

**‘DIVERSION WITH A RESTORATIVE JUVENILE
JUSTICE APPROACH THAT BUILDS UPON THE
STRENGTHS OF CUSTOMARY TRADITIONS’**

**HOW CHILD OFFENDERS CAN BE KEPT OUT OF DETENTION
AND WITHIN THEIR FAMILIES AND COMMUNITIES**

NOVEMBER 2012

TABLE OF CONTENTS

<u>ACRONYMS</u>	p.2
<u>INTRODUCTION: HOW CAN CHILD OFFENDERS BE KEPT OUT OF DETENTION AND WITHIN THEIR FAMILIES AND COMMUNITIES?</u>	p.3
<u>PART 1: HOW DOES DIVERSION RELATES TO ALTERNATIVES TO DETENTION AND OTHER RELATING CONCEPTS APPLICABLE TO CHILD OFFENDERS?</u>	p.4
1. How Relates Diversion to Other Measures in the Context of Judicial Proceedings?	p.4
2. What Means 'Diversion'?	p.4
2.1. What Are the Key-Components of Diversion?	p.4
2.2. What Kind of Diversion-Conditions May Be Appropriate?	p.5
2.3. Which Child Rights and Legal Safeguards Have to Be Respected?	p.6
3. How Relates 'Diversion' to 'Community-Based Measures for Children Under the Minimum Age of Criminal Responsibility'?	p.7
4. How Relates 'Diversion' to 'Decision Not to Pursue the Case'?	p.8
5. How Relates 'Diversion' to 'Alternatives to Deprivation of Liberty'?	p.9
5.1. What Are Alternatives to Deprivation of Liberty?	p.9
5.2. What Are Alternatives to Arrest, Pre-Trial Detention and Post-Trial Detention?	p.9
5.3. What Are the Differences between 'Diversion' and 'Alternatives to Deprivation of Liberty'?	p.10
6. What Means 'Restorative Juvenile Justice'?	p.11
6.1. What Are the Key-Components of Restorative Juvenile Justice?	p.11
6.2. What Are the Main Forms of Restorative Juvenile Justice?	p.12
6.3. Which Child Rights and Legal Safeguards Have to Be Respected?	p.12
6.4. What Are the Differences between 'Diversion' and 'Restorative Juvenile Justice'?	p.13
6.5. Why Is 'Diversion with a Restorative Juvenile Justice Approach' Promoted?	p.13
7. How Relates 'Diversion' to 'Informal Conflict Settlement'?	p.14
8. What Can Be Concluded with regard to 'Diversion' and 'Relating Concepts'?	p.15
<u>PART 2: DOES THE CHILD ACT (2008) PROMOTES 'DIVERSION WITH A RESTORATIVE JUVENILE JUSTICE APPROACH THAT BUILDS UPON THE STRENGTHS OF CUSTOMARY TRADITIONS'?</u>	p.16
1. Does the Child Act (2008) Incorporate Measures to Deal with Child Offenders?	p.16
2. Does the Child Act (2008) Promote 'Diversion'?	p.16
3. Does the Child Act (2008) Promote 'Restorative Juvenile Justice'?	p.16
4. Does the Child Act (2008) Promote 'Customary Traditions'?	p.16
5. What Are the Legislative Challenges?	p.17
5.1. Which Challenges Are Related to 'Diversion'?	p.17
5.2. Which Challenges Are Related to 'Restorative Juvenile Justice'?	p.18
6. What Can Be Concluded with regard to 'Diversion' and 'The Child Act (2008)'?	p.21
<u>PART 3: WHICH DIVERSION-SCHEME IS IN COMPLIANCE WITH INTERNATIONAL AND NATIONAL JUSTICE FOR CHILDREN STANDARDS AS WELL AS IMPLEMENTABLE IN THE SOUTH SUDAN CONTEXT?</u>	p.22
1. Why Is 'Restorative Community Consultation' the Proposed Diversion-Scheme?	p.22
2. What Are the Main Components of the 'Restorative Community Consultation' Process?	p.22
3. Which Child Offender Cases Are Eligible for 'Restorative Community Consultation'?	p.25
4. Which Child Offenders Require Special Attention during 'Restorative Community Consultation'?	p.26
5. Which Parties Are Involved in 'Restorative Community Consultation'?	p.26
6. What Are the Stages of the 'Restorative Community Consultation'-Process?	p.27
7. Why Can Only Trained Facilitators Guide 'Restorative Community Consultation' Processes?	p.27
8. Which Issues Relating to 'Restorative Community Consultation' Have to Be Discussed before the Tryout?	p.28

REFERENCES

p.29

ANNEXES

p.31

Annex 1: Consultative Roundtables on Diversion of Child Offenders in the South Sudanese JfC-Context	p.31
Annex 2: International Child-Specific Standards, Principles and Guidelines on Diversion & Restorative Juvenile Justice	p.32
Annex 3: Sections of the Child Act (2008) that Deal with Diversion	p.38
Annex 4: Sections of the Child Act (2008) that Deal with Restorative Juvenile Justice	p.40
Annex 5: National Legislation Relating to Customary Justice	p.42
Annex 6: Success Indicators for the Proposed Diversion-Scheme/Restorative Community Consultation-Process	p.44

ACRONYMS

CBO	Community-Based Organisations
CJC	Child Justice Committee
CRC	Convention on the Rights of the Child
JfC	Justice for Children
JJ	Juvenile Justice
MoGCSW	Ministry of Gender, Child & Social Welfare
NGO	Non-Governmental Organisations
RCC	Restorative Community Consultation
RJ	Restorative Justice
RJJ	Restorative Juvenile Justice
UNICEF	United Nations Children’s Fund

INTRODUCTION:

HOW CAN CHILD OFFENDERS BE KEPT OUT OF DETENTION AND WITHIN THEIR FAMILIES AND COMMUNITIES?

The Republic of South Sudan is in the process of ratifying the 'Convention on the Rights of the Child' (CRC). The CRC as well as other international child-specific instruments state that deprivation of liberty should be used as a measure of last resort and for the shortest appropriate period of time (see 'box'). Depriving children of their liberty represents a particular risk in terms of rights violations including, but not limited to, torture and ill-treatment, limited contact with family and limited access to education and health facilities. Diversion is one way to prevent child offenders¹ from the detrimental consequences of deprivation of liberty and to keep them at home, in schools and within their communities. International child-specific instruments strongly promote diversion of child offenders (see 'box') and, where possible and appropriate, encourage a restorative juvenile justice approach.

The Child Act (2008) deals with child offenders in Chapter X 'Child in Conflict with the Law' and incorporates alternatives to deprivation of liberty, including diversion with a RJJ-approach (see 'box'), to ensure that detention shall be used as a measure of last resort² and that child offenders can stay with their parents³. In order to support the implementation of the Child Act (2008) and to bring the Justice for Children-System (JfC-System) in line with international standards, the 'Strategic Framework on Justice for Children' (2012) of the 'Ministry of Gender, Child & Social Welfare' (MoGCSW) promotes diversion as well as alternatives to pre-trial detention for child offenders.

This report is the first step to concretize the intention of the MoGCSW to develop a diversion-scheme with a restorative juvenile justice approach and, as a consequence, to keep child offenders out of detention and within their communities. In the first part of the report, the concept of 'diversion' is clarified and compared with other concepts that relate to child offenders, such as 'alternatives to detention' and 'restorative juvenile justice'. The explanations are based on international standards, principles and guidelines on diversion and other ways of dealing with child offenders. In the second part, 'diversion' and 'restorative juvenile justice' are discussed from a national perspective. The sections of the Child Act (2008) that are relevant in this respect are examined and the challenges to implement 'diversion with a restorative justice approach' in the South Sudanese JfC-context, are listed. In the third part, the proposed diversion-scheme, i.e. 'Restorative Community Consultation' (RCC), is presented and justified. The scheme is based on international and national JfC-standards as well as information and experiences provided during consultative roundtables in Juba and Malakal in November 2012⁴.

Article 37(b) of the CRC:

"States Parties shall ensure that: (b) ... The arrest, detention or imprisonment of a child ... shall be used only as a measure of last resort and for the shortest appropriate period of time."

Paragraph 25 of General Comment Nr.10:

"In addition to avoiding stigmatization, this approach [without resorting to judicial proceedings] has good results for children and is in the interests of public safety, and has proven to be more cost-effective."

Section 158(2) of the Child Act (2008):

"Where possible and appropriate, diversion shall include ingredients of the restorative justice process which aim at healing relationships, including the relationships of the victim(s) and offender(s)."

¹ In line with the 'Strategic Framework on Justice for Children' (2012), the term 'child offenders' refers to children alleged of, accused of, or recognized as having infringed the penal law who are above the minimum age of criminal responsibility, i.e. twelve years at the time of their alleged commission of the offence (see §4.2. 'Child Offenders (≥12 - <18 Years)').

² See sections 150(1), 182(1) & 184(1) of the Child Act (2008). Section 150(7) states that "admit, or allow a child to remain, in detention in the police custody after the expiry of the periods of time" is an offence that can be 'sentenced with imprisonment'.

³ Sections 136(3) of the Child Act (2008) states "No child accused of infringing the law shall be removed from parental supervision, either partly or entirely, unless the circumstances of a case make it absolutely necessary".

⁴ See Annex 1 'Consultative Roundtables on Diversion of Child Offenders in the South Sudanese JfC-Context'.

PART 1:
HOW DOES DIVERSION RELATES TO ALTERNATIVES TO DETENTION AND OTHER RELATING CONCEPTS
APPLICABLE TO CHILD OFFENDERS?

1. HOW RELATES DIVERSION TO OTHER MEASURES IN THE CONTEXT OF JUDICIAL PROCEEDINGS?

The 'Committee on the Rights of the Child' recognizes two kinds of interventions with regard to child offenders:⁵

- ✓ *Measures without resorting to judicial proceedings* (i.e. diversion)
- ✓ *Measures in the context of judicial proceedings* (e.g. arrest, pre-trial detention, imprisonment, guidance and supervision orders, probation, early release from detention, etc.)

Diversion is often confused with other measures that can be taken in cases of children in conflict with the law. In the next sections, the concept 'diversion' is discussed (§2) and how it relates to measures in the context of judicial proceedings and other measures that can be taken in child offender cases (§3 - §7). These are:

- ✓ *Community-based measures for children under the minimum age of criminal responsibility* (§3)
- ✓ *Decision not to pursue the case* (§4)
- ✓ *Alternatives to arrest and alternatives to pre-trial detention* (§5)
- ✓ *Alternatives to post-trial detention* (§5)
- ✓ *Restorative juvenile justice* (§6)
- ✓ *Informal conflict settlement* (§7)

In this first part of the report, diversion and the various relating concepts are explained from an international perspective⁶. In order to clarify the differences, a burglary case is used in which six children are involved (see 'box'). According to section 5 'Interpretation' of the Child Act (2008) a child means "a human being under the age of eighteen years".

Burglary Case

Five children – Peter, Lilian, John, Simon and Ladu – have broken into a house in a nearby community. When they just left the house with the valuables, the police caught them in the act and brought all of them to the police station. Another child, Kiden, is also with them in the police station.

Two months ago, Peter and Lilian ran away from home. Neither of them could make enough money to survive. Lilian is pregnant and has severe abdominal pains. Peter wants her to go to a doctor, but they do not have the money. That is why they planned the burglary. They involved Peter's two younger brothers, John and Simon, and their friend Ladu. Now they are in the police station waiting what will happen.

2. WHAT MEANS 'DIVERSION'?

2.1. WHAT ARE THE KEY-COMPONENTS OF DIVERSION?

In this report, diversion is defined as: "the conditional channelling of child offenders 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 judicial proceedings and a criminal record."⁷

The key-components of diversion are:

- ✓ *As soon as possible*: Diversion can be instigated from the time of apprehension, which is before arrest, to any point up until the final disposition hearing. Ideally, diversion should take place as soon as possible and preferable before the child is arrested. Cases should be continually assessed to see if the matter can be diverted in subsequent stages, especially if the child is kept in pre-trial detention, because circumstances may have changed from the time that she/he was arrested. For example, an extended family member of a child in

⁵ Committee on the Rights of the Child, *General Comment No. 10 'Children's Rights in Juvenile Justice'*, 25 April 2007.

⁶ See Annex 2 'International Child-Specific Standards, Principles and Guidelines on Diversion & Restorative Juvenile Justice'.

⁷ www.unicef.org/tdad/index_55653.html (Toolkit on Diversion and Alternatives to Detention).

pre-trial detention may be subsequently located and willing to act as caregiver. This new information may enable the child to be diverted away from further judicial proceedings.

- ✓ *As much as possible:* Diversion can be used for children committing any kind of offence and should not be limited to children who have committed minor offences and/or children who are first-time offenders. Ideally, diversion should take place as much as possible. However, in actual practice diversion is rarely used for the most serious crimes and for persistent offenders. In some cases, diversion may not be appropriate or may not be in the best interests of the child. For example, persistent offenders who have already been diverted in the past but where the measure has failed to prevent re-offending. These children may require formal judicial intervention to help them to get back on track. Diversion is also not appropriate for children who do not admit their responsibility for an offence.
- ✓ *General or specific measure:* Diversion can be a generally applicable procedure or a case-by-case decision of the police, prosecutor, court or similar body. In civil law systems, there is no police discretion to apply diversion measures without the authority of the prosecutor.
- ✓ *Constructive conditions:* Diversion implies that the child has to comply with certain conditions monitored by non-judicial bodies, such as civil society organisations, non-governmental organisations, community groups and administrative bodies like the 'Child Justice Committee' (CJC). An important aim of diversion is to address the root causes of the child's offending behaviour in order to prevent re-offending. Diversion should contribute positively to the child's development, encourage her/him to take responsibility for the harm caused by the offence and reintegrate the child into her/his community (see 'box'). Therefore, the child's diversion-conditions should be well-considered. It is recommended that a variety of community-based services and programmes are developed.
- ✓ *No criminal record:* Compliance with the diversion-conditions results in a definite and final closure of the case. Although confidential records can be kept of diversion for administrative and review purposes, they should not be viewed as 'criminal records' and a child who has been previously diverted must not be seen as having a previous conviction.

Article 40(1) of the CRC:

"States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society."

2.2. WHAT KIND OF DIVERSION-CONDITIONS MAY BE APPROPRIATE?

Which diversion-conditions are appropriate in a particular child offender case generally depends on the nature and seriousness of the offence, the child's background and circumstances as well as which community-based services and programmes are available. In some countries, the diverting professional her/himself decides which conditions the child has to comply with. In other countries, that decision is made through an assessment by a social worker, probation officer or multi-disciplinary team. An assessment of the child's background and circumstances is promoted in order to identify underlying family problems and other problems that need to be addressed so that re-offending can be prevented. The appropriate conditions can also be decided through a restorative juvenile justice process (see §6). Examples of common diversion-conditions are:

- ✓ *Apologizing verbally or in written to the victim*
- ✓ *Apologizing verbally or in written to others affected by the offence (like parents, extended family members, teacher, etc.)*
- ✓ *Writing an essay on the effects of the offence committed (this helps the child to gain insight into the consequences of his/her offending behaviour)⁸*
- ✓ *Attending school or vocational skills training*
- ✓ *Conducting community service work (for a certain number of hours after school for free in a way that benefits the community)⁹*

⁸ See also section 159(f) of the Child Act (2008).

⁹ See also section 158(6) of the Child Act (2008).

- ✓ *Compensating the victim in the form of a payment or through performing some services*
- ✓ *Being supervised and guided by a social worker or probation officer*
- ✓ *Participating in a peer education/youth mentoring programme*
- ✓ *Enrolling in constructive leisure time*
- ✓ *Participating in counselling or therapeutic treatment*
- ✓ *Participating in life skills programme or other kind of competency development programme (such programmes help the child to addressing the underlying problems that contributed to her/his offending behaviour, like responsible decision-making, communication skills, problem-solving, conflict resolution, developing self-esteem and anger management)¹⁰*
- ✓ *Participation in a victim-empathy programme*

According to the South Sudan Child Act (2008) diversion-conditions, called ‘*diversion programmes*’, have to meet a series of standard (section 159 ‘*Diversion Programme Standards*’), among others, ‘*no interference with the child’s schooling*’, ‘*where possible impart useful skills*’ and ‘*no payment for admission to a diversion programme*’.

2.3. WHICH CHILD RIGHTS AND LEGAL SAFEGUARDS HAVE TO BE RESPECTED?

The CRC promotes diversion, but clearly states that diversionary measures should comply with human rights and legal safeguards (see ‘box’), especially:¹¹

Article 40(3) of the CRC:

“States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular: ... (b) 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.”

- ✓ *Legal basis:* Domestic law has to contain specific provisions indicating in which cases diversion is possible. The powers of the police, prosecutors and/or other agencies to make decisions with regard to diversion should be regulated and reviewed, in particular to protect the child from discrimination.
- ✓ *Admission:* Diversion should be used only when:
 - > there is compelling evidence that the child committed the alleged offence
 - > the child freely and voluntarily admits responsibility
 - > no intimidation or pressure has been used to get the child’s admission
 - > the child’s admission will not be used against her/him in any subsequent legal proceeding¹²
 Children who maintain their innocence have the right to a fair trial.
- ✓ *Informed consent:* The child must freely give her/his consent, preferably in writing, to diversion. This must be an ‘informed decision’ based on adequate and specific information on:
 - > pros and cons of the various options available
 - > nature, content and duration of the diversionary measure
 - > consequences of a failure to cooperate, carry out and complete the diversionary-conditions
 With a view to strengthening parental involvement, the consent of the child’s parents may also be required.
- ✓ *Legal and other assistance:* The child must be given the opportunity to seek legal or other appropriate assistance on the appropriateness and desirability of diversion and on the possibility of review of the diversionary measure.
- ✓ *Participation:* The child has the right to be heard and should be given the opportunity to participate in the decision-making process.¹³

¹⁰ See also section 159(e) of the Child Act (2008).

¹¹ Committee on the Rights of the Child, *General Comment No. 10 ‘Children’s Rights in Juvenile Justice’*, 25 April 2007.

Section 30 ‘*Penalties of Infringing any of the Rights of a Child*’ of the Child Act (2008) might be relevant in this regard as it states: “*Notwithstanding penalties contained in any other law, anyone who willfully or as a result of culpable negligence infringes any right of a child commits an offence and shall, on conviction, be sentenced to imprisonment for a term not exceeding seven years or with a fine or with both, and may be liable to pay such compensation to the child as the Court deems fit and just.*”

¹² See also section 155(18) of the Child Act (2008).

¹³ See also sections 17(2)(3) & 136(2) of the Child Act (2008).

- ✓ *Addressing needs:* The content, conditions and the period of time that a child is required to comply with the diversion-conditions should take into account her/his age, maturity, religious and cultural background as well as any other needs and circumstances to prevent further offending. It should also address the needs of any victims involved (see 'box').
- ✓ *Proportionality:* The diversion-conditions should be proportionate to the violation and should not be more severe or restrictive than the sentence/sanction the child would have received through formal judicial proceedings.
- ✓ *Incompatibilities:* Deprivation of liberty, corporal punishment, public humiliation as well as any other measures contrary to the 'Convention on the Rights of the Child' cannot be diversion-conditions.
- ✓ *Referral to formal judicial proceedings:* The case can be referred to a regular (child) court if no solution acceptable to all parties can be reached or if the conditions are not deemed appropriate by the authorities mandated to assess cases for diversion. If the child fails to fulfil the diversion-conditions, the prosecution retains the right to restart judicial proceedings. Moreover, the accused child always retains the right to a court hearing or judicial review.

Commentary to Beijing Rule 11.4:

"Rule 11.4 recommends the provision of viable alternatives to juvenile justice processing in the form of community-based diversion. Programmes that involve settlement by victim restitution and those that seek to avoid future conflict with the law through temporary supervision and guidance are especially commended."

Burglary Case – John (14 years) – Diversion

"My name is John. I am 14 years old. Around 5PM, my brother Peter told me to come with him because he needed my help. When we arrived at a house in a nearby village, Peter broke a window and instructed me to follow him inside the house. I knew something bad was going to happen, but I didn't dare to protest. Now I am in the police station."

That same evening:

"The police officer asked me what had happened when we arrived at the house. I honestly explained to him all details. I admitted that I helped my brother Peter looking for valuables in the drawers of the cupboards. I found two credit-cards and gave them to Peter. I have never stolen something before. The police officer explained to me that I don't have to stay in the police station, but that I can be 'diverted'. He told me that I have to come back with my parents this Wednesday after school to discuss on which conditions I can stay at home and continue my school, without going to court. I was very relieved and told the police officer that I will definitely come on Wednesday, because I want to stay out of trouble in the future. I waited till my father arrived to take me home."

Two days later:

"My parents and I went back to the police officer. He brought us to the social worker with whom we discussed what I should do to show my good intentions and to avoid that I have to go to court. We agreed that I will:

- ✓ *apologize to my parents and family for disgracing them*
- ✓ *go to school every day and not play truant anymore*
- ✓ *go to church with my family every Sunday*
- ✓ *to join the basketball team of my school*

We all signed the diversion-agreement that will last till the end of this school year, i.e. 10 months in total. The social worker told me to come to her office every Monday afternoon at 4PM, so that she can check whether I have complied with my conditions during the previous week and whether I need any support from her, my parents or others. If I stay out of trouble for the next 10 months, I will not have a criminal record."

3. HOW RELATES 'DIVERSION' TO 'COMMUNITY-BASED MEASURES FOR CHILDREN UNDER THE MINIMUM AGE OF CRIMINAL RESPONSIBILITY'?

Only children in conflict with the law who are above the minimum age of criminal responsibility can be diverted from formal judicial proceedings. 'Children under the minimum age of criminal responsibility' are also considered children in conflict with the law, but the term 'diversion' should not be used with regard to these children. Children under the minimum age of criminal responsibility cannot be formally charged and are considered too young to be

prosecuted and, therefore, cannot be diverted from formal judicial proceedings. For children under the minimum age of criminal responsibility, if necessary in their best interest, special protective measures can be taken¹⁴.

The South Sudanese Child Act (2008) includes two ages that have to be considered with regard to the minimum age of criminal responsibility, i.e. 12 years and 14 years¹⁵. Section 138 'Minimum Age of Criminal Responsibility' states: "(1) No child under the age of twelve years shall be prosecuted for a criminal offence as it shall be conclusively presumed that he or she is incapable of committing an offence. (2) There is a rebuttable presumption that a child who is not less than twelve years, but younger than fourteen years of age is incapable of committing an offence because, the child did not have the capacity to know that the act or omission concerned was wrong." This implies that only children from 12 years, and in other cases children from 14 years, until the age of 18 years can be

Burglary Case – Simon (11 years) – Not Criminal Responsible

"My name is Simon. I am 11 years old and Peter's youngest brother. This afternoon, Peter told me to come with him because he needed my help. When we arrived at a house in a nearby village, Peter explained to me that I had to watch the street carefully and to inform him immediately when I saw somebody. Only when Peter broke the window of the house, I knew something bad was going to happen. Now I am in the police station."

That same evening:

"The police officer has called my parents to pick me up from the police station and take me home. I cried with joy, because I thought the police officer was going to lock me up in the police cell. The officer explained to me that I am too young to stay in the police station overnight. When my parents arrived, the police officer told them that I am 'under the minimum age of criminal responsibility' and that tomorrow a social worker will contact us to discuss what will happen."

diverted from formal judicial proceedings.

4. HOW RELATES 'DIVERSION' TO 'DECISION NOT TO PURSUE THE CASE'?

A decision not to pursue a case, for example due to lack of evidence or the non-appearance of the complainer, may be made by the police or prosecutor or after a formal hearing. Such a decision is not considered diversion, but simply dropping the case without conditions or any other further follow-up. Section 174 'The Power of a Judge to Discontinue Proceedings' of the South Sudan Child Act (2008) states in this regard: "A Judge shall have the power to discontinue proceedings involving a child at any time and at any stage of the proceedings for lack of evidence".

5. HOW RELATES 'DIVERSION' TO 'ALTERNATIVES TO DEPRIVATION OF LIBERTY'?

Burglary Case – Kiden (15 years) – Decision Not to Pursue the Case

"My name is Kiden. I am 15 years old and I live with my parents and four siblings just behind this police station. This late afternoon, I walked from my friend's place back to my home when suddenly a police car stopped next to me. The police officer told me to get into the car immediately because I had broken into a house. I did not understand what was going on, but I was terrified and got into the police car. Now I am in the police station together with five peers I have never seen before."

That same evening:

"The police officer told me to tell him why we went into the house. I honestly explained to him that I did not know anything about a house and that I live two streets away from the place where they saw me. The police officer called my parents, who came immediately to the police station. My parents confirmed that I always spent my Monday afternoon at my friend's house to make our homework together and that I had nothing to do with the burglary but was wrongly taken to the police station. The police officer told us that we could go home. My father came with me to the school-headmaster the next day to explain why I was at the police station. My father is afraid for gossips and doesn't want me to get into trouble because of these five children from the other village."

¹⁴ Section 177 'Children Below the Age of Prosecution' lists the measures that can be taken by the social worker, including 'arranging a conference'.

¹⁵ According to section 138 of the Child Act (2008), the minimum age of criminal responsibility is 12 years. However, also children below 14 years of age should be considered not be criminally responsible, i.e. unless proven by a judge that the child "appreciates the difference between right and wrong and is able to act in accordance with that appreciation".

5.1. WHAT ARE ALTERNATIVES TO DEPRIVATION OF LIBERTY?

Alternatives to deprivation of liberty, also referred to as ‘alternatives to detention’ and ‘non-custodial measures’¹⁶, can be defined as: “*measures that may be imposed on children who are being formally processed through the criminal justice system, at both the pre-trial stage and sentencing stages, that do not involve deprivation of liberty*”¹⁷. Alternatives to deprivation of liberty should be available at the arrest stage and pre-trial stage as well as at the sentencing stage.

5.2. WHAT ARE ALTERNATIVES TO ARREST, PRE-TRIAL DETENTION AND POST-TRIAL DETENTION?

Alternatives to arrest and pre-trial detention provide an alternative means of supervising the child pending her/his trial rather than placement in a cell in the police station and pre-trial detention centres or remand homes. Alternatives to deprivation of liberty at these stages of the formal proceedings include release of the child to the care of a parent, guardian, extended family member or another ‘responsible adult’. In some countries, a ‘responsible adult’ may include designated non-governmental organisations (NGOs) and community-based organisations (CBOs). The child can be released with or without certain conditions, such as:

- ✓ *bail*
- ✓ *regular report to a police station*
- ✓ *compliance with a curfew*
- ✓ *agreement not to contact the victim*
- ✓ *agreement not to associate with certain peers*

The South Sudanese Child Act (2008) includes similar conditions for release in the pre-trial stage in section 141 ‘Alternatives to Arrest’, section 151 ‘Powers of Police to Release a Child from Detention before Preliminary Inquiry’ and section 170 ‘Conditions of Releasing a Child’ (see ‘box’)¹⁸.

Section 170 ‘Conditions of Releasing a Child’ of the Child Act (2008):

“(1) Conditions of releasing a child may include the following –
(a) the obligation to appear on a specified time, date and place before the Court;
(b) the obligation to report periodically to a specified person or place;
(c) the prohibition not to interfere with witnesses, to tamper with evidence or to associate with a person or persons; or
(d) the obligation that a child has to return to his or her home or to a specified address.
(2) The terms of release of a child whether on bail or not shall be reasonable and in accordance with the seriousness of the crime committed as well as the financial capacity of a child and his or her parents or guardians.”

Alternatives to deprivation of liberty at the sentencing stage provide community-based options for the supervision and rehabilitation of children rather than sending them to any form of detention centre or prison. Alternatives to deprivation of liberty at the sentencing stage include measures, such as:

- ✓ *judicial caution*¹⁹
- ✓ *probation*
- ✓ *guidance and supervision order*
- ✓ *community monitoring/day report centres*
- ✓ *community service work*
- ✓ *attendance at a treatment programme*
- ✓ *attendance at a life skills or other competency development programme*
- ✓ *fin*²⁰
- ✓ *early (conditional) release from detention*²¹

¹⁶ The terms ‘alternatives to imprisonment’ and ‘non-custodial sentencing’ apply specifically at the sentencing stage.

¹⁷ www.unicef.org/tdad/index_55653.html (Toolkit on Diversion and Alternatives to Detention).

¹⁸ Section 139(1) of the Child Act (2008) is also relevant in this regard as it states that “*the police shall arrest a child only if there is reasonable suspicion that the child has committed a serious crime and no alternative to arrest can be found*”. The professional who has the responsibility to release a child in the pre-trial stage and decides not to do so, has to give the reasons why the alternative could not be carried out (sections 144(3) & 151(5)). Section 170(1)(c) used ‘*prohibition not*’ which is most probably a mistake and should be just ‘*prohibition*’.

¹⁹ See section 181(2)(d) ‘*Penalties and Sanctions*’.

²⁰ Fines should not be encouraged as they discriminate against poor children and are not considered to have a rehabilitative value.

²¹ Early release from detention, with or without conditions, is not a full alternative to post-trial detention but should be considered as soon as possible. The Child Act (2008) includes such measures in section 183(1).

The South Sudanese Child Act (2008) includes rather different alternatives to post-trial deprivation of liberty (see 'box' below).

5.3. WHAT ARE THE DIFFERENCES BETWEEN 'DIVERSION' AND 'ALTERNATIVES TO DEPRIVATION OF LIBERTY'?

The main differences between 'diversion' and 'alternatives to deprivation of liberty' are:

- ✓ *Judicial proceedings*: Diversion implies contact with the formal JfC-system, but is a measure without resorting to judicial proceedings, while alternatives to deprivation of liberty are measures in the context of judicial proceedings.
- ✓ *Consent*: Diversion requires the consent of the child and often also the consent of the parents/guardians, while alternatives to pre-trial deprivation of liberty can be imposed by the police or prosecutor regardless of the child's consent and alternative sentences can be imposed by the court regardless of the child's consent.
- ✓ *Criminal record*: Diversion does not result in a criminal record, while alternative sentences imposed by the court generally result in a criminal record.
- ✓ *Conditions*: Diversion implies that the child has to comply with certain constructive conditions, while the conditions relating to alternatives to arrest and pre-trial detention are of a restrictive nature.

Section 181 'Penalties and Sanctions' of the Child Act (2008):

"(2) Sentencing shall be non-custodial where possible and may include orders for any of the following reliefs in respect of a child against whom an offence is proved –
(a) reconciliation;
(b) compensation, restitution or fine;
(c) apology;
(d) caution;
(e) a probation order; or
(f) sending him or her to reformatory.
(3) Sentencing of expectant mothers under eighteen years of age and mothers of infants who have been accused or found guilty of violating the law, non-custodial sentencing shall be considered."

Burglary Case – Lilian (16 years)

"My name is Lilian. I am 16 years old. My boyfriend, Peter, and I want to marry and have kids but our parents don't allow us. Therefore, we have run away from home. I am pregnant and have severe abdominal pains. We needed money for the doctor. That is why we committed the burglary. Now I am in the police station."

That same evening - Arrest/Deprivation of liberty:

"The police officer has arrested me and now I am waiting in police custody what's going to happen."

24 hours later - Alternative to pre-trial detention:

"After one day, the Court decided to release me on bail, because I am pregnant and need medical attention. I have to stay with my parents till my trial and may not contact Peter's brothers and our friend with whom we committed the burglary. I also have to report to the police station in my village every other Monday."

Two months later - Alternative to post-trial detention:

"Today, two months after I was arrested, I went to the Court. The judge has sentenced me to probation. Until my eighteenth birthday, that will be about one and a half year, I have to live with my parents and to report every first Monday of the month at the police station. I also have to go back to school. At the end of my trial, my parents got the money back that they had paid as bail."

Burglary Case – Peter (17 years)

“My name is Peter. I am 17 years old. My girlfriend, Lilian, and I have run away from home. Lilian is pregnant and doesn’t feel well. We committed a burglary to get money to go to a doctor. Now I’m in the police station.”

That same evening - Arrest/Deprivation of liberty:

“The police officer has arrested me. I have to stay in police custody till the court decides what will happen with me.”

48 hours later – Pre-trial detention:

“After two days the Court decided that I cannot be released on bail, because the judge considers me the mastermind of the burglary and I persuaded my two younger brothers to help me with the burglary. The police officer found two credit cards in my pocket, so I had to admit that I was involved in the burglary. I have to await my trial in detention. I do not know how long I have to stay there.”

Three months later - Post-trial detention:

“After three months in pre-trial detention, I went to the Court again. The judge explained that I have committed a serious offence and that I am sentenced to ten months in the reformatory’. My three months in pre-trial detention will be deducted, so I will go to the reformatory for only seven months.”

Five months later – Early conditional release:

“It is my lucky day today. I have spent five months in the reformatory. The judge told me that I will be early released from detention because of my good behaviour. It means that I may spend the remaining two months of my sentence in my community, on condition that I enrol in a vocational training so I can earn a living and take care of Lilian and my baby.”

6. WHAT MEANS ‘RESTORATIVE JUVENILE JUSTICE’?

6.1. WHAT ARE THE KEY-COMPONENTS OF RESTORATIVE JUVENILE JUSTICE?

‘Restorative juvenile justice’ (RJJ) can be described as: *“an approach in which the victim and child offender, and in some cases other persons affected by an offence, participate actively together in the resolution of matters arising from the crime, generally with the help of a trained facilitator.”*²² RJJ is a way of responding to an offence committed by a child that emphasises repairing the harm caused by the offence and restoring harmony as much as possible between the child offender, victim(s) and community. The objectives of the juvenile justice system as mentioned in the South Sudanese Child Act (2008) are very similar. Section 135 ‘Objectives of the Juvenile Justice System’ states: *“The main objectives of the juvenile justice system are - (a) reformation, social rehabilitation and reintegration of the child, while emphasizing individual accountability for crimes committed; and (b) the restoration of harmonious relationships between the child offender and the victim through reconciliation, restitution and compensation.”*

The key-components of RJJ are (see ‘box’)²³:

- ✓ **Accountability:** RJJ holds the child offender fully accountable for his/her offending behaviour and for restoring the harms her/his offence has caused to the victim(s) and the wider community²⁴.
- ✓ **Active participation:** RJJ actively involves all parties, i.e. the child offender, her/his parents, the victim(s), extended family members, school-representatives, peers and/or others affected by the offence, in setting the

Guideline 28 of the Guidelines on Action for Children in the Justice System in Africa:

“Wherever appropriate and consistent with human rights standards, alternatives to formal adjudication, such as mediation, conciliation, restorative justice practices, and traditional dispute resolution mechanisms, the essential aim of which is the child’s reformation, re-integration into his or her family and social rehabilitation, must be promoted.”

²² www.unicef.org/tdad/index_55653.html (Toolkit on Diversion and Alternatives to Detention). In this report, we use the term ‘restorative juvenile justice’ and not the general term ‘restorative justice’ that applies to both children and adults. We also prefer the term ‘restorative juvenile justice’, because our focus is ‘diversion with a restorative juvenile justice approach’ and diversion applies only to child offenders, while ‘restorative justice’ applies to (child) offenders as well as (child) victims.

²³ www.unicef.org/tdad/index_55653.html (Toolkit on Diversion and Alternatives to Detention).

²⁴ An offence also harms the community of which the victim is a part as well the community of the child offender, especially the child’s relationship with her/his parents and other family members. These communities are often indignant about the offence and may experience feelings of uncertainty, insecurity and disappointment.

conditions of accountability plus monitoring and supporting compliance with the conditions, thereby maximising the likelihood of the child offender being successfully reintegrated in the community.

- ✓ *Focus on consequences*: RJJ establishes a direct, concrete and immediate link between the offence and its consequences, including the social reaction.
- ✓ *Reintegration*: RJJ gives the child offender an opportunity to prove his/her capacity and qualities; helps the child offender to understand the implications of her/his offence and tackles guilt feelings of the child offender in a positive way. It creates a supportive social network around the child offender and her/his parents/family.
- ✓ *Prevention*: RJJ prevents re-offending through tackling the root causes of the offending behaviour and, where necessary, organising adequate support for the child offender (and his/her family).

6.2. WHAT ARE THE MAIN FORMS OF RESTORATIVE JUVENILE JUSTICE?

The two main forms of RJJ that are used in child offender cases are²⁵:

- ✓ *Victim-offender mediation*: These are programmes designed to address the needs of victims while ensuring that child offenders are held accountable for their offending. The mediation-process is more likely to fully meet its objectives if the victim and the child offender meet face-to-face, can express their feelings directly to each other and develop a new understanding of the conflicting situation. With the help of a trained mediator, they can reach an agreement that will help them both bring closure to the incident. In actual practice, the mediator usually meets with both parties in advance of a face-to-face meeting and helps the victim and child offender to prepare for that occasion.
- ✓ *Family group conferencing*: Conferences bring together the victim, child offender, her/his parents or guardians, and members of their respective communities. The process identifies the desirable outcomes for the parties, addresses the consequences of the offence and explores appropriate ways to prevent the child offender from re-offending. Because conferences involve a wider circle of concerned people, including individuals who may be in a position to work with and support the child offender, these processes are particularly effective as a means of ensuring that the child offender follows through on agreed outcomes.

6.3. WHICH CHILD RIGHTS AND LEGAL SAFEGUARDS HAVE TO BE RESPECTED?

RJJ-processes should comply with human rights and legal safeguards (see 'box'), especially:²⁶

- ✓ *Right to the assistance of a parent or guardian*
- ✓ *Right to consult with a legal counsel*: The victim and child offender should have the right to consult with a legal counsel concerning the restorative-process and, where necessary, to translation and/or interpretation.
- ✓ *Right to be fully informed*: Before agreeing to participate in a restorative process, the parties should be fully informed of their rights, the nature of the process and the possible consequences of their decision.
- ✓ *Informed consent*: Children may need special advice and assistance before being able to form a valid and informed consent.
- ✓ *Right not to participate*: Neither the victim nor the child offender should be coerced to participate in a restorative process or to accept a restorative outcome and have the right to participate in the decision-making.
- ✓ *Participation is not evidence of guilt*: Participation of a child offender in a RJJ-process should not be used as evidence of admission of guilt in subsequent legal proceedings.
- ✓ *Agreements should be voluntary and reasonable*: Child offenders should not be forced to reach an agreement and conditions should not be imposed. Agreements should only contain reasonable and proportionate conditions.

Paragraph 3 of General Comment Nr.10:

"Juvenile justice administration in compliance with the CRC, which should promote, inter alia, the use of alternative measures such as diversion and restorative justice, will provide States parties with possibilities to respond to children in conflict with the law in an effective manner serving not only the best interests of these children, but also the short- and long-term interest of the society at large."

²⁵ UNODC, *Handbook on Restorative Justice Programmes*, Criminal Justice Handbook Series, UNODC, Vienna, 2006, 114p.

The Child Act (2008) includes the same forms of restorative justice processes (section 154(a)(b)).

²⁶ www.unicef.org/tdad/index_55653.html (Toolkit on Diversion and Alternatives to Detention).

- ✓ *Confidentiality*: Discussions in a RJJ-process involving child offenders should be confidential and not be disclosed subsequently.
- ✓ *Failures*: Not reaching an agreement should not be used against the child offender in subsequent criminal proceedings. Failure to implement an agreement should not be used as justification for a more severe measure or sentence in subsequent criminal proceedings.
- ✓ *Judicial supervision*: The results of an agreement arising out of a RJJ-process should, where appropriate, be judicially supervised or incorporated into judicial decisions or judgments, i.e. if the RJJ-process is not part of diversion.

6.4. WHAT ARE THE DIFFERENCES BETWEEN ‘DIVERSION’ AND ‘RESTORATIVE JUVENILE JUSTICE’?

The main differences between ‘diversion’ and ‘restorative juvenile justice’ are:

- ✓ *JJ-process*: RJJ can be applied in any stage of the juvenile justice-process, including in the post-sentencing stage. For example, a RJJ-meeting can make recommendations to the court on how a case of a child offender may be dealt with to the parole board/probation officers on which conditions a child offender may be early released. Diversion can only be applied until the final disposition hearing.
- ✓ *Restoration*: RJJ makes the child offender responsible for the restoration of the consequences of the offence. Diversion focuses more on the root causes of the offending behaviour.
- ✓ *Victim-centred*: RJJ involves the victim and wider community in the decision-making process, while diversion does not necessarily do so. Diversion-conditions can be decided by the involved professional and the child offender (and her/his parents).

6.5. WHY IS ‘DIVERSION WITH A RESTORATIVE JUVENILE JUSTICE APPROACH’ PROMOTED?

Diversion does not automatically use a RJJ-approach, but can be very compatible with one another. Diversion is an ideal opportunity to capitalise on the strengths of a RJJ-approach, where possible and appropriate. Involvement of the victim and the wider community can mean that the benefits are greater than those achieved through ‘pure’ diversion which seeks to address the root causes of the child’s offending behaviour but may fail to address the needs of the victim and wider community. Moreover, diversion with a RJJ-approach reflects the strengths of many informal, traditional and customary justice systems, thereby rendering it acceptable, and often welcomed, by local communities. In this regard, section 37 *‘The Duties and Responsibilities of a Child’* of the South Sudan Child Act (2008) may be relevant as it underlines the child’s duty to *‘(c) serve the community by placing his or her physical and intellectual abilities at its service’* and *‘(e) uphold the positive values of his or her community and maintain good and cordial relations with other members of the community’*.

Burglary Case – John (14 years) – Diversion with a Restorative Juvenile Justice Approach

[See page 7]

That same evening:

[See page 7]

Two days later:

“My parents and I went back to the police station. The police officers explained to us what a ‘restorative juvenile justice meeting’ means. I and my parents and also other people of our family and community may discuss with the people from which we have stolen the credit cards and other valuables how I can make thing good again with them. If I participate in the ‘restorative juvenile justice meeting’ and comply with the conditions we may agree on, the police officer explained that I don’t have to go to court and will not be sentenced. My parents and I were very happy. Although I am nervous to face the owners of the house and apologize to them, I am very happy to get a second change. The police officer explained that a social worker will visit us at home to discuss the ‘restorative juvenile justice meeting’ in more detail. She will come tomorrow after school.”

Burglary Case – John (14 years) – Diversion with a Restorative Juvenile Justice Approach

Two weeks later:

“We were in the meeting-place at 3PM that Thursday. We took our seat in the circle and the social worker explained that we have come together to discuss how I can amend for the harm I had caused by the burglary. I felt very ashamed. We discussed the consequences of the burglary for the owners of the house as well as for my parents. After almost two hours discussing, we agreed that I will:

- ✓ *write a letter to the owners of the house in which I explain why I took part in the burglary and that I regret very much what I have done (next Saturday)*
- ✓ *go to school every day and not play truant anymore (till the end of the school-year)*
 - ✓ *go to church with my family (every Sunday)*
 - ✓ *join the basketball team of my school (till the end of the school year)*
- ✓ *do the shopping for the elderly people in the special home in our village (next ten weekends)*
 - ✓ *apologize to my parents and family for disgracing them (Sunday after church)*
- ✓ *accompany my little brother Simon from his school to home every Wednesday so that my mother can visit her sick sister that afternoon (next twelve Wednesdays)*

We all signed the agreement that will last till the end of this school year, i.e. 10 months in total. The social worker explained to us that she will come to my home every other Monday afternoon at 4PM, so that she can check whether I have complied with my conditions during the previous two weeks and whether I need any support from her, my parents or others. If I stay out of trouble for the comina 10 months. I will not have a criminal record.”

7. HOW RELATES ‘DIVERSION’ TO ‘INFORMAL CONFLICT SETTLEMENT’?

‘Informal justice’ implies *“the resolution of disputes and the regulation of conduct by adjudication or the assistance of a neutral third party that is not a part of the judiciary as established by law and/or whose substantive, procedural or structural foundation is not primarily based on statutory law”*.²⁷ ‘Conflict settlement’ refers to *“all processes that aim at reaching a jointly beneficial and constructive solution to a conflict between parties affected by an offence”*. International child-specific instruments promote ‘diversion with a restorative justice approach’ that builds upon the strengths of informal justice mechanisms, provided that they respect basic human rights principles and standards (see two ‘boxes’).

The main differences between ‘diversion’ and ‘informal conflict settlement’ are:

- ✓ *Justice system:* Diversion is part of the formal JfC-system and should be regulated by law, while informal conflict settlement is part of a non-state justice system and does not require written procedures.
- ✓ *Legal safeguards:* Diversion of child offender cases has to comply with child rights and legal safeguards, while there are no legal safeguards for informal conflict settlement and child rights are not fully respected .
- ✓ *Right to participation:* Diversion requires the informed consent of the child offender and active participation in the decision-making process, while the child offender is not always present during informal conflict settlements and/or does not actively participate in the decision-making process.

Guideline 43 of the Guidelines on Action for Children in the Justice System in Africa:

“Traditional courts, religious courts or other similar structures, where they exist, are required to respect international standards on the right to a fair trial and children’s rights.”

Guiding Principle 8 of the UN Common Approach to Justice for Children:

“Programming on justice for children needs to build on informal and traditional justice systems as long as they respect basic human rights principles and standards, such as gender equality.”

²⁷ UNICEF, UNDP & UN Women, *Informal Justice Systems, Charting a Course for Human Rights-Based Engagement*, United Nations, New York, 2012, 396p. Page 8: *“Any attempt to define ‘informal justice systems’ must acknowledge that no definition can be both very precise and sufficiently broad to encompass the range of systems and mechanisms that play a role in delivering rule of law and access to justice. ‘Informal justice systems’ vary considerably, encompassing many mechanisms of differing degrees and forms of formality.”*

- ✓ *Responsibility*: Diversion implies that the child offender has to comply with certain conditions and will be monitored during a certain period of time, while informal conflict settlement in child offender cases most of the time implies that the child's parents have to compensate the victim.
- ✓ *Prevention*: Diversion implies that the child has to comply with certain conditions that tackle the root causes of her/his offending behaviour in order to prevent reoffending, while informal conflict settlement that only implies financial compensation of the victim by the child's parents is unlikely to prevent reoffending.

Burglary Case – Ladu (16 years) – Informal Settlement

“My name is Ladu. I am 16 years old. Yesterday evening I helped my friend Peter with a burglary. Peter’s girlfriend is pregnant and needs medical assistance. I told him about a rich family that lives a few villages from ours. Peter promised me a part of the loot if I showed him the house and helped him with the burglary. The police arrived when we were just leaving the house, but I could escape through the backdoor.”

Three days later:

“Even before I got home that night, my entire community already knew what had happened and that I had been involved in a burglary. I suppose Peter or his brothers had told the police that I was with them. Our village-chief has told my parents to come to the customary court on Tuesday morning.”

Two days later:

“I have been nervous the entire morning. My parents went to our village-chief at 10AM and stayed away for more than 5 hours. My father was furious when they came home. He has to pay the owners of the house a huge amount of money to compensate the broken window and stolen valuables. My father doesn’t know how to get the money on time. He slapped me in my face and ordered me to wait for him in the kitchen. I do not know what is going to happen.”

8. WHAT CAN BE CONCLUDED WITH REGARD TO ‘DIVERSION’ AND ‘RELATING CONCEPTS’?

Diversion only applies to child offenders above the minimum age of criminal responsibility, i.e. 12 years and in other circumstances 14 years until 18 years. It is a formal JfC-measure, but implies that the child offender is conditionally channelled away from formal judicial proceedings and dealt with by non-judicial bodies. The child is fully accountable for the harm caused by her/his offence, has to restore the harms and has to comply with certain conditions while living with her/his family and in her/his community. International standards promote ‘diversion with a restorative justice approach that builds upon the strengths of customary traditions’, where possible and appropriate, and requires that the measure is regulated by national legislation and complies with child rights and legal safeguards.

PART 2:

DOES THE CHILD ACT (2008) PROMOTES 'DIVERSION WITH A RESTORATIVE JUVENILE JUSTICE APPROACH THAT BUILDS UPON THE STRENGTHS OF CUSTOMARY TRADITIONS'?

1. DOES THE CHILD ACT (2008) INCORPORATE MEASURES TO DEAL WITH CHILD OFFENDERS?

Chapter X 'Child in Conflict with the Law' of the Child Act (2008) deals with the procedures to be followed in cases of child offenders. Sections 135 to 191 incorporate both 'measures without resorting to judicial proceedings' and 'measures in the context of judicial proceedings'. In this second part of the report, the sections of the Child Act (2008) relevant to 'diversion' (§2)²⁸ and 'restorative justice approach' (§3)²⁹ as well as national legislation relevant to customary JfC (§4) are examined, including the relating challenges (§5).

2. DOES THE CHILD ACT (2008) PROMOTE 'DIVERSION'?

Diversion of child offenders is specifically addressed in sections 158, 159 & 160 of the Child Act (2008). Also sections 5, 149(3c), 161, 175(6a), 178(1c) & 179(3a) refer to diversion and other sections are indirectly related, such as sections 6, 7, 9, 12, 13, 14, 16, 17, 37, 136(2) & 148. The Child Act (2008) promotes diversion "as a matter of first resort to institutionalization of children being a measure of last resort" (section 160(2)) and "where possible and appropriate, diversion shall include ingredients of the restorative justice process which aim at healing relationships, including the relationships of the victim(s) and offender(s)" (section 158(2)).

3. DOES THE CHILD ACT (2008) PROMOTE 'RESTORATIVE JUVENILE JUSTICE'?

Restorative juvenile justice is specifically addressed in sections 153, 154, 155, 156 & 157 of the Child Act (2008). Other sections refer to restorative juvenile justice, i.e. sections 5, 135(b) & 158(2), or are interrelated, such as sections 6, 9, 17, 37 & 136(2) (see 'box'). The Child Act (2008) strongly promotes restorative juvenile justice as it states that "crimes committed by a child shall be dealt with in accordance with the principle of restorative justice" (section 153).

Section 136(2) 'Purposes of Co-ordination between the Law Enforcement Agencies and the Child' of the Child Act (2008):

"Any proceedings involving a child shall be conducted in an atmosphere of understanding, which shall allow the juvenile to participate therein and to express himself or herself freely."

4. DOES THE CHILD ACT (2008) PROMOTE 'CUSTOMARY TRADITIONS'?

In South Sudan, the great majority of child offender cases is dealt with through informal justice mechanisms, i.e. customary courts. The Transitional Constitution of the Republic of South Sudan (2011) and the Local Government Act (2009), which are not child-specific laws, as well as the Child Act (2008) recognize customary courts³⁰. However, it is not fully clear to which extent these courts have jurisdiction in child offender cases³¹. Section 4 'Authority and Application' of the Child Act (2008) states that "(4) Nothing in this Act shall prevent, discourage or prohibit the application of customary and traditional laws that are protective of the rights of the child except where those laws are contrary to the best interests of the child." However, according to the most recent 'Concluding Observations' of the 'Committee on the Rights of the Child' (22 October 2010) customary law is not applied in line with international standards (see 'box'). One of the serious challenges that have been expressed by the customary representatives during the roundtable in Malakal³² is what is called 'protective detention of child offenders'. If the parents of a child who has committed a murder do not or cannot pay the so-called 'blood money' to the victim's family, the child offender is deprived of her/his liberty in one of the formal detention-facilities in order to protect her/him from revenge by the victim's family. Section

Concluding Observation 89(e):

"... The Committee is also concerned, inter alia, that: ... (e) Juvenile justice is dispensed according to customary law in Southern Sudan, which is not in conformity with international standards in the field of juvenile justice."

²⁸ See Annex 3 'Sections of the Child Act (2008) that Deal with Diversion'.

²⁹ See Annex 4 'Sections of the Child Act (2008) that Deal with Restorative Juvenile Justice'.

³⁰ See Annex 5 'National Legislation Relating to Customary Justice'.

³¹ See §3. 'Customary Justice for Children Procedures' of the 'Strategic Framework on Justice for Children' (2012).

³² See Annex 1 'Consultative Roundtables on Diversion of Child Offenders in the South Sudanese JfC-Context'.

182(2) of the Child Act (2008) states in this regard: “No child shall be arrested, detained or imprisoned where a financial penalty, imposed by any authority or in a settlement of any case, has not been paid, including by his or her family”.

5. WHAT ARE THE LEGISLATIVE CHALLENGES?

5.1. WHICH CHALLENGES ARE RELATED TO ‘DIVERSION’?

Considering the key-components, child rights and legal safeguards relevant to ‘diversion’ as discussed in §2 of Part 1 of this report, it is obvious that various legislative challenges have to be discussed before the proposed diversion-schema can be implemented. The main challenges are:

✓ *Definition of diversion:*

Section 5 ‘*Interpretation*’ defines diversion in a way that differs fundamentally at two points from the definition that has been internationally agreed on:

--> Diversion implies ‘away from formal judicial proceeding’ and not ‘away from the adult criminal justice system’ (section 5).

--> The conditions the child offender has to comply with are considered a crucial component of diversion. Therefore, diversion should not be ‘with or without conditions’ (section 5). ‘Diversion without conditions’ is called ‘*cautioning*’ or ‘*warning*’ and is considered an appropriate response for the majority of first-time offenders. Section 148 deals with ‘*cautioning by a policeman or a policewoman*’ as an alternative to ‘*arresting a child*’.

✓ *Kind of cases/offences eligible for diversion:*

Sections 158, 159 & 160 do not clearly indicate which cases and/or which offences are eligible for diversion, but the Child Act (2008) includes the following general criteria:

--> ‘*prior convictions*’ (section 149(c))

--> ‘*in the best interest of the child*’ (section 158(3))

--> ‘*having committed an offence*’ (section 160(1))

--> ‘*crime of a non-violent nature*’ (section 178(1)(c))

--> ‘*offence of a violent nature*’ (section 179(3)(a))

✓ *Work as condition:*

Section 158(6) prohibits ‘*community service or other work as a part of diversion*’ for child offenders under the age of thirteen³³. As diversion only applies to children above the minimum age of criminal responsibility, which is twelve years, section 158(6) actually deals exclusively with children in the age category from 12 to 13 years. Moreover, it needs further clarification what ‘*other work*’ means because odd jobs in the house, at school, for the community or for the victim are often included in an agreement within the framework of ‘diversion with a restorative justice approach’.

✓ *Non-discrimination*³⁴:

Section 160(1)(d) states that only children who have a ‘*fixed address*’ can be diverted (see ‘*box*’), which may imply that ‘children living and working in the streets’ are discriminated against whereas section 158(4) states that ‘*all children must have equal access to diversion options*’.

✓ *Child rights & legal safeguards:*

Sections 158, 159 & 160 ‘*Diversion*’ do not include all internationally promoted child rights & legal safeguards of diversion (see previous ‘*box*’), that is:

Section 160(1) “*Circumstances to be Considered for Diversion*” of the Child Act (2008):

“A child suspected of having committed an offence may only be referred for diversion by a Social Worker, Public Attorney, Judge or a police officer if -

(a) such a child acknowledges responsibility for the alleged offence and consents to diversion;

(b) there are reasons to believe that there is sufficient evidence for the matter to proceed to trial;

(c) there is no risk of infringement of the child’s procedural rights; and

(d) the child has a fixed address.”

³³ See also section 25(4) of the Child Act (2008) that mentions ‘*twelve years*’ as the minimum age for ‘*light work*’.

³⁴ Section 9 ‘*No Discrimination*’ is one of the general principles and states in subsection (2) that “Any person who discriminates against a child or his or her parents or guardians in contravention of this section commits an offence, and upon conviction, shall be sentenced to imprisonment for a term not exceeding one year or with fine or with both”.

- > legal basis for diversion, i.e. in which kinds of cases/offences diversion is possible
 - > opportunity to seek legal and other assistance
 - > deprivation of liberty and any other measures contrary to the 'Convention on the Rights of the Child' shall not be part of diversion
 - > proportionality of the diversion-conditions
 - > no criminal record after compliance with the conditions
- ✓ *Referral to diversion:*
- > Section 160(1) states that – among others – ‘a social worker’ may refer child offenders to diversion and section 178(2) states that ‘a decision taken by a social worker... may be effected in her/his sole discretion, like ‘referring the child to a diversion option’ (section 178(1)(c)). Section 5 defines ‘social worker’ as ‘a person who holds a qualification recognized by an authorized person to conduct social work’. This may be interpreted that any social worker, including those who do not work within the formal JfC-system or relating bodies, may refer a child offender to diversion (see also sections 155(6)(d), 157(1)(f), 157(4), 160(1) & 161(1)(b))
 - > It is not mentioned in section 160(1) that ‘chiefs’ may refer a child offender for diversion, while section 157(1)(b) includes ‘chief’ as potential referrer to restorative justice processes. Section 5 defines ‘chief’ as: “the head or leader of a group or body of people, including any chief, sub-chief or headman of a Boma, Payam or of any town, and any other person by whatever title under which he or she is known, appointed by the Government to perform among other things functions similar to those of a policeman or policewoman”.
 - > Section 160(1) seems to suggest that ‘social workers, public attorneys, judges and police officers’ divert child offenders straight to a particular diversion-programme instead of to an administrative body that is responsible for further referring the child to community-based programmes.
- ✓ *Diversion & customary JfC:*
- None of the sections on diversion deals with the relation between diversion and customary JfC and how professionals of both systems may or have to collaborate in cases of child offenders that are diverted. Only section 4(4) can be applied in this regard.

5.2. WHICH CHALLENGES ARE RELATED TO ‘RESTORATIVE JUVENILE JUSTICE’?

Considering the key-components, child rights and legal safeguards relevant to ‘restorative juvenile justice’ as discussed in §6 of Part 1 of this report, it is obvious that various legislative challenges have to be discussed before the proposed diversion-schema can be implemented. The main challenges are:

- ✓ *Children referred to restorative justice processes:*
- Section 5 states that ‘family conferencing’ applies to ‘child offenders’ and section 154(a) mentions ‘family conference’ as a ‘restorative justice process’. Also section 153 relates ‘restorative justice’ to ‘child offenders’ (see ‘box’). However, sections 153 – 157 that deal with ‘restorative justice’ do not only apply to ‘child offenders’:
- > Section 153(d) deals with ‘children at risk’ and states that restorative justice aims to ‘empower communities to address children at risk of offending without resorting to criminal justice’.
 - > Section 155(11) lists the functions of ‘family conferencing’ (see ‘box’), but seems to deal exclusively with

Section 153 ‘Restorative Justice’ of the Child Act (2008):

“Crimes committed by a child shall be dealt with in accordance with the principle of restorative justice which aims to - ...”

Section 155(11) ‘Family Conference’ of the Child Act (2008):

“The functions of the family conference as pertaining to the child with respect to which the conference has been convened are as follows -

- (a) to consider such matters relating to the care and protection of the child as the conference deems appropriate;*
- (b) to consider the need of care or protection, to make such decisions or recommendations and to formulate plans as the conference considers necessary in the best interests of that child; and*
- (c) to review from time to time the decisions and recommendations made and the plans formulated by that conference and their implementation.”*

'children in need of care and protection' (section 155(11)(a)(b)).

--> Section 177(1)(c) refers to *'a conference'*, which may be interpreted as *'family conference'*, although the section applies to *'children under the minimum age of criminal responsibility'*.

Using *'family conferencing'* for other children than *'child offenders above the minimum age of criminal responsibility'* is not only in contradiction with the definition of section 5, but also with section 155(21) that states that finally a *'sentence'* can be imposed on children who fail to follow the decisions of the family conference.

✓ *Terminology:*

In sections 154, 155, 156, 157 & 177 the terms *'family conferencing'*, *'family group conferencing'* and *'conference'* are used. All seem to refer to *'family conferencing'*.

✓ *Family conference – chairperson:*

Section 155 states that *'a family group conference shall be convened by the Chairperson of the Child Justice Committee'*. However, it is not clarified:

--> Whether the chairperson also facilitates the actual family conference or that the facilitator can or has to be someone else.

--> Whether the chairperson has to be a trained facilitator or can be anybody (see also section 156(2)).

--> Which persons may be the chairperson (section 155(6)(d)) mentions *'social worker'* in the specific situation that *'a social worker has prepared a report'* (which as such may undermine the neutrality of the chairperson)).

✓ *Family conference – revision of the agreement:*

Section 155(11c) states that one of the functions of the family conference is *'to review from time to time the decisions and recommendations made and the plans formulated by that conference and their implementation'*. Within a restorative juvenile justice perspective, an agreement may only be revised after consultation with the victim and others who have signed the agreement.

✓ *Family conference – non-discrimination:*

Section 155(20) states *'a family conference shall be convened in rural areas where all parties under section 155(6) are present'*. This may result in discrimination against two groups of children (see also sections 157(3) & 156(6)):

--> Children living in non-rural areas

--> Children who do not have parents/guardians, family members and/or legal representative

These two groups of children seem to have no access to family conferencing, which implies that not all children *'have equal access to diversion options'* (see section 158(4)).

✓ *Family conference – remaining issues:*

--> Section 155(14) does not specify how many times the chairperson can *'reconvene'* a family conference.

--> Section 155(21) does not specify after how many family conferences the chairperson may *'refer the child to a court'*.

--> In section 155(6) the phrase *'are entitled to attend'* is used, which may imply that *'the parent(s) or guardians of the child'* (section 155(6)(b)) and *'members of the families of the children concerned'* (section 155(6)(c)) may attend the family conference even when that is not in the *'best interest of the child'* (sections 6 & 155(11)(b)), for example when those persons have forced the child into crime³⁵. Moreover, from a restorative juvenile justice perspective, the child her/himself may also suggest persons of her/his so-called *'community of care'* to participate in the family conference. Section 155(1) suggests that only *'the families of the children concerned'* will be consulted in this regard. Also the victim(s) is not explicitly mentioned as participant of the family conference.

--> Section 155(8) states that *'the permission of the conference'* is required for *'any person that may attend the conference for the purpose of conveying any information ...'*. In actual practice this may not be realistic as the conference consist of various participants (see section 155(6)).

--> Section 156(8) deals with *'family conferencing'* instead of victim offender mediation.

³⁵ Section 172(1)(i) may be relevant in this regard: *"shall have the matter determined in his or her presence and in the presence of parents or guardians unless the presence of parents or guardians would be detrimental to the case"*.

- ✓ *Victim offender mediation – participation of parents:*
Victim offender mediation seems to exclude the child's parents (section 156(1)(2), which may need reconsideration in the light of the functions of mediation (section 156(3)(b)(c)).
- ✓ *Victim offender mediation – mediator:*
Section 156(2) states that either a 'trained mediator' or the 'Chairperson of the Child Justice Committee' functions as facilitator of the victim offender mediation (see 'box'). However, in the other subsections only the 'Chairperson of the Child Justice Committee' is mentioned (156(4)(5)(7)(8)).
- ✓ *Victim offender mediation - non-discrimination:*
Section 156(6) states that 'a victim offender mediation shall be convened, where the offence has been committed in an urban area and all family and committee members are not available to attend a family group conference'. This may result in discrimination against two groups of children (see also sections 155(20) & 157(3)):
 - > Children living in non-urban areas
 - > Children whose family members and community members are available
 These two groups of children seem to have no access to victim offender mediation, which implies that not all children 'have equal access to diversion options' (see section 158(4)).
- ✓ *Victim offender mediation – failures:*
 - > Section 156(7) states that 'the Chairperson of the Child Justice Committee shall have the power to refer a child, who does not abide by the agreement made in the victim offender mediation, to a Family or Child Court to impose sentence of diversion or probation' (see 'box'). This may imply three challenges:
 - > The consequence of 'not abide by the agreement' should not automatically be a 'sentence'. The prosecutor/court might take into account the reason for the noncompliance, i.e. the child's inappropriate behaviour or attitude or a structural problem and/or failures of others/monitors.
 - > The consequence of 'not abide by the agreement' should not be limited to either 'diversion' or 'probation' but also include 'community service' and other forms of symbolic compensation.
 - > diversion can never be a 'sentence'
- ✓ *Referral to restorative justice process:*
 - > Section 157 deals with 'referral to restorative justice process' and suggests that the listed persons may refer the child offender straight to one of the three restorative justice processes (see section 154(a)(b)(c)) instead of to the 'Child Justice Committee' and, subsequently, the chairperson decides on the most appropriate restorative justice process.
 - > Section 157(1)(a) states that a 'referral to restorative justice process may be made by - (a) the child or his/her parent, guardian or any appropriate adult'. This subsection needs further clarification of:
 - what exactly 'referral' means in this regard
 - whether it is appropriate/desirable that the child can refer her/himself
 - whether victims should not be included
 - what 'any appropriate adult' means (and whether it also includes CBOs & NGOs) and in which cases they may refer a child
 - which 'social worker' is meant (see §5.1. 'referral to diversion')
 - whether it is actually appropriate and functional if all these persons may refer child offenders
 - > Section 157(1) uses both 'and' & 'or' which might be confusing.
 - > Section 157(2) states 'the Chairperson of the Child Justice Committee who shall further refer the child ...', which implies three challenges:
 - it may be interpreted that the chairperson cannot deny referrals and has to further refer the case

Section 156(2) 'Victim Offender Mediation' of the Child Act (2008):

"The victim and the offender shall meet in a safe and structured setting with the assistance of a trained mediator or Chairperson of the Child Justice Committee."

Section 156(7) 'Victim Offender Mediation' of the Child Act (2008):

"The Chairperson of the Child Justice Committee shall have the power to refer a child, who does not abide by the agreement made in the Victim - Offender Mediation, to a Family or Child Court to impose sentence of diversion or probation."

- it may be interpreted that the child's 'informed consent' and 'admittance of the offence' are not required
 - only two options are mentioned, i.e. *'either family group conference or victim-offender mediation'*, while section 154 includes three options, i.e. also (c) *'any other restorative justice processes'*
 - > Section 157(3) discriminates between children in rural/urban areas and children whose family members and community members are available/not available (see also sections 155(20) & 156(6)).
 - > Section 157(4) states that if *'the victim and offender do not agree on the decision to be made'* the case shall go back to the referrer. However, the case will also be referred back when only one party does not agree, i.e. either the child offender or the victim.
 - > Section 157(4) does not states what happens if *'the victim and offender do not agree on the decision to be made'* and the case has been referred by a person listed in section 157(1)(a)(b), i.e. the *'child or hh parents, guardian or any appropriate adult'* or *'chief'*.
- ✓ *Restorative juvenile justice & customary JfC:*
 None of the sections on RJJ deals with the relation between RJJ and customary JfC and how professionals of the formal JfC-system and customary JfC-system may or have to collaborate in cases of child offenders that are referred to a RJJ-process. Only section 157(1)(b) refers to *'chief'* but does not elaborate on the collaboration.

6. WHAT CAN BE CONCLUDED WITH REGARD TO 'DIVERSION' AND 'THE CHILD ACT (2008)'?

The Child Act (2008) promotes *'diversion with a restorative justice approach'* for child offenders through section 158(2) and underlines in section 4(4) that such measures *'should not prevent, discourage or prohibit customary traditions that are protective to the rights of the child'*. Section 154(c) can be considered the legal basis for *'diversion with a restorative justice approach that builds upon the strengths of customary traditions'* that the MoGCS promotes. Although the Child Act (2008) includes a series of challenges relating to *'diversion'* and *'restorative juvenile justice'* and various subsections relating to diversion and restorative juvenile justice are not in line with international JfC-standards and principles, there is no urgent need to advocate for amendments before the proposed diversion-scheme has been tried out. It will be more efficient and effective to first make an inventory of the lessons learned from the tryout and then advocate for amendments that are based on actual South Sudanese practices.

PART 3:

WHICH DIVERSION-SCHEME IS IN COMPLIANCE WITH INTERNATIONAL AND NATIONAL JUSTICE FOR CHILDREN STANDARDS AS WELL AS IMPLEMENTABLE IN THE SOUTH SUDAN CONTEXT?

1. WHY IS 'RESTORATIVE COMMUNITY CONSULTATION' THE PROPOSED DIVERSION-SCHEME?

The diversion-scheme proposed in this third part of the report is called '*Restorative Community Consultation*'. The decision of the MoGCSW to introduce diversion in the form of 'Restorative Community Consultation' (RCC) in South Sudan is a well-considered one. The reasons are:

- ✓ RCC complies with international JfC-standards as promoted by the Convention on the Rights of the Child and other child-specific JfC-instruments (see Part 1)
- ✓ RCC complies with national JfC-standards as promoted by the Child Act (2008) and the Strategic Framework on JfC (2012) (see Part 2)
- ✓ RCC combines diversion with a restorative juvenile justice approach (see §6.5. of Part 1)
- ✓ RCC has many similarities with the current dominant customary practice in child offender cases and builds upon customary traditions that are in line with international and national JfC-standards (see §7 of Part 1)
- ✓ RCC requires less human and financial resources as well as less specialized professionals than 'pure' diversion-options that are based on an assessment of JfC-professionals or a multidisciplinary team (see §6.5. versus §2. of Part 1)
- ✓ RCC is more realistic in a JfC-context with limited community-based services and programmes for child offenders than 'pure' diversion-options that are based on an assessment of JfC-professionals or a multidisciplinary team (see §6.5. versus §2. of Part 1)
- ✓ RCC is implementable in local communities of the various South Sudan states (see §1. to §8. of Part 3)

Moreover, the experiences with the RCC-methodology in cases of child offender above the minimum age of criminal responsibility may be useful and transferable to future JfC-initiatives, such as restorative justice processes in cases of child victims, children under the minimum age of criminal responsibility³⁶ and young adult offenders as well as alternatives to post-trial detention for convicted child offenders.

2. WHAT ARE THE MAIN COMPONENTS OF THE 'RESTORATIVE COMMUNITY CONSULTATION' PROCESS?

The flowchart 'Restorative Community Consultation' (see page 24) shows the main steps and actors in the RCC-process (see dark green boxes & arrows). The main RCC-components, in chronological order, are:

- ✓ *Child offender cases*: RCC is a form of 'diversion with a restorative juvenile justice approach' and, therefore, can only be used in cases of child offenders above the minimum age of criminal responsibility ($\geq 12/14$ years - < 18 years). In actual practice, alleged child offender cases are reported either to the formal JfC-system, i.e. the (child) police, or to customary courts in local communities. Most cases are dealt with according to customary law.
- ✓ *Referral by customary courts*: Representatives of customary courts may refer alleged child offender cases directly or indirectly through the (child) police to the 'Child Justice Committee' (CJC) of the county where the alleged offence has been committed (i.e. not the county where the alleged child offender and her/his family live)³⁷.
- ✓ *Referral by formal justice providers*: The (child) police decide first whether the alleged child offender case is formally eligible for diversion (see '*preconditions for diversion*'/§3 of Part 3), including cautioning³⁸. If the case can be diverted, a social worker attached to the formal JfC-system checks whether the alleged child offender admits her/his involvement in the offence. If the child does not admit, the social worker refers the case back to the original referrer. If the child admits, a legal adviser attached to the formal JfC-system provides the child offender and her/his parents with the required information to decide whether to consent to diversion. If the child (and her/his parents) gives her/his informed consent, the social worker assesses whether 'pure diversion'

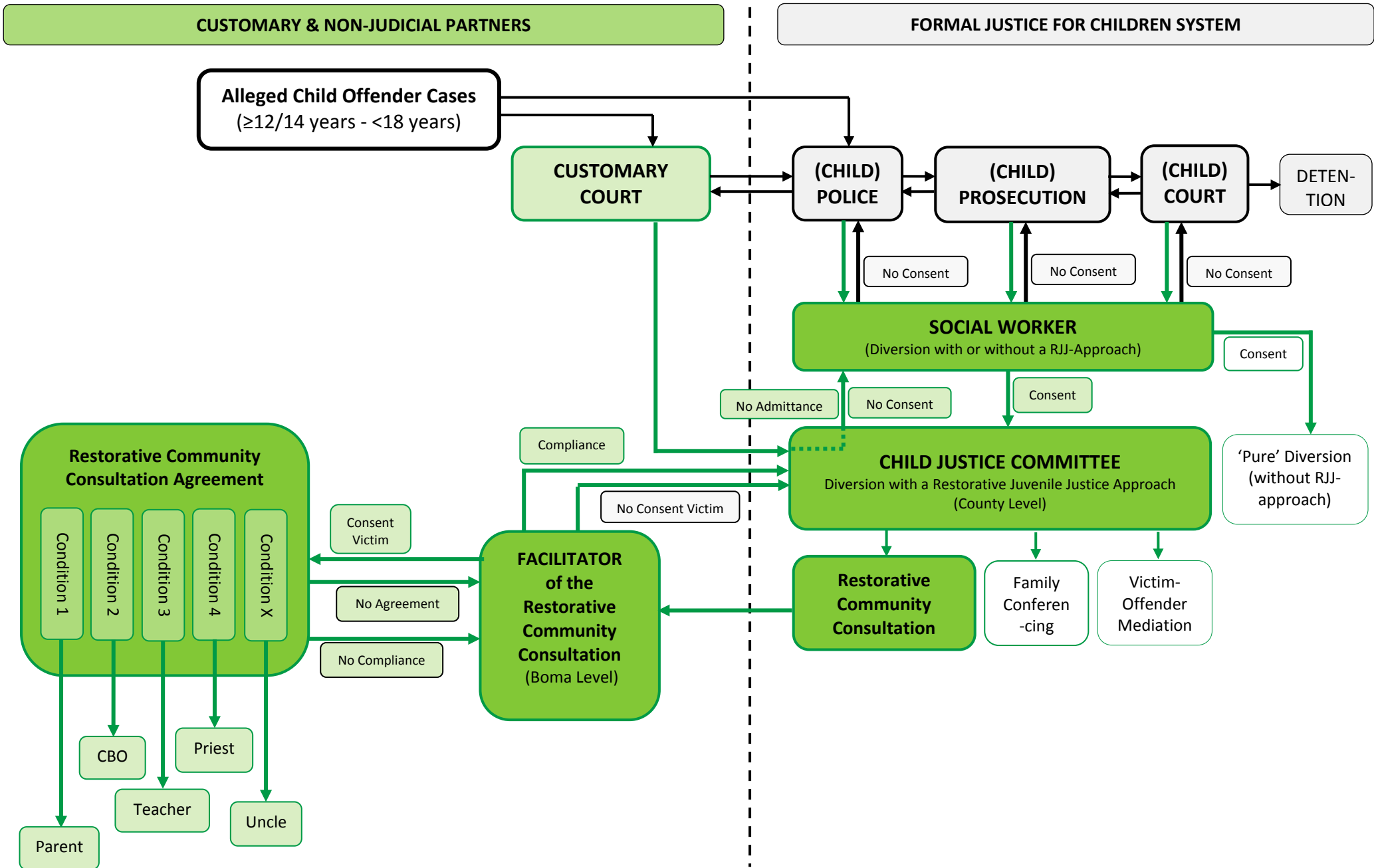
³⁶ The Child Act (2008) seems to select 'family conferencing' for children under the minimum age of criminal responsibility (section 177(2)(3)).

³⁷ According to the Strategic Framework on JfC (2012), 'Child Justice Committees' will be established at county-level during the period 2013/2015 (See Objective 2.1. '*Child-specific formal and customary Justice for Children-institutions and Justice for Children-structures, -programmes and -services strengthened and established*').

³⁸ See section 148 of the Child Act (2008).

- or 'diversion with a restorative justice approach' will be the most appropriate diversion-option. She/he registers the case as well as the arguments for that particular diversion-option. If the case cannot be diverted at the police-level, for example because the child's age has to be assessed or the child's parents cannot be located immediately, the (child) prosecutor and (child) judge involved in the case can still divert the case until the final disposition hearing.
- ✓ *CJC-chairperson*: The procedures to be followed by the chairperson depend on who has been the original referrer of the child offender case.
 - > *If the child has been referred by the (child) police, (child) prosecution or (child) court*: The CJC-chairperson decides, in consultation with the child and her/his parents, whether to further refer the child (and her/his parents) to 'family conferencing', 'victim-offender mediation' or 'restorative community consultation' (RCC). The CJC-chairperson registers the case as well as the arguments for that particular RJJ-option. If the child and her/his parents are referred to RCC, the CJC-chairperson appoints a neutral RCC-facilitator from one of the bomas within the CJC-county (see §7 of Part 3).
 - > *If the child has been referred by a customary court*: In these cases, the CJC-chairperson checks whether the alleged child offender admits her/his involvement in the offence and gives her/his informed consent to a RJJ-process.
 - *Admittance & consent*: If the child admits the offence and consents to a RJJ-process, the CJC-chairperson decides, in consultation with the child and her/his parents, whether to further refer the child (and her/his parents) to 'family conferencing', 'victim-offender mediation' or 'restorative community consultation' (RCC). The CJC-chairperson registers the case as well as the arguments for that particular RJJ-option. If the child and her/his parents are referred to RCC, the CJC-chairperson appoints a neutral RCC-facilitator from one of the bomas within the CJC-county (see §7 of Part 3).
 - *No admittance*: If the child does not admit the offence, the CJC-chairperson refers the case to the (child) police who then investigates and formally proceed with the case.
 - *No consent*: If the child admits the offence but does not give her/his informed consent to a RJJ-process, the CJC-chairperson refers the case to the (child) police, who then requests the social worker attached to the formal JfC-system to assess whether 'pure' diversion' can be an appropriate option for the child. If so, the social worker checks whether the alleged child offender gives her/his informed consent to 'pure' diversion and further refers the child. If the child does not consent to 'pure' diversion, the (child) police formally proceed with the case.
 - ✓ *RCC-meeting*: The RCC-facilitator is responsible for the entire RCC-process, i.e. the preparation stage, facilitation stage, agreement stage and follow-up stage (see §6 of Part 3). The actual RCC takes place in the boma of the victim(s) or, if agreed upon by all parties, the RCC-meeting can be organised in the boma of the child offender and her/his family or any other boma of the CJC-county. The RCC-facilitator is the one who contacts the victim(s) and checks whether the victim(s) consents to the RJJ-process. If the victim(s) does not consent, the RCC-facilitator and CJC-chairperson will decide on the most appropriate alternative diversion-option for the child.
 - ✓ *RCC-agreement*: If the parties come to a RCC-agreement, the child offender fulfils the conditions for the periods agreed upon. The child offender's parents and 'community of care' support the child while fulfilling the conditions and monitor the child's compliance with the conditions. The RCC-facilitator monitors and evaluates the child offender's overall compliance with the conditions. If the child offender has complied with all conditions within the timeframe agreed upon, the RCC-facilitator informs the CJC-chairperson who then informs the original referrer of the case as well as the victim(s). The case will be closed and the child will not have criminal record. If the RCC-process deviates from the above, i.e. the parties do not come to an agreement or the child does not comply with one or more of the conditions, the RCC-facilitator refers the case back to the 'Child Justice Committee' and the CJC-chairperson refers the case to the original referrer. Then the (child) prosecutor or (child) judge decides on how to proceed with the case, which does not necessarily mean formal judicial proceedings and/or deprivation of liberty.

'Restorative Community Consultation'



3. WHICH CHILD OFFENDER CASES ARE ELIGIBLE FOR 'RESTORATIVE COMMUNITY CONSULTATION'?

The referral of a child offender case consists of the following two steps:

- ✓ *Preconditions for diversion/RCC:* An alleged child offender can only be diverted if the preconditions are fulfilled. The original referrer of the case, i.e. the (child) police, (child) prosecution or (child) court, checks the first two preconditions:
 - > the alleged child offender is at least 12 years old but not older than 18 years
 - > there is compelling evidence that the child has committed the alleged offenceSubsequently, the social worker attached to the JfC-system checks the next two preconditions:
 - > the child freely admits her/his involvement in the offence
 - > the child gives her/his informed consents to diversion³⁹

The Child Act (2008) includes two other preconditions, i.e. *'there is no risk of infringement of the child's procedural rights'*⁴⁰ and *'the child has a fixed address'* (section 160(1)(c)(d)). The Child Act (2008) does not restrict diversion to particular offences. Applying the international diversion-principle 'as much as possible' (see §2.1. of Part 1) implies that diversion, and therefore RCC, can be used in all child offender cases. However, if the safety risks for the community and/or victim(s) are too high, formal judicial proceedings may be required⁴¹, especially in the following cases:

- > children who have committed a very serious offence such as rape, manslaughter, murder or any other very violent offence
- > persistent offenders who have committed an offence three times or more and who have already participated in a diversion-option and/or RJJ-process but have not complied with the agreement-conditions

Using diversion/RCC in all child offender cases is in line with South Sudan customary practices. Customary courts deal with all kinds of offences committed by children, including the most severe cases such as murder. In the proposed RCC-process, customary courts may also refer child offender cases directly to 'Restorative Community Consultation' instead of through the (child) police. In these cases, the preconditions might not be respected and need to be checked by the 'Child Justice Committee'. For example, customary courts do not always distinguish between child offenders above the minimum age of criminal responsibility and do not always respect the age of 18 years as the upper limit of child offender cases.

- ✓ *Other restrictive criteria for diversion/RCC:* It is recommended that the referring police officer and/or the social worker involved in the diverted case checks whether the child belongs to one of the following categories of children who cannot be diverted/participate in a RCC-process:
 - > children who are alleged to have committed also other offences (pending charges)
 - > children who are assumed to be mentally ill
 - > children who have been involved in so-called 'status-offences'⁴²
 - > children who have not been engaged in criminal activities⁴³
 - > children who have been intimidated or forced into crime by adult criminals⁴⁴

It may be considered to add two more categories of children to this list of restrictive criteria, namely:

- > alleged child offenders who are actually child victims, for example child victims of rape who are considered child offenders involved in adultery
- > children who are alleged to have committed a minor offence for the first time or second time; an informal or formal police caution may be more appropriate in these cases (section 148 of the Child Act (2008)).

³⁹ The consent of the child offender's parents is not considered a precondition for diversion/RCC, because sometimes parents do not want to take responsibility for their children who are in conflict with the law and prefer that their children are sentenced and/or deprived of their liberty.

⁴⁰ See section 172 of the Child Act (2008).

⁴¹ Another option in these cases may be that the court formally supervises the diversion/RCC and takes the final decision after the child has complied with the diversion/RCC-conditions.

⁴² A 'status offence' is an act or behaviour that is only considered criminal if the person committing it is - or is believed to be - under the age of eighteen, i.e. it is an 'offence' due to their 'status' as a child. For example: run-away from home or an institution, truancy, defilement, etc. International guidelines call for decriminalisation of status offences (Riyadh Guideline 56).

⁴³ Sometimes children who have not been engaged in criminal activities, like children living and/or working on the streets, are nevertheless arrested and detained.

⁴⁴ Internationally, child suspects and child offenders who have been intimidated or forced to act illegally or have done so under duress are considered 'children in need of protection' (See 'Model Law on Justice in Matters Involving Child Victims and Witnesses of Crime').

4. WHICH CHILD OFFENDERS REQUIRE SPECIAL ATTENTION DURING 'RESTORATIVE COMMUNITY CONSULTATION'?

The MoGCSW strongly advocates the implementation of a diversion-scheme that does not discriminate against particular groups of child offenders. Especially the inclusion of the following six groups might need additional advocacy and awareness efforts during the preparation stage of 'Restorative Community Consultation':

- ✓ *Child offenders without parental care:* Children who do not have parents or another guardian, like children living and/or working on the streets and children whose parents/guardian cannot be located immediately, are often discriminated against and excluded from diversion-options. However, members of the child's extended family as well as other supportive members of the child's community may be considered potential replacements of parents if that allows the child to participate in diversion/RCC instead of being formally processed through the JfC-system. In theory, also local NGOs and CBOs can act as legal guardian of the child for diversionary purposes.
- ✓ *Child offenders whose victim does not consent to RCC:* The consent of the victim to RCC is required. However, 'diversion with a RJJ-approach' can still be an option for children whose victim is not willing to participate in RCC. For example, the child offender can symbolically restore the harm through 'community service'⁴⁵.
- ✓ *Child offenders who have committed an offence against another child:* Facilitating a RCC-process in which both the offender and the victim are children below the age of 18 years requires an experienced and well-skilled RCC-facilitator in order to ensure that the child victim will not be secondarily victimized through the RCC-process.
- ✓ *Child offenders who have committed a domestic offence:* Facilitating a RCC-process in which the victim is the child offender's parent(s) requires an experienced and well-skilled RCC-facilitator, because the parent(s) is also supposed to support her/his child while fulfilling the RCC-conditions.
- ✓ *Child offenders involved in a group offence:* RCC may not result in re-victimization of the victim(s). Therefore, it is recommended that one big RCC-meeting is organised in case of a group offence so that the victim(s) does not have to participate in more than one RCC-meeting for each separate child offender. It is obvious that such RCC-processes have to be guided by an experienced and well-skilled RCC-facilitator.
- ✓ *Girl-offenders:* Girls are not that used to expressing their views and concern, giving their consent freely and being involved in decision-making processes as boys.

5. WHICH PARTIES ARE INVOLVED IN 'RESTORATIVE COMMUNITY CONSULTATION'?

Four parties are involved in the 'Restorative Community Consultation'-process. These are:

- ✓ *Child offender:* The child offender is the one who has committed the offence and whose behaviour has caused the harms. The child is supposed to take full responsibility for her/his offending behaviour and to discuss the ways in which the harms may be restored.
- ✓ *Parents or guardian of the child offender:* As RCC deals with offences committed by underage girls and boys, the parents of the offender are also engaged in the RCC-process. Usually the parents are very much affected and troubled by the offence committed by their son/daughter and have to deal with many emotions - such as shame, disappointment, fail and loss of trust – and they are often the ones who have to financially/materially compensate the victim(s). Because of the specific consequences of the offence for the parents, they are considered a separate party in the RCC-process and not as members of the child's 'community of care' (see last bullet-point). RCC motivates the parents to take an active role in both the decision-making process how to deal with the consequences of their child's offence and in (co-)monitoring the agreement-conditions.
- ✓ *Victim(s):* From a restorative justice point of view, the victim is the key-party in the RCC-process. The victim is the one who is directly affected by the offence. Her/his material damages and losses, physical injuries, emotional and social harms - such as fear, anger, shame, insecurity and distrust – have to be restored. In case there are more victims involved in the same offence, all of them are invited to participate in the RCC-meeting.
- ✓ *Communities of care:* A specific characteristic of RCC is the presence of so-called 'communities of care' of each of the other three parties. The child offender, the child's parents as well as the victim may invite others to support them during the RCC-meeting. Possible representatives of 'communities of care' are: husband/wife, siblings, grandparents, members of the extended family, friends, class mates, neighbour, religious leader, village elder, counsellor, teacher, sports-coach, etc.

⁴⁵ 'Community service' can also be an option for child offenders involved in victimless offences, such as graffiti, drug use, possession of pornography, etc.

The participation of the four parties in the RCC-process goes beyond simply being present. The child offender, her/his parents, the victim(s) and the members of their 'communities of care' are expected to actively participate in the discussions, in the decision-making process how to deal with the consequences of the offence and which conditions the child has to comply with and in monitoring the child's compliance with the conditions.

6. WHAT ARE THE STAGES OF THE 'RESTORATIVE COMMUNITY CONSULTATION'-PROCESS?

A well-organized 'Restorative Community Consultation'-process consists of four subsequent stages. These are:

- ✓ *Preparation stage:* It is a mistake to assume that a child offender, her/his parents, the victim(s) and their 'communities of care' can simply be brought together without a proper preparation and without carefully informing them about the RCC-process. The RCC-facilitator who is assigned to the case informs the parties about the RCC-process and prepares them for their participation in the actual RCC-meeting. This can be done through visits of the parties at their respective homes or through separate meetings in the RCC-facilitator's office at the 'Child Justice Committee'.
- ✓ *Facilitation stage:* The RCC-facilitator guides the actual RCC-meeting. She/he guides the information-sharing between the four parties and the discussion how the offence has affected their lives.
- ✓ *Agreement stage:* The CC-meeting aims at an agreement between the child offender and victim(s). The RCC-facilitator leads the discussion between the parties on how the child offender may restore the harms caused by her/his offending behaviour and which conditions will be included in the agreement.
- ✓ *Follow-up stage:* Monitoring the compliance of the child with the conditions may certainly not be neglected. Insufficient and inefficient monitoring of the conditions may result in the child's noncompliance and as a consequence in formal judicial proceedings. The RCC-facilitator is responsible for following-up the overall agreement and the final evaluation of the child's compliance with the conditions. The child's parents as well as the members of the 'communities of care' of the child and her/his parents monitor the compliance with the specific conditions.

7. WHY CAN ONLY TRAINED FACILITATORS GUIDE 'RESTORATIVE COMMUNITY CONSULTATION' PROCESSES?

Although it is not an international standard, the MoGCSW strongly suggests ensuring that the RCC-processes is guided by well-trained RCC-facilitators (see 'box'), because RJJ is not without challenges. Possible risks include:

- ✓ *Victims may feel compelled or pressured to participate*
- ✓ *Victim's needs may be far too serious and may require treatment as a priority to involvement in restorative justice processes*
- ✓ *Child offenders may be pressured to readily admit guilt in order to avoid formal judicial proceedings*
- ✓ *Agreements may vary widely because the child offender and the victim, together with the child's parents and the 'communities of care', decide together how to resolve the conflict between them and how to address the consequences of the offence; ready-made agreements do not exist within restorative (juvenile) justice processes*

Article 20 of the Basic Principles on RJ Programmes:

"Facilitators should receive initial training before taking up facilitation duties and should also receive in-service training. The training should aim at providing skills in conflict resolution, taking into account the particular needs of victims and offenders, at providing basic knowledge of the criminal justice system and at providing a thorough knowledge of the operation of the restorative programme in which they will do their work."

It is difficult to decide how many RCC-facilitators have to be trained per 'Child Justice Committee', i.e. per county, because there is no baseline-data available that shows the number of potential diversion/RCC-cases. The CJC-chairman may need a pool of at least three to four trained RCC-facilitators in order to have enough RCC-facilitators and to appoint a neutral RCC-facilitator in each referred child offender case. Potential RCC-facilitators are social workers, psychologists, paralegals, CBO-staff, NGO-staff, members of 'Women Associations' and community volunteers. Teachers may be trained as RCC-facilitators, but experience shows that they may have difficulties with being neutral while guiding the discussions as well as with the horizontal-approach that RJJ-

processes require⁴⁶. In the South Sudan JfC-context, also representatives of customary courts will be trained as RJJ-facilitators in order to motivate them to refer child offender cases, directly or indirectly through the (child) police, to the 'Child Justice Committee' as well as to introduce JfC-standards to customary justice providers. One of the trained RCC-facilitators may act as the JfC-chairperson during the tryout-stage of RCC.

8. WHICH ISSUES RELATING TO 'RESTORATIVE COMMUNITY CONSULTATION' HAVE TO BE DISCUSSED BEFORE THE TRYOUT?

Before the described RCC-proposal can be tried-out and implemented, various issues/questions have to be discussed and agreed upon by the different stakeholders. These are:

- ✓ *Referrals to diversion & 'Restorative Community Consultation':*
 - > Which offences/cases are eligible for diversion and RCC?
 - > Can child offenders who have already participated in a diversion-option/RCC-process be diverted again? How many times?
 - > Which criteria will be used to choose between 'diversion with a RJJ-approach' and 'diversion without a restorative justice approach'?
 - > Which criteria will be used to choose between the three RJJ-options, i.e. 'family conferencing', 'victim-offender mediation' and 'restorative community consultation'?
 - > Which child offenders will be diverted 'with conditions' and which children 'without conditions' (see section 5 & section 148 of the Child Act (2008))?
 - > What does it mean to use the 'best interests of the child' as criterion to divert a child offender (see section 158(3) of the Child Act (2008))? Who will decide whether diversion is in 'the child's best interests'?⁴⁷
- ✓ *'Restorative Community Consultation'-process:*
 - > Are special RCC-procedures required for specific groups of child offenders (see §4. of Part 3)?
 - > Is there a role for probation officers in diversion/RCC-processes (see section 179(3) of the Child Act (2008))?
 - > May NGOs/CBOs act as guardian of child offenders without parental care?
 - > Is it considered a positive or negative consequence if the implementation of diversion/RCC causes net-widening?⁴⁸
- ✓ *Tryout of 'Restorative Community Consultation':*
 - > Which other Ministries than the MOGCSW have to be aware and/or involved before implementing the diversion/RCC in order to ensure commitment from the outset and to obtain their approval before starting the implementation?
 - > In which and how many counties will RCC be tried-out?⁴⁹
 - > How long will the tryout-stage of RCC last?⁵⁰
 - > Is the availability of community-based services and programmes for children in conflict with the law and/or children in need of protection a selection criterion for the tryout-counties?
 - > Who will document the tryout-experiences of RCC and how?
 - > Will it be possible to collect some baseline-data?
 - > Which success-indicators will be used to evaluate the diversion-scheme/RCC?⁵¹
 - > Are awareness building initiatives among the public needed before the implementation of diversion/RCC?
- ✓ *Next steps:*
 - > What are the steps to be taken to prepare the implementation of the proposed Diversion-scheme/RCC-process?

⁴⁶ An important feature of RJJ-processes is that the parties come to a mutual agreement that is not imposed or influenced by the RJJ-facilitator/JfC-professional like in formal judicial proceedings where the common approach is 'top-down'.

⁴⁷ Is diversion not per definition in the child's best interests as opposed to deprivation of liberty, except in exceptional cases of severe crime and recidivists?

⁴⁸ Tokyo Rule 2.7 states "The use of non-custodial measures should be part of the movement towards depenalization and decriminalization instead of interfering with or delaying efforts in that direction". It may be expected, if diversion-options such as RCC are available, that judges will more often decide that an alleged child offender between the age of 12 and 14 years 'appreciates the difference between right and wrong and is able to act in accordance with that appreciation' and should, therefore, be considered 'criminally responsible' (article 138(2)).

⁴⁹ One way of deciding on the number of tryout-counties is to start from the maximum number of RCC-facilitators that can be trained at once, which is maximum 20 participants. If the pool of RCC-facilitators per county consists of three to four trained RCC-facilitators, five to six tryout-counties can be selected. The MoGCSW, in consultation with UNICEF, has already decided that the potential tryout-states are Central Equatorial State, Upper Nile State & Western Bahr el Ghazal State.

⁵⁰ A period of 12 months, from the moment the RCC-facilitators are trained, may be necessary to collect sufficient data to formulate the lessons-learned and recommendations.

⁵¹ See Annex 6 'Success Indicators for the Proposed Diversion-Scheme/Restorative Community Consultation-Process'

REFERENCES:

- *International Child-Specific⁵² Instruments*
 - ✓ African Charter on the Rights and Welfare of the Child (1990)
 - ✓ Guidelines on Action for Children in the Justice System in Africa (2011)
 - ✓ Guidelines on the Role of Prosecutors (1990)*
 - ✓ UN Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters (2002)*
 - ✓ UN Committee on the Rights of the Child, General Comment No.9 'Rights of Children with Disabilities' (2006)
 - ✓ UN Committee on the Rights of the Child, General Comment No.10 'Child Rights in Juvenile Justice' (2007)
 - ✓ UN Committee on the Rights of the Child, General Comment No. 11 (2009) – Indigenous Children and their Rights under the Convention
 - ✓ UN Committee on the Rights of the Child, General Comment No.12 'Right of the Child to Be Heard' (2009)
 - ✓ UN Convention on the Rights of the Child ('CRC') (1989)
 - ✓ UN Guidelines for Action on Children in the Criminal Justice System ('Vienna Guidelines'/Annex to UN Resolution 1997/30 – Administration of Juvenile Justice) (1997)
 - ✓ UN Standard Minimum Rules for Non-Custodial Measures ('Tokyo Rules') (1990)*
 - ✓ UN Standard Minimum Rules for the Administration of Juvenile Justice ('Beijing Rules') (1985)
- *National Legislation*
 - ✓ Child Act (2008)⁵³
 - ✓ Penal Code (2003)
 - ✓ Penal Code Act (2008)
 - ✓ Code of Criminal Procedure Act (2008)
 - ✓ Local Government Act (2009)
 - ✓ Transitional Constitution of the Republic of South Sudan (2011)
- *Other Relevant Documents & Websites - International Documents*
 - ✓ UNICEF, *Implementation Handbook for the Convention on the Rights of the Child*, 2007, 817p.
 - ✓ UNICEF, UNDP & UN Women, *Informal Justice Systems, Charting a Course for Human Rights-Based Engagement*, United Nations, New York, 2012, 396p.
 - ✓ United Nations, *UN Common Approach to Justice for Children*, March 2008, 31p.
 - ✓ United Nations, *Guidance Note of the Secretary General, UN Approach to Justice for Children, Summary*, September 2008, 7p.
 - ✓ UNODC, *Handbook on Restorative Justice Programmes*, Criminal Justice Handbook Series, Vienna, 2006, 114p.
 - ✓ UNODC & UNICEF, *Manual for the Measurement of Juvenile Justice Indicators*, United Nations, 2006, 116p.
 - ✓ UN Security Council, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, Report of the Secretary General*, S/2004/616, August 2004.
 - ✓ www.crin.org (Child Rights Information Network)
 - ✓ www.crnhq.org (Conflict Resolution Network)
 - ✓ www.euforumrj.org (European Forum for Restorative Justice)
 - ✓ www.realjustice.org (International Institute for Restorative Practices)
 - ✓ www.unicef.org/tdad (Toolkit on Diversion & Alternatives to Detention)
- *Other Relevant Documents & Websites - Documents Relating to South Sudan*
 - ✓ Biar, A. & Harvey, R., *Child Protection in the Customary Law System in South Sudan*, Save the Children, 2005, 43p.
 - ✓ Mamiya, R., *Implementing the Child Act; A Roadmap for Restorative Justice in South Sudan*, UNMIS, 28p.

⁵² International instruments that are not 'child-specific' but also apply to adults involved in the criminal justice process are indicated with *.

⁵³ The Child Act (2008) is the only national law that can be considered 'child-specific'. The other laws do also apply to adults involved in the criminal justice process.

- ✓ Ministry of Gender, Child and Social Welfare & UNICEF, *Consultative Workshop Report*, Juba, February 2012, 19p.
- ✓ Ministry of Justice, *A Strategic Plan for the Ministry of Justice of South Sudan (2011 - 2013), Part 1: The Strategic Framework*, 2011, 49p.
- ✓ Ministry of Justice, *A Strategic Plan for the Ministry of Justice of South Sudan (2011 - 2013), Part 1: The Strategic Framework*, 2011, 49p.
- ✓ Oziegbe, J., *Customary Law and Practice in South Sudan – Opportunities and Challenges for Enhancing Access to Justice for Children* (PowerPoint Presentation), UNDP South Sudan, February 2012.
- ✓ RSS-UNICEF, *Child Protection Programme Work Plan 2012-2013* (Excel file)
- ✓ UN Committee on the Rights of the Child, *Consideration of reports submitted by states parties under article 44 of the convention, Concluding Observations: Sudan, CRC/C/SND/CO/3-4*, 1 September – 13 October 2010.
- ✓ UNICEF, *Juvenile Justice Assessment of Southern Sudan*, 2009, 57p.
- ✓ UNICEF & MoGCSW, *Strategic Framework on Justice for Children of the Republic of South Sudan; How Children Can Be Better Served and Protected by the Justice for Children System*, UNICEF & MoGCSW, 2012, 36p.
- ✓ www.unicef.org/infobycountry/southsudan

ANNEXES:

ANNEX 1: CONSULTATIVE ROUNDTABLES ON DIVERSION OF CHILD OFFENDERS IN THE SOUTH SUDANESE JFC-CONTEXT

Organisations Represented at Roundtable 1 in Juba on 6 November 2012:

- ✓ XX (XX participants)
- ✓ XX (XX participants)
- ✓ XX (XX participants)

Organisations Represented at Roundtable 2 in Malakal on 7 November 2012:

- ✓ UNICEF (1 participant)
- ✓ MoGCSW (4 participants)
- ✓ Child Hope Restoration Mission (1 participant)
- ✓ Malakal Mobile Theatre Team (1 participant)
- ✓ Women Empowerment (1 participant)
- ✓ CHAD Field Office (1 participant)
- ✓ WERD (1 participant)

Organisations Represented at Roundtable 3 in Malakal on 8 November 2012:

- ✓ UNICEF (1 participant)
- ✓ MoGCSW (4 participants)
- ✓ Ministry of Justice (1 participant)
- ✓ Police (4 participants)
- ✓ Lawyer (3 participants)
- ✓ Prosecutor (1 participant)
- ✓ WERD (1 participant)
- ✓ CHORM (1 participant)

Organisations Represented at Roundtable 4 in Malakal on 8 November 2012:

- ✓ Chief (23 participants)
- ✓ WERD (1 participant)
- ✓ MoGCSW (1 participant)

ANNEX 2: INTERNATIONAL CHILD-SPECIFIC⁵⁴ STANDARDS, PRINCIPLES AND GUIDELINES ON DIVERSION & RESTORATIVE JUVENILE JUSTICE

1. Convention on the Rights of the Child (1989):

- ✓ **Article 40(1):** States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.
- ✓ **Article 40(3b):** 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.

2. General Comment No.9 'Rights of Children with Disabilities' (2006):

- ✓ **Paragraph 7(4b):** Governments should develop and implement alternative measures with a variety and a flexibility that allow for an adjustment of the measure to the individual capacities and abilities of the child in order to avoid the use of judicial proceedings. Children with disabilities in conflict with the law should be dealt with as much as possible without resorting to formal/legal procedures. Such procedures should only be considered when necessary in the interest of public order. In those cases special efforts have to be made to inform the child about the juvenile justice procedure and his or her rights therein.

3. General Comment No.10 'Child Rights in Juvenile Justice' (2007):⁵⁵

- ✓ **Paragraph 3:** "... This juvenile justice [administration in compliance with the CRC], which should promote, inter alia, the use of alternative measures such as diversion and restorative justice, will provide States parties with possibilities to respond to children in conflict with the law in an effective manner serving not only the best interests of these children, but also the short- and long-term interest of the society at large.
- ✓ **Paragraph 10:** ... The protection of the best interests of the child means, for instance, that the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders. [...].
- ✓ **Paragraph 24:** According to article 40 (3) of CRC, the States parties shall seek to promote measures for dealing with children alleged as, accused of, or recognized as having infringed the penal law without resorting to judicial proceedings, whenever appropriate and desirable. Given the fact that the majority of child offenders commit only minor offences, a range of measures involving removal from criminal/juvenile justice processing and referral to alternative (social) services (i.e. diversion) should be a well-established practice that can and should be used in most cases.
- ✓ **Paragraph 25:** In the opinion of the Committee, the obligation of States parties to promote measures for dealing with children in conflict with the law without resorting to judicial proceedings applies, but is certainly not limited to children who commit minor offences, such as shoplifting or other property offences with limited damage, and first-time child offenders. Statistics in many States parties indicate that a large part, and often the majority, of offences committed by children fall into these categories. It is in line with the principles set out in article 40 (1) of CRC to deal with all such cases without resorting to criminal law procedures in court. In addition to avoiding stigmatization, this approach has good results for children and is in the interests of public safety, and has proven to be more cost-effective.
- ✓ **Paragraph 26:** States parties should take measures for dealing with children in conflict with the law without resorting to judicial proceedings as an integral part of their juvenile justice system, and ensure that children's human rights and legal safeguards are thereby fully respected and protected (art. 40(3)(b)).
- ✓ **Paragraph 27:** It is left to the discretion of States parties to decide on the exact nature and content of the measures for dealing with children in conflict with the law without resorting to judicial proceedings, and to take the necessary legislative and other measures for their implementation. Nonetheless, on the basis of the information provided in the reports from some States parties, it is clear that a variety of community-

⁵⁴ International standards relevant to diversion that are promoted by the 'United Nations Standard Minimum Rules for Non-Custodial Measures ('Tokyo Rules') (1990)' & 'Guidelines on the Role of Prosecutors (1990)' are not included in the overview, because these instruments are not 'child-specific' but apply to all persons in conflict with the law. There are no international child-specific instruments on restorative (juvenile) justice. The 'UN Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters' (2000) apply to all persons involved in criminal matters. Also relevant provision national legislation that are not child-specific are not listed, i.e. 'Local Government Act (2009)' & 'Transitional Constitution of the Republic of South Sudan (2011)'.

⁵⁵ It should be noted here that paragraphs 68 & 69 are actually referring to diversion, i.e. diverting the child out of formal judicial proceedings and away from a court conviction. The use of the term 'pre-trial alternatives' in these paragraphs refers to 'alternatives to formal processes' rather than 'alternatives to detention', which apply to formal judicial processes.

based programmes have been developed, such as community service, supervision and guidance by for example social workers or probation officers, family conferencing and other forms of restorative justice including restitution to and compensation of victims. Other States parties should benefit from these experiences. As far as full respect for human rights and legal safeguards is concerned, the Committee refers to the relevant parts of article 40 of CRC and emphasizes the following:

- Diversion (i.e. measures for dealing with children, alleged as, accused of, or recognized as having infringed the penal law without resorting to judicial proceedings) should be used only when there is compelling evidence that the child committed the alleged offence, that he/she freely and voluntarily admits responsibility, and that no intimidation or pressure has been used to get that admission and, finally, that the admission will not be used against him/her in any subsequent legal proceeding;
- The child must freely and voluntarily give consent in writing to the diversion, a consent that should be based on adequate and specific information on the nature, content and duration of the measure, and on the consequences of a failure to cooperate, carry out and complete the measure. With a view to strengthening parental involvement, States parties may also consider requiring the consent of parents, in particular when the child is below the age of 16 years;
- The law has to contain specific provisions indicating in which cases diversion is possible, and the powers of the police, prosecutors and/or other agencies to make decisions in this regard should be regulated and reviewed, in particular to protect the child from discrimination;

The child must be given the opportunity to seek legal or other appropriate assistance on the appropriateness and desirability of the diversion offered by the competent authorities, and on the possibility of review of the measure;

The completion of the diversion by the child should result in a definite and final closure of the case.

Although confidential records can be kept of diversion for administrative and review purposes, they should not be viewed as “criminal records” and a child who has been previously diverted must not be seen as having a previous conviction. If any registration takes place of this event, access to that information should be given exclusively and for a limited period of time, e.g. for a maximum of one year, to the competent authorities authorized to deal with children in conflict with the law.

- ✓ **Paragraph 68:** The decision to initiate a formal criminal law procedure does not necessarily mean that this procedure must be completed with a formal court sentence for a child. In line with the observations made above in section B, the Committee wishes to emphasize that the competent authorities - in most States the office of the public prosecutor - should continuously explore the possibilities of alternatives to a court conviction. In other words, efforts to achieve an appropriate conclusion of the case by offering measures like the ones mentioned above in section B should continue. The nature and duration of these measures offered by the prosecution may be more demanding, and legal or other appropriate assistance for the child is then necessary. The performance of such a measure should be presented to the child as a way to suspend the formal criminal/juvenile law procedure, which will be terminated if the measure has been carried out in a satisfactory manner.
- ✓ **Paragraph 69:** In this process of offering alternatives to a court conviction at the level of the prosecutor, the child’s human rights and legal safeguards should be fully respected. In this regard, the Committee refers to the recommendations set out in paragraph 27 above, which equally apply here.

4. General Comment No.11 ‘Indigenous Children & their Rights under the Convention’ (2009):

- ✓ **Paragraph 74:** The Committee notes with concern that incarceration of indigenous children is often disproportionately high and in some instances may be attributed to systemic discrimination from within the justice system and/or society. To address these high rates of incarceration, the Committee draws the attention of States parties to article 40 (3) of the Convention requiring States to undertake measures to deal with children alleged as, accused of, or recognized as having infringed the penal law without resorting to judicial proceedings, whenever appropriate.
- ✓ **Paragraph 75:** States parties are encouraged to take all appropriate measures to support indigenous peoples to design and implement traditional restorative justice systems as long as those programmes are in accordance with the rights set out in the Convention, notably with the best interests of the child.

5. General Comment No.12 'Right of the Child to Be Heard' (2009):

- ✓ **Paragraph 59:** 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.

6. Beijing Rules (1985):

- ✓ **Rule 5.1:** The juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence.

Commentary: Rule 5 refers to two of the most important objectives of juvenile justice. The first objective is the promotion of the well-being of the juvenile. This is the main focus of those legal systems in which juvenile offenders are dealt with by family courts or administrative authorities, but the well-being of the juvenile should also be emphasized in legal systems that follow the criminal court model, thus contributing to the avoidance of merely punitive sanctions. (See also rule 14.)

- ✓ **Rule 6.1:** In view of the varying special needs of juveniles as well as the variety of measures available, appropriate scope for discretion shall be allowed at all stages of proceedings and at the different levels of juvenile justice administration, including investigation, prosecution, adjudication and the follow-up of dispositions.
- ✓ **Rule 10.2:** A judge or other competent official or body shall, without delay, consider the issue of release.
- ✓ **Rule 10.3:** Contacts between the law enforcement agencies and a juvenile offender shall be managed in such a way as to respect the legal status of the juvenile, promote the well-being of the juvenile and avoid harm to her or him, with due regard to the circumstances of the case.

- ✓ **Rule 11:**

11.1 Consideration shall be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial by the competent authority [...].

11.2 The police, the prosecution or other agencies dealing with juvenile cases shall be empowered to dispose of such cases, at their discretion, without recourse to formal hearings, in accordance with the criteria laid down for that purpose in the respective legal system and also in accordance with the principles contained in these Rules.

11.3 Any diversion involving referral to appropriate community or other services shall require the consent of the juvenile, or her or his parents or guardian, provided that such decision to refer a case shall be subject to review by a competent authority, upon application.

11.4 In order to facilitate the discretionary disposition of juvenile cases, efforts shall be made to provide for community programmes, such as temporary supervision and guidance, restitution, and compensation of victims.

Commentary – Rule 11:

Diversion, involving removal from criminal justice processing and, frequently, redirection to community support services, is commonly practised on a formal and informal basis in many legal systems. This practice serves to hinder the negative effects of subsequent proceedings in juvenile justice administration (for example the stigma of conviction and sentence). In many cases, non-intervention would be the best response. Thus, diversion at the outset and without referral to alternative (social) services may be the optimal response. This is especially the case where the offence is of a non-serious nature and where the family, the school or other informal social control institutions have already reacted, or are likely to react, in an appropriate and constructive manner.

As stated in **Rule 11.2**, diversion may be used at any point of decision-making-by the police, the prosecution or other agencies such as the courts, tribunals, boards or councils. It may be exercised by one authority or several or all authorities, according to the rules and policies of the respective systems and in line with the present Rules. It need not necessarily be limited to petty cases, thus rendering diversion an important instrument.

Rule 11.3 stresses the important requirement of securing the consent of the young offender (or the parent or guardian) to the recommended diversionary measure(s). (Diversion to community service without such consent would contradict the Abolition of Forced Labour Convention.) However, this consent should not be left unchallengeable, since it might sometimes be given out of sheer desperation on the part of the juvenile. The rule underlines that care should be taken to minimize the potential for coercion and intimidation at all levels in the diversion process. Juveniles should not feel pressured (for example in order

to avoid court appearance) or be pressured into consenting to diversion programmes. Thus, it is advocated that provision should be made for an objective appraisal of the appropriateness of dispositions involving young offenders by a "competent authority upon application". (The "competent authority," may be different from that referred to in rule 14.)

Rule 11.4 recommends the provision of viable alternatives to juvenile justice processing in the form of community-based diversion. Programmes that involve settlement by victim restitution and those that seek to avoid future conflict with the law through temporary supervision and guidance are especially commended. The merits of individual cases would make diversion appropriate, even when more serious offences have been committed (for example first offence, the act having been committed under peer pressure, etc.).

7. Vienna Guidelines (1997):

- ✓ **Guideline 15:** A review of existing procedures should be undertaken and, where possible, diversion or other alternative initiatives to the classical criminal justice systems should be developed to avoid recourse to the criminal justice systems for young persons accused of an offence. Appropriate steps should be taken to make available throughout the State a broad range of alternative and educative measures at the pre-arrest, pre-trial, trial and post-trial stages, in order to prevent recidivism and promote the social rehabilitation of child offenders. Whenever appropriate, mechanisms for the informal resolution of disputes in cases involving a child offender should be utilized, including mediation and restorative justice practices, particularly processes involving victims. In the various measures to be adopted, the family should be involved, to the extent that it operates in favour of the good of the child offender. States should ensure that alternative measures comply with the Convention, the United Nations standards and norms in juvenile justice, as well as other existing standards and norms in crime prevention and criminal justice, such as the United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules), with special regard to ensuring respect for due process rules in applying such measures and for the principle of minimum intervention.
- ✓ **Guideline 35:** Prior to the first meeting of the coordination panel, a strategy should be elaborated for addressing the issue of how to activate further international cooperation in the field of juvenile justice. The coordination panel should also facilitate the identification of common problems, the compilation of examples of good practice and the analysis of shared experiences and needs, which in turn would lead to a more strategic approach to needs assessment and to effective proposals for action. Such a compilation would allow for concerted advisory services and technical assistance in juvenile justice, including an early agreement with the Government requesting such assistance, as well as with all other partners having the capacity and competence to implement the various segments of a country project, thus ensuring the most effective and problem-oriented action. This compilation should be developed continuously in close cooperation with all parties involved. It will take into account the possible introduction of diversion programmes and measures to improve the administration of juvenile justice, to reduce the use of remand homes and pre-trial detention, to improve the treatment of children deprived of their liberty and to create effective reintegration and recovery programmes.
- ✓ **Guideline 42:** To prevent further overreliance on criminal justice measures to deal with children's behaviour, efforts should be made to establish and apply programmes aimed at strengthening social assistance, which would allow for the diversion of children from the justice system, as appropriate, as well as improving the application of non-custodial measures and reintegration programmes. To establish and apply such programmes, it is necessary to foster close cooperation between the child justice sectors, different services in charge of law enforcement, social welfare and education sectors.

8. UN Common Approach to Justice for Children (2008):

- ✓ **Guiding Principle 8:** Deprivation of liberty of children should only be used as a measure of last resort and for the shortest appropriate period of time. Provisions should therefore be made for restorative justice, diversion mechanisms and alternatives to deprivation of liberty. For the same reason, programming on justice for children needs to build on informal and traditional justice systems as long as they respect basic human rights principles and standards, such as gender equality

9. Guidelines on Action for Children in the Justice System in Africa (2011):

- ✓ **Guideline 3(h):** The Guidelines for Action shall be implemented with due regard to: ... (h) The recognition of informal and traditional justice systems which can be harnessed and developed to ensure children's optimal access to justice with due respect for their rights and the avoidance of harm;
- ✓ **Guideline 4:** These Guidelines apply to: (a) All procedures of an administrative or judicial nature, whether formal or informal, where children are brought into contact with, or are involved in, civil, criminal or administrative law matters, whether as victims or witnesses alleged offenders, persons who have been convicted or admitted responsibility for an offence or offences, or as subjects in care and protection proceedings or family law or succession and inheritance disputes; (b) Traditional justice systems and justice systems of religious courts and bodies.
- ✓ **Guideline 27:** The desirability of alternatives to contact with the formal justice system where children are alleged to be in conflict with the law ('diversion') must be recognized and promoted wherever this is consistent with the best interests of the child and other human rights standards. Alternative measures of an educative, vocational and reintegrative nature must to this end be developed and sustained on the basis of equal access for all children.
- ✓ **Guideline 28:** Wherever appropriate and consistent with human rights standards, alternatives to formal adjudication, such as mediation, conciliation, restorative justice practices, and traditional dispute resolution mechanisms, the essential aim of which is the child's reformation, re-integration into his or her family and social rehabilitation, must be promoted.
- ✓ **Guideline 43:** Traditional courts, religious courts or other similar structures, where they exist, are required to respect international standards on the right to a fair trial and children's rights. The following provisions shall apply, as a minimum, to all proceedings before traditional courts and other similar structures:
 - (a) equality of all children without distinction as regards race, colour, sex, gender, religion, creed, language, political or other opinion, national or social origin, fortune, disability, birth, or other status;
 - (b) respect for the inherent dignity of children, including the right not to be subject to torture, or other cruel, inhuman, humiliating or degrading punishment or treatment; no physical punishment of any kind shall be imposed by any such court or structure; undue pressure and duress shall not be used;
 - (c) respect for the right to liberty and security of every child, in particular the right of every child not to be subject to arbitrary arrest or detention;
 - (d) respect for gender equality in all traditional justice and religious proceedings, and the recognition of the special vulnerability of the girl child;
 - (e) adequate opportunity to prepare a case, present arguments and evidence and to challenge or respond to opposing arguments or evidence;
 - (f) an entitlement to the assistance of an interpreter if the child cannot understand or speak the language used in or by the traditional court or other similar structure;
 - (g) an entitlement to seek the assistance of and be represented by a representative of the child's choosing in all proceedings before traditional courts, religious courts and informal justice proceedings, unless the child chooses not to avail herself of such legal representation or where such choice is not in her best interests;
 - (h) an entitlement to have rights and obligations affected only by a decision based on evidence presented to the traditional or religious court;
 - (i) an entitlement to receive a decision without undue delay and with adequate notice of and reasons for the decision;
 - (j) an entitlement to an appeal to a higher traditional court, administrative authority or a judicial tribunal;
 - (k) all hearings before traditional courts shall respect children's rights to privacy, including proceedings concerning matrimonial disputes, child support or the guardianship of children;
 - (l) All proceedings shall also give due consideration to the human rights of parents, guardians or care givers representing the child;
 - (m) State parties shall abolish systems for the administration of justice for children conducted by secret societies;
 - (n) States parties shall ensure the impartiality of traditional courts. In particular, members of traditional courts shall decide matters before them without improper influence, inducements, pressure, threats or interference, direct or indirect, from any quarter;
 - (o) Religious leaders and educators are bound to exercise any jurisdiction on matters involving child justice in a manner that is fully compatible with these Guidelines and international standards.

- ✓ **Guideline 50:** Alternatives to criminal prosecution, with proper safeguards for the protection of the well-being of the child, may include community, customary or traditional mediation; warnings, cautions and admonitions accompanied by measures to rehabilitate the child; implementation of programmes of restorative justice such as conferences between the child, the victim and members of the community; and community programmes such as temporary supervision and guidance, or programmes involving restitution and compensation to victims.
- ✓ **Guideline 56:** In disposing of a case involving a child who has been found to be in conflict with the law, the competent authority shall be guided by the following principles: (a) The action taken against the child shall always be in proportion to the circumstances and gravity of the offence and in the best interest of the child; (b) Non-custodial options which emphasise the value of restorative justice should be given primary consideration and restrictions on the personal liberty of a child shall only be imposed after careful consideration and shall be imposed as a last resort after careful consideration and for the shortest appropriate period of time. Non-custodial measures could include:
 - i) Care, guidance and supervision orders;
 - ii) Probation;
 - iii) Financial penalties, compensation and restitution;
 - iv) Intermediate treatment and other treatment orders;
 - v) Orders to participate in group counselling and similar activities;
 - vi) Orders concerning foster care, living communities or other educational settings;
 - vii) Referral to restorative justice processes for the furtherance of restorative outcomes
- ✓ **Guideline 61:** Transitional justice processes which seek to enhance the accountability of children involved in offences committed during conflict situations shall seek to promote restorative justice solutions aimed at the reformation of the child, reintegration into his or her family and social rehabilitation.
- ✓ **Guideline 88:** In order to strengthen child friendly justice on a national level, states are encouraged to draw on regional expertise and technical and other assistance from intergovernmental, non-governmental, academic institutions, and international and regional financial institutions. These efforts should be directed towards research, disseminating information, strengthening infrastructure and information systems, including birth registration systems; training; the development of alternative measures (diversion) and services aimed at social reintegration and psychological recovery; and implementing these Guidelines.

ANNEX 3: SECTIONS OF THE CHILD ACT (2008) THAT DEAL WITH DIVERSION

Sections dealing with 'diversion':

✓ **Section 5 'Interpretation':**

Diversion means the referral of a criminal matter, involving an offence alleged to have been committed by a child, away from the adult criminal justice system with or without conditions.

✓ **Section 158 'Purpose of Diversion':**

- (1) The purposes of diversion in terms of this Act are to —
 - (a) encourage the child to be accountable for the harm caused by him or her;
 - (b) promote an individualized response to the harm caused which is appropriate to the child's circumstances and proportionate to the circumstances surrounding the harm caused;
 - (c) promote the reintegration of the child into the family and community; and
 - (d) prevent stigmatization of a child which may occur through contact with the criminal justice system.
- (2) Where possible and appropriate, diversion shall include ingredients of the restorative justice process which aim at healing relationships, including the relationships of the victim(s) and offender(s).
- (3) In making a decision whether to or not to divert a child, consideration must be given to whether, this would be in the best interest of the child.
- (4) No child may be unfairly discriminated against on the basis of race, gender, sex, ethnic or social origin, colour, sexual orientation, religion, conscience, belief, culture, language, birth or socio-economic status in the selection of a diversion programme, process or option and all children must have equal access to diversion options.
- (5) Corporal punishment and public humiliation shall not be parts of diversion.
- (6) A child under the age of thirteen years shall not be permitted to perform community service or other work as a part of diversion.

✓ **Section 159 'Diversion Programmes Standards':**

- (1) All diversion programmes must meet the following standards —
 - (a) promote the dignity and well-being of the child and the development of his or her sense of self-worth and ability to contribute to society;
 - (b) not be exploitative, harmful or hazardous to the child's physical or mental health;
 - (c) be appropriate to the age and maturity of the child;
 - (d) not interfere with a child's schooling;
 - (e) where possible impart useful skills;
 - (f) where possible and appropriate, include an element which seeks to ensure that the child understands the impact of his or her behaviour on others, including the victims of the offence; and
 - (g) where possible and appropriate, be presented in a location reasonably accessible to children, and children who do not have the means to afford transport in order to attend a selected diversion programme, should be provided with the means to do so.
- (2) No child shall be required to pay for admission to a diversion programme.

✓ **Section 160 'Circumstances to be Considered for Diversion':**

- (1) A child suspected of having committed an offence may only be referred for diversion by a Social Worker, Public Attorney, Judge or a police officer if —
 - (a) such a child acknowledges responsibility for the alleged offence and consents to diversion;
 - (b) there are reasons to believe that there is sufficient evidence for the matter to proceed to trial;
 - (c) there is no risk of infringement of the child's procedural rights; and
 - (d) the child has a fixed address.
- (2) Where circumstances as referred to in subsection (1), above exist, diversion must be considered as a matter of first resort to institutionalization of children being a measure of last resort.

Other sections relevant to 'diversion':

✓ **Section 149(3c) 'Pre-Trial Procedures and Presence of a Parent or Guardian':**

Fingerprinting of a child should be regarded as a measure which should not be resorted to before the finalization of a preliminary inquiry: provided that the fingerprints of a child may be taken during the period after arrest and before appearance of the child before the preliminary inquiry if – (c) it is necessary to

establish the prior convictions of a child for the purposes of making a decision on diversion, release from detention in police custody or placement in a particular place of safety.

- ✓ **Section 161(1b)(1c) 'Age Assessment':**
 - (1) The purpose of age assessment is to —
 - (b) establish the prospects of the child being able to be diverted by a Social Worker;
 - (c) establish the prospects for diversion by a Public Prosecution Attorney or Judge;
- ✓ **Section 167(2) 'Preliminary Investigation':**
 - (2) The purpose of a preliminary investigation is to establish whether a matter can be diverted before charges are instituted before the Court, and assess whether there is sufficient evidence to warrant a prosecution.
- ✓ **Section 168(1a) 'The Duty of a Police Officer after Preliminary Investigation':**
 - (1) Following an age assessment and preliminary inquiry into the facts of a case, a Judge shall undertake one of the following options —
 - (a) divert the case in accordance with the provisions of this Act;
- ✓ **Section 172(2h) 'Procedural Safeguards':**
 - (1) Every child accused of committing an offence or involved in legal proceeding in any manner; such a child reporting an offence or reporting himself or herself as a victim of an offence shall be subject to the following considerations — (h) shall have the matter determined, where a case has not been diverted by a Court in the presence of legal counsel and according to the principles of a fair and just trial;
- ✓ **Section 175(6a) 'Duties of a Social Worker in Relation to Social Assessment':**
 - (6) Unless the child is below the minimum age of prosecution, the Social Worker shall make a report with the following recommendations —
 - (a) the prospects of diversion;
- ✓ **Section 178(1c) 'Children above the Minimum Age of Prosecution':**
 - (1) After conducting an age assessment, and where the child is determined to be above the minimum age of prosecution, and subject to the provisions of this Act, and in those cases where the child is alleged to have committed a crime of a non-violent nature, the Social Worker shall —
 - (c) if the child acknowledges responsibility for the alleged offence, refer the child to a diversion option where there are no factors mitigating against such decision.
- ✓ **Section 179(3a)(3d) 'Child Accused of Committing an Offence':**
 - (3) After an assessment referred to under subsection (1) above, the Probation officer may recommend —
 - (a) the diversion of the child to a specified process programme or appropriate alternative order;
 - (d) that the matter not be diverted and be referred to the Public Attorney;

ANNEX 4: SECTIONS OF THE CHILD ACT (2008) THAT DEAL WITH RESTORATIVE JUVENILE JUSTICE

Sections dealing with 'restorative (juvenile) justice':

✓ **Section 153 'Restorative Justice':**

Crimes committed by a child shall be dealt with in accordance with the principle of restorative justice which aims to –

- (a) provide an opportunity to the person(s) or community affected by an offence to express their views regarding the impact of such harm;
- (b) encourage restitution of a specified object or symbolic restitution;
- (c) promote reconciliation between a child and the person(s) or community affected by the harm caused; and
- (d) empower communities to address children at risk of offending without resorting to criminal justice.

✓ **Section 154 'Restorative Justice Processes':**

The restorative justice processes include –

- (a) family conference;
- (b) victim - offender mediation; and
- (c) any other restorative justice processes

✓ **Section 155 'Family Conference':**

- (1) A family group conference shall be convened by the Chairperson of the Child Justice Committee in consultation with the families of the children concerned.
- (2) The Chairperson of the Child Justice Committee who convenes a family conference shall notify all persons who are entitled to attend the conference of the date, the time and the venue of the conference.
- (3) No notice is required to be given pursuant to subsection (1) above, to any person whose whereabouts cannot, after reasonable enquiries, be ascertained.
- (4) A notice required under subsection (2), above, shall be served seven days before the convening of the conference.
- (5) Failure to notify any person in accordance with the provisions of subsection (4) above, shall not affect the validity of the proceedings of a family group conference unless it is shown that the failure is likely to affect the outcome of that conference.
- (6) The following persons shall constitute the Child Justice Committee and are entitled to attend the Family Group Conference –
 - (a) the child in respect of whom the conference is being held;
 - (b) the parent(s) or guardians of the child;
 - (c) members of the families of the children concerned;
 - (d) a Social Worker, where the conference is convened on the basis of a report from him or her, and he/she shall be the Chairperson of the Child Justice Committee in that area;
 - (e) legal representatives of the children concerned;
 - (f) any relevant body or organization which the concerned families may recommend as appropriate to attend the conference; and
 - (g) any person, body or organization whose attendance at the conference is recommended by the Chairperson of the Child Justice Committee working in consultation with the concerned families.
- (7) The Chairperson of the Child Justice Committee who convenes a family conference shall take all reasonable steps to ensure that all information and advice required by the conference to carry out its functions are made available to the conference.
- (8) Where it is appropriate and with the permission of the conference, any person may attend a family conference for the purpose of conveying to that conference any information or advice required by that conference to carry out its functions.
- (9) A family group conference shall regulate its own procedure in such manner as it deems fit.
- (10) The Chairperson of the Child Justice Committee shall provide such administrative services as may be necessary to enable a family group conference to discharge its functions.
- (11) The functions of the family conference as pertaining to the child with respect to which the conference has been convened are as follows –

- (a) to consider such matters relating to the care and protection of the child as the conference deems appropriate;
 - (b) to consider the need of care or protection, to make such decisions or recommendations and to formulate plans as the conference considers necessary in the best interests of that child; and
 - (c) to review from time to time the decisions and recommendations made and the plans formulated by that conference and their implementation.
- (12) The Chairperson of the Child Justice Committee who convenes a family group conference shall cause to be made a written record of the details of the decisions and recommendations made and the plans formulated by the conference pursuant to this subsection.
 - (13) The Chairperson of the Child Justice Committee who has convened a family conference shall communicate the decisions, recommendations and the plans made by the family conference to every person that will be directly involved in the implementation of decisions, recommendations or plans and seek their consent.
 - (14) Where the Chairperson of the Child Justice Committee is unable to secure consent to a decision, recommendation or plan referred to under subsection (13), the Chairperson of the Child Justice Committee may, for the purpose of enabling the conference to reconsider that decision, recommendation or plan, reconvene that conference.
 - (15) A Family Group Conference reconvened under subsection (14), above, may confirm, rescind or modify its previous decision, recommendation or plan.
 - (16) Any decision, recommendation or plan confirmed or modified under subsection (15) above, and any new decision, recommendation or plan made or formulated under that section, shall be deemed to have been made in the previous conference.
 - (17) The Chairperson of the Child Justice Committee who convenes a Family Conference shall ensure that copies of the proceedings of the conference, where the proceedings were recorded, are given to all persons present at the conference.
 - (18) Information, statement or admission made or disclosed in the course of a family conference shall not be admissible in any Court.
 - (19) No person shall publish any report of the proceedings of a family conference except the publication of statistical information relating to family conferences.
 - (20) A Family Group Conference shall be convened in rural areas where all parties under section 155 (6) are present.
 - (21) The Chairperson of the Child Justice Committee shall have the power to refer a child, who after several Family Group Conferences, fails to follow the decisions of the Family Conference, to a Family or Child Court to impose sentence of diversion or probation.
- ✓ **Section 156 'Victim-Offender Mediation':**
- (1) Victim-offender mediation shall be convened by the Chairperson of the Child Justice Committee in consultation with the victim and offender.
 - (2) The victim and the offender shall meet in a safe and structured setting with the assistance of a trained mediator or Chairperson of the Child Justice Committee.
 - (3) The functions of the victim-offender mediation are to—
 - (a) enable the victim and offender to talk about the crime, express their feelings and concerns;
 - (b) participate directly in developing options for trying to make things right; and
 - (c) the offender an opportunity to make apologies, provide information and develop reparative plans and gain insight for personal growth.
 - (4) The Chairperson of the Child Justice Committee who convenes the victim-offender mediation shall cause to be made a written record of the details of the decisions and recommendations made and the plans formulated in the victim-offender mediation.
 - (5) The Chairperson of the Child Justice Committee who has convened victim-offender mediation shall communicate the decisions, recommendations and the plans made by the victim-offender mediation to every person that will be directly involved in the implementation of decisions, recommendations or plans and seek their consent.
 - (6) A Victim Offender Mediation shall be convened, where the offence has been committed in an urban area and all Family and Committee Members are not available to attend a Family Group Conference.

- (7) The Chairperson of the Child Justice Committee shall have the power to refer a child, who does not abide by the agreement made in the Victim - Offender Mediation, to a Family or Child Court to impose sentence of diversion or probation (8) The Chairperson of the Child Justice Committee shall have the power to refer a child, who after several Family Group Conferences, fails to follow the decision of the family Conference, to a Family or Child Court to impose sentence of diversion or probation as he or she may deem appropriate

✓ **Section 157 'Referral to Restorative Justice Process':**

- (1) Referral to restorative justice process may be made by the—
- (a) child or his/her parent, guardian or any appropriate adult;
 - (b) Chief;
 - (c) police;
 - (d) Public Prosecution Attorney; and
 - (e) Court; or
 - (f) social worker.
- (2) Whoever makes referral to Restorative Justice Process under section 157(1), shall take the child before the Chairperson of the Child Justice Committee who shall further refer the child to either the Family Group Conference or Victim - offender Mediation.
- (3) Referral to restorative Justice in Rural areas shall be to a Family Group Conference; provided that in urban areas, where all family and community members are not available to attend a Family Group Conference, a Victim-Offender Mediation shall be convened.
- (4) Where the case is referred to restorative justice process by a Court, Public Prosecution Attorney, the police or Social Worker, and the victim and offender do not agree on the decision to be made at such a forum, the case shall go back to the Court, public attorney, the police or Social Worker for further action.

Other sections relevant to 'restorative (juvenile) justice':

✓ **Section 135(b) 'Objectives of the Juvenile Justice System':**

The main objectives of the juvenile justice system are — (b) the restoration of harmonious relationships between the child offender and the victim.

✓ **Section 158(2) 'Purpose of Diversion':**

- (2) Where possible and appropriate, diversion shall include ingredients of the restorative justice process which aim at healing relationships, including the relationships of the victim(s) and offender(s).

ANNEX 5: NATIONAL LEGISLATION RELATING TO CUSTOMARY JUSTICE

✓ **Section 4(4) of the Child Act (2008):**

Nothing in this Act shall prevent, discourage or prohibit the application of customary and traditional laws that are protective of the rights of the child except where those laws are contrary to the best interests of the child.

✓ **Article 98(1)(2) of the Local Government Act (2009):**

(1) The Customary Law Courts shall have judicial competence to adjudicate on customary disputes and make judgments in accordance with the customs, traditions, norms and ethics of the communities.

(2) A Customary Law Court shall not have the competence to adjudicate on criminal cases except those criminal cases with a customary interface referred to it by a competent Statutory Court.

✓ **Article 5(b) of the Transitional Constitution of the Republic of South Sudan (2011):**

The sources of legislation in South Sudan shall be:

(a) this Constitution;

(b) customs and traditions of the people;

(c) the will of the people; and

(d) any other relevant source.

✓ **Article 166 of the Transitional Constitution of the Republic of South Sudan (2011):**

(1) The institution, status and role of Traditional Authority, according to customary law, are recognised under this Constitution.

(2) Traditional Authority shall function in accordance with this Constitution, the state constitutions and the law.

(3) The courts shall apply customary law subject to this Constitution and the law.

ANNEX 6: SUCCESS INDICATORS FOR THE PROPOSED DIVERSION-SCHEME/RESTORATIVE COMMUNITY CONSULTATION-PROCESS⁵⁶

- ✓ Reduction of the number of child offenders arrested
- ✓ Reduction of the number of child offenders deprived of their liberty in police-custody & pre-trial facilities
- ✓ Reduction of the number of child offenders deprived of their liberty in post-trial facilities, including adult prisons
- ✓ Reduction of the time that child offenders are detained prior to trial
- ✓ Reduction of the number of child offenders appearing before formal courts
- ✓ Reduction of the number of child offenders sentenced by the court & having a criminal record
- ✓ Reduction of the number of child offenders dealt with by customary courts & other informal justice providers without the case being reported to the police
- ✓ Increase of the number of alleged child offenders reported to police by customary courts & other informal justice providers
- ✓ Increase of restorative juvenile justice processes at other stages of the formal JfC-system
- ✓ Increase of the quantity of community-based services and programmes for (diverted) child offenders
- ✓ Increase of the quality of existing community-based services and programmes for (diverted) child offenders
- ✓ Increase of satisfaction with the justice process of other parties involved in offences committed by child offenders, i.e. victims, parents, extended family members & community members
- ✓ Increase of consultation and collaboration between formal and informal (juvenile) justice providers
- ✓ Increase of respect for child rights & legal safeguards by customary justice providers and & informal justice providers
- ✓ Decrease of child rights violations by customary justice providers & other informal justice providers, especially 'non-discrimination', 'best interests', 'life, survival & development', 'participation' and 'dignity'

⁵⁶ See also: UNODC & UNICEF, *Manual for the Measurement of Juvenile Justice Indicators*, United Nations, 2006, 126p.