criminal prosecution;
- (6) the child and his/her legal representative have given an informed written consent to the application of diversion.

Before a decision is made, the lawyer and the legal representative of the child as well as the child must be provided with detailed information about the nature of diversion, the procedure for diversion, its duration, and the

consequences of failure to comply with the conditions and measures of diversion. It must be explained to the minor verbally and in writing that consent to diversion is voluntary and he or she may refuse diversion at any stage. The confession to a crime by a child in the course of diversion and any information gained about the child in the course of diversion may not be used against him or her in court (Law of Georgia: Juvenile Justice Code article 41).

Diversion (for instance, in the form of a diversion agreement) may provide for the following measures: (a) a written warning; (b) a restorative justice measure, including involvement in a diversion programme; (c) the full or partial compensation for injury or damage caused; (d) the transfer to the state of property obtained by illegal means; (e) the transfer to the state of the weapon of crime and/or object withdrawn from civil circulation; (f) the imposition of obligations on the child; and (g) the placement of the child in foster care. In the Georgian language, the contract to diversion is also called a 'mediation contract', which shows that the victim to offender mediation is an inherent part of the diversion programme.

Several diversion measures may be simultaneously applied to the child's circumstances. Diversion measures shall be determined on the basis of an individual assessment report, as established by the legislation of Georgia. Diversion activities shall be reasonable and proportionate to the crime committed. No obligation may be imposed on the child in the course of diversion, which infringes on his or her dignity and honour, excludes him or her from regular educational processes and basic work, or causes harm to his or her physical and/or mental health. It shall not be permitted to impose stricter diversion measures than the minimum sanctions provided for by law for the committed crime (Law of Georgia: Juvenile Justice Code article 42). As mentioned previously, the MACR is 14 years where the highest age threshold for diversion applied in Georgia is 21 years.

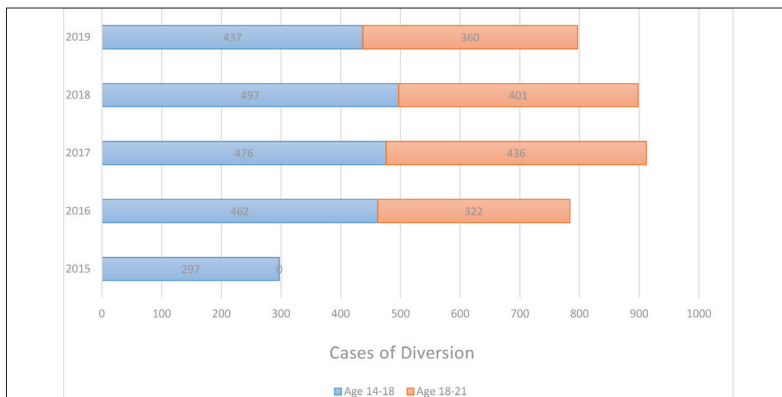


Figure 1: Cases in Georgia in the period of 2015 to 2019 (LEPL, 2017)

As the graph displays, the number of diversion cases increasingly grew in 2017, since diversion has been actively applied in practice in 2017. As UNICEF Georgia mentioned, this year was also significant for a number of reasons: the decrease of the initiation of prosecution against minors; their detention and imprisonment; the shortening of the terms for taking final decision on the cases of minors; and the low record of repeated offences by the diverted minors (only 9 per cent had been reported to commit repeated crimes) (UNICEF 2017).

When a decision on diversion is made, the prosecutor contacts a social worker and passes on the child's case file. The social worker must then formulate a bio-psycho-social portrait of the child and, bearing in mind the child's mental, physical and social conditions, will draw up a contract. Subsequently, the contract must be signed by the child, his or her parents/legal representatives, the prosecutor, social worker and the victim of the crime. The victim is invited to participate in a conference with the child. Additionally, the diverted child must be provided with all needed services, while the child is also given the responsibility to fulfil certain obligations and carry out a set of concrete actions. Diversion programmes do not result in a criminal record, though information on participation can be used for statistics or in the case of new offences.

Article 48 of the Juvenile Justice Code provides that

where the child fails to comply with diversion measures intentionally, a social worker shall notify the prosecutor, and the prosecutor, based on this and other circumstances, after hearing the views of the child, his/her legal representative and the social worker, shall cancel or keep in force the decision on imposing diversion, or shall change the diversion measures and/or shall extend the duration of the diversion agreement. Where the decision on imposing diversion is cancelled, a prosecutor may, with a reasoned resolution, cancel the decision, not to initiate a criminal prosecution or to terminate an already initiated criminal prosecution, or initiate or resume a criminal prosecution with a new reasoned resolution.

While analysing the provisions of the diversion programme, it is evident that no efficient monitoring mechanisms exist to assess the programmes. The rate of recidivism among diverted children may remain, which could be rectified through a detailed study of the diversion agreement, an analysis of individual cases, and the strengthening of relevant conditions. The engagement of the victim is not specified. Another concern is the division of criminal offences into categories when evaluating a diversion programme. Statistics have shown that the diversion programme is mostly used for less serious crimes, indicating that the state avoids taking on extra responsibilities in cases where the application of the diversion programme involves serious offences, based on individual assessment.

5.2 Kyrgyzstan

At present the legislative framework of the Kyrgyz Republic concerning children in conflict with the law consists of the following regulatory legal acts: the UN Convention on the Rights of the Child; several codes and laws that govern the implementation of protection and child justice; and the Constitution of the Kyrgyz Republic 2010 (Constitution of the Kyrgyz Republic adopted by referendum (popular vote) on 27 June 2010), which enshrines the rights and freedoms of all citizens across the country.

The Concluding Observations of the CRC Committee remain the main guidepost for Kyrgyzstan in relation to the implementation of its children's rights obligations. Kyrgyzstan also received periodic recommendations from the CRC Committee in 2000, 2004, 2007 and 2014. Studying the 2000 report, the Committee highlighted the following serious issues:

- ill-treatment and use of torture against detained children;
- a lack of separate consideration of cases and special procedures in relation to children within the framework of judicial proceedings;
- a lack of physical and psychological rehabilitation for children who committed crime.

Despite the changes undertaken since then, the 2014 report still points towards serious issues in the child justice system. The 2014 Concluding Observations of the CRC Committee highlighted the following issues:

- a lack of an integrated child justice system;
- the detention of children in prison-like conditions, often for homelessness, vagrancy and truancy;
- keeping children in temporary detention centres with adults with a very limited number of allowed visits with their family members.

According to the law of the Kyrgyz Republic on probation, people in custody also have the opportunity to apply for parole in the form of probationary supervision (Law of Kyrgyzstan: About Probation article 5). According to the annual report of the Ombudsman Institute in Kyrgyzstan in 2017 (Akylkatchy of Kyrgyz Republic 2017) 325 cases of torture were recorded in penal institutions for children.

To date, there have been efforts to mitigate the mistakes and progressive steps have been taken in the gradual eradication of the system of imprisonment of children as a preventative measure. The progressive measures resulted in the adoption of –

- the Child Code of the Kyrgyz Republic in 2012;
- the Law of the Kyrgyz Republic on Probation in 2017;
- the new version of the Criminal Code of the Kyrgyz Republic in 2017.

The main prerequisite for the creation of the child justice system was the adoption in 2012 of the Child Code. Chapter 11 of the Code is devoted to child justice and contains rules and principles for the administration of child justice. Gradually, all the norms of the Child Code began to apply to other types of criminal laws in relations to children.

In an interview, Deputy Minister of Justice of the Kyrgyz Republic, Marat Kanulkulov, outlined the economic problems of Kyrgyzstan in the full implementation of the probation law. In this regard, it was decided that probation would be introduced only in the process of trial (Baremoter. kg 2019). According to article 83 of the Criminal Code of Kyrgyzstan, probation can be applied to a child who has committed a crime, the measure for which may not exceed five years in prison (crimes of minor gravity) (Law of Kyrgyzstan: Criminal Code article 83).

In 2018, among the total number of convicted children, the main share belonged to the conditionally sentenced to imprisonment measure and correctional labour (approximately 58 per cent) as well as to imprisonment (approximately 24 per cent) (National Statistic Committee 2019). Compared to 2010, there have been major changes in the use of imprisonment. In 2010, more than 50 per cent of those convicted children were sentenced to imprisonment, while in 2018 only 23 per cent of the total number received this sentence. It is vital to note that it is not the number of convictions that plays a part here, but the number of reported crimes. This may be clarified by the fact that the number of sentences undertaken, as of now, is the ultimate choice of the judge. If one compares the number of those sentenced to imprisonment to the number of registered crimes, the picture becomes clearer. That is, out of 1 176 offences committed in 2010, approximately 180 were sentenced to imprisonment, whereas in 2018, out of 1 432 offences committed, only 42 children were sentenced to imprisonment. It is critical to note that the types of offences committed have not changed much over the eight years. In cases of crimes that were classified as ‘grave’ and ‘especially grave’, these children were mainly sentenced to imprisonment. This has not changed between 2010 and 2018, as set out in Table 4 below:

	2010	2011	2012	2013	2014	2015	2016	2017	2018
Sentenced total	358	439	324	231	201	191	162	193	161
Detention	51.4	53.5	65.4	32.5	34	24.1	30.9	25.4	23.2
Parole	36.0	31.4	23.5	56.7	53.2	61.8	50.6	59.6	57.8
Fine	7.3	5.2	5.2	6.5	5.0	7.9	9.9	6.7	5.0

Table 4: Distribution of children convicted according to the sentences imposed by the court, in percentage (National Statistic Committee, 2019)

In 2018, out of the total number of children sentenced to imprisonment by judicial authorities, almost 32 per cent of the detention sentences were between three and five years (see Figure 2 below). A further 24 per cent were capped between six and eight years, while more than 18 per cent of the number of children sentenced received one or two-year terms. Almost 16 per cent of the children convicted received sentences as high as none and ten years.⁴

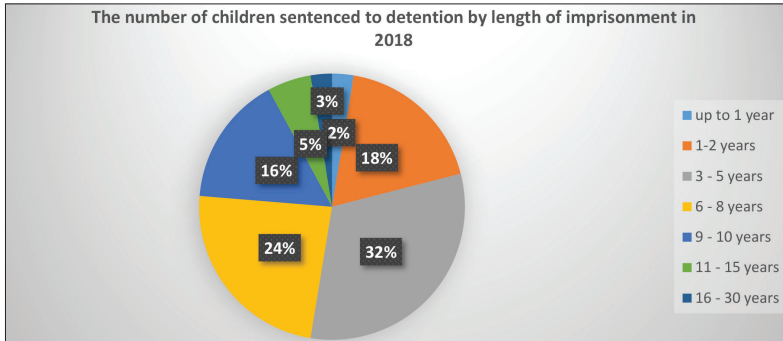


Figure 2: The number of children sentenced to detention by length of imprisonment in 2018 (National Statistic Committee, 2019)

In 2017, imprisonment was used in 25 per cent of the total number of sentences (see Figure 3 below). In 2018 this figure went down to 23 per cent. In this regard, however, it should be noted that the number of sentences passed in 2018, were fewer than in 2017. In the latter year, 193 children were sentenced, while in the following year 161 cases are noted.

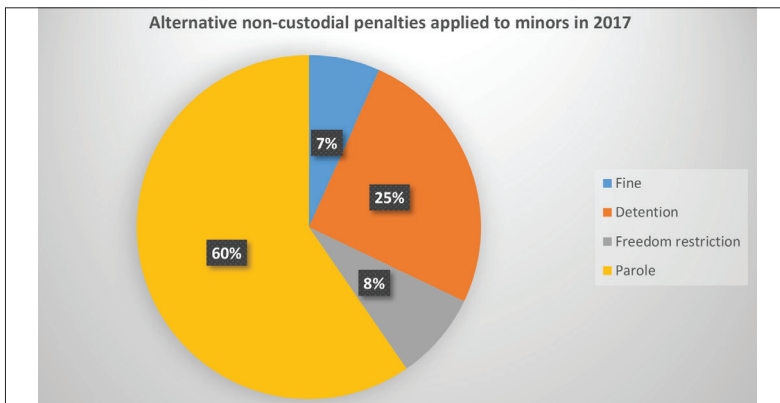


Figure 3: Alternative non-custodial penalties according to minors in 2017

⁴ Prosecutor office of Kyrgyzstan: Overview of Child Offences and violence against children, 2018 6-13, available at <https://www.prokuror.kg/files/docs/2019/overview-of-juvenile-delinquency-as-well-as-violence-against-children-in-2018.pdf>.

At present the Criminal Code and the Criminal Procedure Code of the Kyrgyz Republic provide special chapters on the implementation of child justice. Chapter 17 of the Criminal Code contains norms defining the types of educational measures applied in relation to children. According to article 102 of the Criminal Code, measures of an educational nature may be applied for a less serious crime committed. In turn, the Criminal Procedure Code of the Kyrgyz Republic identifies a special type of child justice in chapter 54. The chapter describes in detail the investigative measures and court procedures applied to the case involving a child. In addition, article 458 provides for the removal of a child from the criminal justice system and the termination of pre-trial proceedings, that is, this article presupposes the possibility of resolving the case before trial.

Summarising the above, the following conclusions may be drawn:

- The severity of the crime committed is the main determinant of the application of diversion measures.
- The criminal law provides for the possibility of applying diversion in the form of compulsory educational measures.
- A child may be released from criminal offence in pre-trial proceedings by the decision of the investigator.
- Diversion is applied only by the decision of a judge.

There is no separate diversion programme in Kyrgyzstan. Diversion is considered part of the responsibility of the probation service. During probation an enforcement agency works with the child to come up with suggestions whether the child can be included in a diversion programme. Upon receipt of the case, the judge sends a request for the preparation of a report to the probation authority (Law of Kyrgyzstan: Criminal Code article 30). The judge then evaluates the personality of the accused child as well as his or her socio-psychological profile, which is drawn up by the probation rapporteur. After that, the judge has the right to apply probationary supervision over the child in question. According to the regulations of the probationary institution, for each convicted person serving an alternative sentence in the form of probation, various educational measures are used depending on the psychological profile (Law of Kyrgyzstan: Criminal Code article 83). A child works directly with three people: a social worker, a psychologist and a probation officer, for a specified period of time, after which the child may enter a rehabilitation programme.

Probation does have its drawbacks, which may not correspond to the principles of the service and, therefore, may also not meet the needs of the diverted child. One such example is a criminal conviction, where a child will be given a mark for a crime. This measure is decided in court in criminal proceedings and cannot be used in pre-trial proceedings, which in itself aggravates the situation of the child in the future. At this stage in

the establishment of the probation institute, the annual report for the past year has not yet been published to track the results of the work of the body.

There are also non-governmental organisations in Kyrgyzstan that work with children in conflict with the law. Such organisations often work with children who are registered with schools and with the child inspector, that is, children at risk of committing offences. Consequently, organisations support diversion measures in order to reduce the cases of recidivism among children. Among non-governmental organisations, the Adilet Legal Clinic stands out, which provides free legal assistance to all persons who have been subjected to torture and other offences. This includes support for children in conflict with the law, who were maltreated in police stations.⁵ One of the main international organisations that have contributed significantly in this area is UNICEF. According to recommendations from the CRC Committee in 2000, Kyrgyzstan needed to establish cooperation with international agencies (Committee on the Rights of the Child 2000). Since then, UNICEF has been a direct partner in the process of building up the child justice system in Kyrgyzstan.

When considering the development of diversion in Georgia and Kyrgyzstan, it should be noted that non-conditional diversion is applied in neither of the two countries. The description of the type of diversion applied stipulates certain conditions. For instance, in Georgia civil citation programmes and mentoring are conditions mentioned when considering the placement of a child in foster care. Individualised treatment as part of a counselling programme is also applied when social workers consider the needs of the child in order to determine the appropriate diversion programme. In the case of Kyrgyzstan, a confusion between what constitutes 'probation' and what constitutes 'diversion' can clearly be identified. This confusion arises from the placement of diversion programmes under the liability of the country's probation services. Probation itself is a newly-developed service in the country, thereby placing all the reformative measures related to child justice under the responsibility of this department in the prosecutor's office.

6 Conclusions and recommendations

The Global Study considers diversion one of the most effective ways of ensuring liberty for children in the administration of justice. As suggested, states should reconsider the entire system that leads to the deprivation of liberty, by focusing on systemic rather than individual failures. In this way, states could effectively prevent children from entering the criminal justice system (Nowak 2019). To this end, the Global Study suggests to avoid the

5 The Adilet Legal Clinic website is available at <http://www.adilet.kg/en/>.

unnecessary criminalisation of children by increasing the minimum age of criminal responsibility to at least 14 years, to decriminalise status offences and behaviour related to morality, invest in early prevention strategies and to ensure that children deal with a functioning protection system. These changes may lead to the establishment of specialised justice systems for children, which allows for the application of diversion, informal justice systems, non-custodial practices during the pre-trial and trial stages as well as for the development restorative justice approaches. This research concurs with the Global Study findings in that it shows the necessity of non-custodial measures and specifically also diversion. Analysing the 12 post-Soviet countries selected for this research notably revealed an overreliance on arrest. As mentioned in the theoretical framework, diversion is considered an effective measure of channelling children away from the formal justice system, thus mitigating the negative impact detention can have on their lives and development.

Thus, considering the main findings of the article, the following recommendations are put forward:

- (1) The legislation and practices of countries that apply custodial measures should be changed in favour of non-custodial measures. The institutions referred to as 'reformatory institutions', 'educational colonies' or the like generally are regarded as 'rehabilitation centres' for children in conflict with the law. These centres, however, deprive children of both their liberty and their enjoyment of many rights. It is necessary, therefore, to replace these institutions by applying non-custodial measures.
- (2) Minor or repeated minor offences should not be considered for detention. Any type of diversion should rather be applied as an alternative. For instance, considering the popularity of community services in most countries in the post-Soviet space, police-led service coordination and skills-building initiatives could be applied as diversion alternatives.
- (3) The deprivation of a child's liberty strongly depends on the individual decisions of courts. All the legislations (except those of Georgia and Kyrgyzstan) apply pre-trial detention, thus associating children with the formal justice system at the earliest stage. It is recommended that the countries selected for this study should refrain from pre-trial detention and provide alternative solutions.
- (4) The study found that little cooperation exists between professional services that deal with children in conflict with the law. Decisions strongly rely on the police, the prosecutor's office as well as on judges. Although in Kyrgyzstan children work closely with social workers, psychologists and other specialists, the decision to divert them is exclusively made by the court or prosecutor. Inter-agency cooperation in relation to children in conflict with the law should thus be strengthened in order to best consider the needs and characteristics of children.

(5) In Kyrgyzstan and Georgia, diversion is not considered for children with previous convictions. The legislations of neither provide prevention mechanisms, while a gap still exists in the protection of children with minor criminal offences. The division of crime into categories when evaluating a diversion programme should be applied. Statistics in Georgia revealed that the diversion programme is mostly used for less serious crimes, indicating that the state avoids taking on extra responsibilities when it comes to serious crimes. It therefore is recommended that diversion programmes should also become a viable option for children who committed serious crimes – based, of course, on individual assessments. Additionally, both Kyrgyzstan and Georgia should regularly monitor and evaluate the effectiveness of their diversion programmes.

(6) Despite the increased use of diversion in Georgia, the rate of recidivism remains at the same level. This could be rectified through a detailed study of the diversion agreement, the analysis of individual cases, and the strengthening of relevant conditions. In this regard, the role of the victim should be strengthened in the diversion process, thus applying aspects of restorative justice during the diversion process. Once a prosecutor decides to apply a diversion measure, the victim should also be notified. Currently, however, victims do not have the means to oppose this decision. This may cause serious distress and/or harm to the victim, which may in turn also lead to a certain distrust towards law enforcements and even the development of the so-called ‘impunity syndrome’ often experienced by victims.

(7) In Kyrgyzstan, legal and strategic changes should be made in order to improve diversion services. The confusion between ‘probation services’ and ‘diversion’ should be clarified urgently by separating these two services. It is also recommended that pre-trial diversion should become standard practice so as to limit the child’s exposure to lengthy criminal procedures. Similar to Georgia, Kyrgyzstan should also include serious offences when considering diversion since, the intention should be for diversion to benefit as many children in conflict with the law.

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