



UNITED NATIONS
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Handbook on
Restorative
justice programmes

CRIMINAL JUSTICE HANDBOOK SERIES

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Introduction



This handbook is one of a series of practical tools developed by UNODC to support countries in the implementation of the rule of law and the development of criminal justice reform. It can be used in a variety of contexts, including as part of UNODC technical assistance and capacity building projects. It introduces the reader to restorative justice programmes and processes. A companion *Handbook of Basic Principles and Promising Practices on Alternatives to Imprisonment* is also available from UNODC.

The present handbook offers, in a quick reference format, an overview of key considerations in the implementation of participatory responses to crime based on a restorative justice approach. Its focus is on a range of measures and programmes, inspired by restorative justice values, that are flexible in their adaptation to criminal justice systems and that complement them while taking into account varying legal, social and cultural circumstances. It was prepared for the use of criminal justice officials, non-governmental organizations and community groups who are working together to improve current responses to crime and conflict in their community. The materials presented in this handbook are directed toward a number of different audiences and, therefore, individual users may find some sections of more relevance and interest than others.

The *Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century* (2000) encouraged the “development of restorative justice policies, procedures and programmes that are respectful of the rights, needs and interests of victims, offenders, communities and all

other parties”.¹ In August 2002, the United Nations Economic and Social Council adopted a resolution calling upon Member States that are implementing restorative justice programmes to draw on a set of *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters* (hereinafter: the *Basic Principles*) developed by an Expert Group (see annex II). In 2005, the declaration of the Eleventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders (2005) urged Member States to recognize the importance of further developing restorative justice polices, procedures and programmes that include alternatives to prosecution.^{2, 3}

Restorative justice programmes can be used to reduce the burden on the criminal justice system, to divert cases out of the system and to provide the system with a range of constructive sanctions,

The handbook attempts to synthesize the lessons learned during the implementation and evaluation of various new models and programmes. It places that discussion in the context of an emerging international normative framework for the development of participatory and restorative justice programmes, but it does not use prescriptive language. Its main purpose is to help those involved in the implementation of participatory and restorative justice programmes make informed decisions about programme design, implementation and evaluation.

The implementation of restorative justice programmes, as a complement to the criminal justice system, was accompanied by the development of safeguards for participants and efforts to maximize their restorative and crime prevention outcomes. In 2002, the United Nations Economic and Social Council adopted a resolution containing a set of *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*. These principles offer important guidance for policy makers, community organizations and criminal justice officials involved in the development of restorative justice response to crime in their society. The *Basic Principles* provided the basis for the present handbook and are reproduced in annex II.

This handbook contains seven sections. The first one reviews the main concepts involved, as well as the values and objectives of participatory and restorative justice. Section two deals with the use of restorative

¹ The *Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century*, 10th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Vienna, 10-17 April 2000, A/CONF. 184/4/Rev. 3, para. 29.

² The *Bangkok Declaration—Synergies and Responses: Strategic Alliances in Crime Prevention and Criminal Justice*, 11th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Bangkok, 18-25 April 2005, para. 32.

³ Note also that, in 2001, the European Union issued a framework decision stating that member states should promote mediation in criminal cases and bring into force their legal instruments by 2006. See. European Union Council Framework Decision of 15 of March 2001 on the Standing of Victims in Criminal Proceedings, Article 10.

programmes, while section three focuses on the question of the normative framework for such programmes. The remaining sections deal with various aspects of the implementation of a successful restorative programme. They deal respectively with programme design and implementation, programme operation and the mobilization of community assets, and programme evaluation issues and findings. The emphasis is on presenting information and referring to examples that will be useful in the development of new programmes in a variety of social, cultural and legal contexts.

1. Restorative justice



In many countries, dissatisfaction and frustration with the formal justice system or a resurging interest in preserving and strengthening customary law and traditional justice practices have led to calls for alternative responses to crime and social disorder. Many of these alternatives provide the parties involved, and often also the surrounding community, an opportunity to participate in resolving conflict and addressing its consequences. Restorative justice programmes are based on the belief that parties to a conflict ought to be actively involved in resolving it and mitigating its negative consequences. They are also based, in some instances, on a will to return to local decision-making and community building. These approaches are also seen as means to encourage the peaceful expression of conflict, to promote tolerance and inclusiveness, build respect for diversity and promote responsible community practices.

New and established forms of restorative justice offer communities some welcome means of resolving conflicts. They involve individuals who are not detached from the incident, but are directly involved in or affected by it. The participation of the community in the process is no longer abstract, but rather very direct and concrete. These processes are particularly adapted to situations where the parties participate voluntarily and each one has a capacity to engage fully and safely in a process of dialogue and negotiation. This handbook focuses on restorative justice programmes in criminal matters, but it should be noted that restorative processes are being used to address and resolve conflict in a variety of other contexts and settings, including schools and the workplace.

In many countries, the idea of community involvement enjoys a large consensus.⁴ In many developing countries, restorative justice practices are applied through traditional practices and customary law. In doing so, these approaches may serve to strengthen the capacity of the existing justice system. A fundamental challenge for participatory justice is, however, to find ways to effectively mobilize the involvement of civil society, while at the same time protecting the rights and interests of victims and offenders.

Restorative justice is an approach to problem solving that, in its various forms, involves the victim, the offender, their social networks, justice agencies and the community. Restorative justice programmes are based on the fundamental principle that criminal behaviour not only violates the law, but also injures victims and the community. Any efforts to address the consequences of criminal behaviour should, where possible, involve the offender as well as these injured parties, while also providing help and support that the victim and offender require

Restorative justice refers to a process for resolving crime by focusing on redressing the harm done to the victims, holding offenders accountable for their actions and, often also, engaging the community in the resolution of that conflict. Participation of the parties is an essential part of the process that emphasizes relationship building, reconciliation and the development of agreements around a desired outcome between victims and offender. Restorative justice processes can be adapted to various cultural contexts and the needs of different communities. Through them, the victim, the offender and the community regain some control over the process. Furthermore, the process itself can often transform the relationships between the community and the justice system as a whole.

1.1 Definitions of key concepts

Restorative justice is a way of responding to criminal behaviour by balancing the needs of the community, the victims and the offenders. It is an evolving concept that has given rise to different interpretation in different countries, one around which there is not always a perfect consensus. Also, because of the difficulties in precisely translating the concept into different languages, a variety of terminologies are often used.

There are many terms that are used to describe the restorative justice movement. These include “communitarian justice”, “making amends”, “positive justice”, “relational justice”, “reparative justice”, “community justice” and “restorative justice”, among others.⁵

⁴ Faget, 2003, p. 39.

⁵ Miers, 2001, p. 88.

Restorative process

Definition: A restorative process is any process in which the victim and the offender and, where appropriate, any other individuals or community members affected by a crime participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator.

Restorative justice programme

Definition: “Restorative justice programmes” means any programme that uses restorative processes and seeks to achieve restorative outcomes”.

For the purposes of this handbook, the term “restorative justice programmes” is given the same usage as found in the *Basic Principles*: “any programme that uses restorative processes and seeks to achieve restorative outcomes”. The emphasis in this definition is clearly on participatory processes designed to achieve a desired outcome. A “restorative process” is defined as “any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator”. Restorative justice gives as much importance to the process as to the outcome. The individuals involved in this process are referred to as the “parties”. In Europe and in many other parts of the world, the process is often referred to by means of the technique that most models have in common, that is “mediation” as distinct from legal adjudication.⁶

Restorative process

Definition: A restorative process is any process in which the victim and the offender and, where appropriate, any other individuals or community members affected by a crime participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator.

According to the *Basic Principles*, a “restorative outcome” is an *agreement* reached as a result of a restorative process. The agreement may include referrals to programmes such as reparation, restitution and community services, “aimed at meeting the individual and collective needs and responsibilities of the parties and achieving the reintegration of the victim and the offender”. It may also be combined with other measures in cases involving serious offences.

1.2 Features of restorative justice programmes

The following are features of restorative justice programmes:

- A flexible response to the circumstances of the crime, the offender and the victim, one that allows each case to be considered individually;
- A response to crime that respects the dignity and equality of each person, builds understanding and promotes social harmony through the healing of victims, offenders and communities;
- A viable alternative in many cases to the formal criminal justice system and its stigmatizing effects on offenders;
- An approach that can be used in conjunction with traditional criminal justice processes and sanctions;
- An approach that incorporates problem solving and addressing the underlying causes of conflict;

⁶ See: Council of Europe (1999). *Recommendation No. RR (99) 19 of the Committee of Ministers to Member States Concerning Mediation in Penal Matters*.

- An approach that addresses the harms and needs of victims;
- An approach which encourages an offender to gain insight into the causes and effects of his or her behaviour and take responsibility in a meaningful way;
- A flexible and variable approach which can be adapted to the circumstances, legal tradition, principles and underlying philosophies of established national criminal justice systems;
- An approach that is suitable for dealing with many different kinds of offences and offenders, including many very serious offences;
- A response to crime which is particularly suitable for situations where juvenile offenders are involved and in which an important objective of the intervention is to teach the offenders some new values and skills;
- A response that recognizes the role of the community as a prime site of preventing and responding to crime and social disorder.

1.3 Underlying assumptions

Restorative justice programmes are based on several underlying assumptions: *(a)* that the response to crime should repair as much as possible the harm suffered by the victim; *(b)* that offenders should be brought to understand that their behaviour is not acceptable and that it had some real consequences for the victim and community; *(c)* that offenders can and should accept responsibility for their action; *(d)* that victims should have an opportunity to express their needs and to participate in determining the best way for the offender to make reparation, and *(e)* that the community has a responsibility to contribute to this process.

1.4 Process values and goals

There are at least four critical ingredients for a fully restorative process to achieve its objectives: *(a)* an identifiable victim; *(b)* voluntary participation by the victim; *(c)* an offender who accepts responsibility for his/her criminal behaviour; and, *(d)* non-coerced participation of the offender. Most restorative approaches strive to achieve a specific interactive dynamic among the parties involved. The goal is to create a non-adversarial, non-threatening environment in which the interests and needs of the victim, the offender, the community and society can be addressed.

The objectives of restorative justice programmes and the kind of outcomes they purport to produce have led to the articulation of a number of process values reflected to a different extent in each of the

Process values

- Participation and empowerment of participants
- Respect for all participants
- Preference for consensual outcomes over imposed ones
- Commitment of parties to agreement reached through the process
- Flexibility and responsiveness of process and outcomes
- Community empowerment

various forms of restorative justice. The process is characterized by respectful treatment of all parties. It is also one that promotes the participation and, to a varying extent, the empowerment of all parties concerned. It functions best when it remains clear and predictable, yet flexible and responsive to the individual circumstances of each case. It favours consensual outcomes over imposed ones and it is concerned with eliciting a genuine commitment from the parties to live up to the agreement that they have articulated.

Process goals include the following:

- Victims who agree to be involved in the process can do so safely and come out of it satisfied;
- Offenders understand how their action has affected the victim and other people, assume responsibility for the consequences of their action and commit to making reparation;
- Flexible measures are agreed upon by the parties which emphasize repairing the harm done and, wherever possible, also address the reasons for the offence;
- Offenders live up to their commitment to repair the harm done and attempt to address the factors that led to their behaviour; and,
- The victim and the offender both understand the dynamic that led to the specific incident, gain a sense of closure and are reintegrated into the community.

1.5 Objectives

More specifically, restorative justice practitioners tend to agree that what truly makes a particular response to crime a “restorative” one is not so much a specific practice or process, but rather its adherence to a set of broad objectives that provide a common basis for the participation of parties in responding to a criminal incident and its consequences.

The objectives of restorative justice programmes have been stated in a number of different ways, but essentially contain the following key elements:

(a) Supporting victims, giving them a voice, encouraging them to express their needs, enabling them to participate in the resolution process and offering them assistance. For the last two decades or so criminal justice systems have been called upon to focus more directly on the needs and interests of victims. In 1985, the General Assembly adopted a *Declaration of Basic Principles on Justice for Victims of Crime and Abuse of Power* which stated that “informal mechanisms for the resolution of disputes, including

mediation, arbitration and customary justice or indigenous practices, should be utilized where appropriate to facilitate conciliation and redress for victims”.⁷ We now know much more about the needs of victims of crime and the ways in which the criminal justice system may address these needs (e.g. the need for information, participation, expression, empathy, redress, restoration of a sense of control and security, etc.). However, there remain frequent complaints that the formal criminal justice process ignores the victims’ needs and wishes. By contrast, a restorative justice process is often uniquely suited to address many of the victims’ most important needs. In particular, the formal justice process is not designed to allow victims to describe the nature and consequences of the crime, let alone to ask questions of the offender. The restorative justice model can support a process where the victims’ views and interests count, where they can participate and be treated fairly and respectfully and receive restoration and redress. By participating in the decision-making, victims have a say in determining what would be an acceptable outcome for the process and are able to take steps toward closure.

(b) Repairing the relationships damaged by the crime, in part by arriving at a consensus on how best to respond to it. In fact, it is often argued that the focus of the response should not be solely on the criminal incident, but rather on the relationships that it affected or damaged. Strengthening the community can sometimes prevent further harm. A key feature of restorative justice is that the response to criminal behaviour focuses on more than just the offender and the offence. Peacemaking, dispute resolution and rebuilding relationships are viewed as the primary methods for achieving justice and supporting the victim, the offender and for interests of the community. It can also be helpful for identifying underlying causes of crime and developing crime prevention strategies.

(c) Denouncing criminal behaviour as unacceptable and reaffirming community values. Denouncing certain behaviours is an objective of the restorative justice process just as it has been a fundamental objective of criminal law for centuries. However, the way in which the behaviour is denounced is different. Denunciation is achieved in a more flexible manner, taking into account not only the rules, but also the individual circumstances of the offence, the victim and the offender. It is designed to be a positive denunciation within a larger process, rather than being the sole focus of the intervention. What the denunciation looks like and how it takes place during the restorative process will vary widely, but it remains an essential part of the process. At times, issues can obviously arise when the values that a given community reaffirms through the restorative justice process are not congruent with those enshrined in existing law.

(d) Encouraging responsibility taking by all concerned parties, particularly by offenders. The restorative process is meant to make it easier for offenders

Restorative justice objectives

- Restore community order and peace and repair damaged relationships
- Denounce criminal behaviour as unacceptable and reaffirm community values
- Support victims, give them a voice, enable their participation and address their needs
- Encouraging all concerned parties to take responsibility, particularly by the offenders
- Identify restorative, forward-looking outcomes
- Prevent recidivism by encouraging change in individual offenders and facilitating their reintegration into the community

⁷ General Assembly resolution 40/34 of 29 November 1995, para. 7.

to assume responsibility for their behaviour and its consequences. A restorative process moves from merely assessing legal guilt to attempting to determine responsibility for a conflict and its consequences. Active acknowledgment and acceptance of personal responsibility for the crime and its consequences, rather than a mere passive one imposed by others, is what is being encouraged. Others who had a role to play in the offence or the circumstances that led to it are also encouraged to assume responsibility for their part in the incident. This has the effect of broadening out the process beyond the specific incident, victim and offender. The manner in which this responsibility will lead to action, in particular apologies and restoration, is left to be determined through the process itself and not through the automatic application of some general legal rules. At its best, the process may lead the offender not only to assume responsibility but also to experience a cognitive and emotional transformation and improve his or her relationship with the community and, depending upon the particular circumstance, with the victim and the victim's family.

(e) Identifying restorative, forward-looking outcomes. Rather than emphasizing the rules that have been broken and the punishment that should be imposed, restorative approaches tend to focus primarily on the persons who have been harmed. A restorative justice process does not necessarily rule out all forms of punishment (e.g. fine, incarceration, probation), but its focus remains firmly on restorative, forward-looking outcomes. The restorative outcome that is being pursued is the repair, as far as possible, of the harm caused by the crime by providing the offender with an opportunity to make meaningful reparation. Restorative justice is relationship based and strives for outcomes that satisfy a wide group of stakeholders.

(f) Reducing recidivism by encouraging change in individual offenders and facilitating their reintegration into the community. The past behaviour of individuals and its consequences are clearly a central preoccupation of the restorative process, but so is the offender's future behaviour. An offender's undertaking as it relates to his or her future behaviour is usually an essential component of agreements arrived at through mediation or other restorative processes. Transforming or "reforming" the offender through the restorative process is a legitimate objective of the process and so is the prevention of recidivism. The insistence that offenders understand and accept responsibility for the consequences of their actions is clearly meant to affect the offenders' future behaviour. It is understood that the community and statutory agencies have a role to play in this process.

(g) Identifying factors that lead to crime and informing authorities responsible for crime reduction strategy. The restorative process is an open one that encourages frank discussion of the background of the offence in a spirit of explanation rather than making excuses. If, for example, this reveals that offenders come from areas with particular deficits, action can be taken to remedy the problem.

2. The use of restorative approaches



This section of the handbook presents information on the main types of restorative justice programmes, including victim offender mediation programmes, community and family group conferencing, circle sentencing and reparative probation. It also includes a discussion of indigenous and customary justice forums and the main characteristics of existing criminal justice programmes.

As emphasized in the *Basic Principles*, restorative justice programmes complement rather than replace the existing criminal justice system. A restorative intervention can be used at any stage of the criminal justice process, although in some instances amendments to existing laws may be required. Generally speaking, there are within a criminal justice system four main points at which a restorative justice process can be successfully initiated: (a) at the police level (pre-charge); (b) prosecution level (post-charge but usually before a trial), (c) at the court level (either at the pre-trial or sentencing stages; and, (d) corrections (as an alternative to incarceration, as part of or in addition to, a non-custodial sentence, during incarceration, or upon release from prison. In some countries, restorative interventions are possible in parallel to the prosecution. In Belgium, for example, mediation can also be offered when the public prosecutor has already decided to prosecute the suspect.⁸ At any one of these points, an opportunity can be created for officials to use their discretionary powers and refer an offender to a restorative justice programme (See figure I).

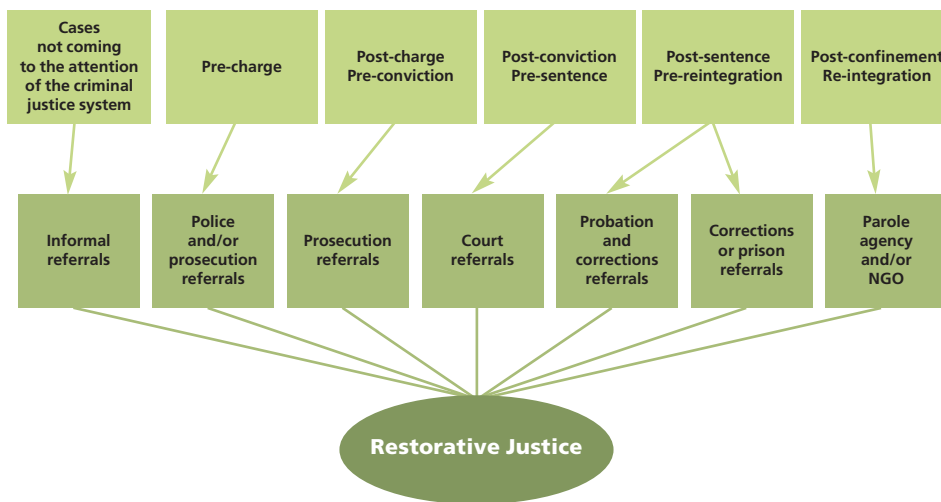
⁸ See: the Belgian Mediation for Redress Programme which focuses on more serious crimes. The mediation is carried out by an independent mediator and when an agreement is reached, this can be added to judicial file of the offender and can be considered as part of the sentencing process. (Aertsen, *et al.*, 2004: 24).

A restorative process can also be initiated in some cases instead of bringing a particular crime or conflict to the attention of the criminal justice system in the first place. This is the case, for instance, in school-based programmes using mediation or other restorative processes to deal with minor behavioural problems that take place within the school community. As well, restorative programmes can also operate in neighbourhood mediation centres.

Finally, police officers can often also informally incorporate restorative justice principles into their decision-making when they are called upon to intervene on the street, in situations of minor disorder or conflict or in specific contexts, such as schools.

Generally, cases involving more serious incidents are referred to the restorative justice process later in the criminal justice system.⁹ A comprehensive approach to the implementation of restorative justice programmes within a national system would normally provide a range of programmes designed for referrals from different points within the criminal justice process.

Figure I.
Restorative justice programmes and the criminal justice system



2.1 Main types of programmes

There is considerable variability among existing programmes. They cover a wide range of processes centred on a restorative approach. This is due in part to varying interpretations of conflict and different perspectives on how such conflict is addressed and resolved.¹⁰ The main categories of programmes are: (a) victim offender mediation; (b) community and

⁹ See: Latimer and Kleinknecht, 2000.

¹⁰ For an international review of justice programmes see Miers, 2001 and for a review of European Programmes, see Miers and Willemsens, 2004.

family group conferencing; (c) circle sentencing; (d) peacemaking circles; and, (e) reparative probation and community boards and panels. The main characteristics of each model are presented here briefly and are summarized in tables at the end of this section.

2.2 Variation in criminal justice programmes

The various characteristics of existing programmes can be situated along a number of continuums (see table 1). Existing programmes vary considerably in formality; in how they relate to the criminal justice system; how they are operated, in the level of involvement they encourage from various parties, or in the main objectives they pursue. The view adopted in this handbook is that a balance must always be achieved in order to fit the circumstances within which a programme is being developed (e.g. limits of the existing legal framework, limited support from criminal justice officials, cultural obstacles, limited public support, limited means).

There is also considerable variation in the extent to which criminal justice professionals participate in restorative processes. For example, the role of justice professionals in circle sentencing, with the exception of formal completion of legal tasks (e.g. prosecutor reading the charges, judge calling the session to order), is limited. While prosecutors make recommendations to the court in indictable offences and judges are asked for legal input on what is required by statute, officials for the most part become members of the circle, expressing their personal views of the offence, offender and victim when it is their turn to speak.

Although there is no perfect agreement on what constitute a “true” restorative justice approach, these are mostly matters of choices needing to be made carefully at the time of designing a new programme or strategy. For a discussion of the controversies and disagreements that exist around what constitutes the essential characteristics of restorative justice programmes, see annex III.

A large proportion of restorative justice programmes are operated by public sector organizations. There are court-based programmes, police-based programmes, and programmes that are operated by not-for-profit organizations in the community. While public sector agencies tend to utilize professionals, community-based programmes generally rely on trained volunteers from the community.

While restorative justice programmes vary on a number of key dimensions, there are also a number of commonalities. These are evident in the description in the selection of programmes presented below.

Table 1.
Varying characteristics of existing programmes

<i>Position of programme in relation to the criminal justice system</i>				
Outside of the system as an alternative to formal response	Part of formal diversion programme		Integrated into the justice system's response	
<i>Formality</i>				
Very informal	Somewhat informal		Very formal	
<i>Position of programme in relation to the use of punishment</i>				
The process takes place in addition to punishment	Punishment is one of the outcomes of the process		The process and its outcome are a substitute to punishment	
<i>Arbitration involved</i>				
Does not involve any arbitration	Involves an element of arbitration		Is essentially a process of arbitration	
<i>Involvement of legal counsel</i>				
No legal counsel involved	Role of legal counsel limited (e.g. to ensure informed consent of offender)		Legal counsel involved	
<i>Involvement of criminal justice officials</i>				
None	Limited involvement of criminal justice professionals (e.g. primarily for referrals)		The programme is operated by criminal justice officials	
<i>Community involvement</i>				
Full community participation	Only family or small element of community involved	Limited community involvement	Essentially no involvement of community	
<i>Involvement of victim</i>				
Central participant	One of many participants	Indirect involvement	A surrogate victim is used	Little or no involvement
<i>Provision of victim assistance</i>				
No or little assistance provided	Provision of some assistance		Primary focus on victim assistance	
<i>Programme delivery mechanism</i>				
By independent NGOs and voluntary sector	By voluntary sector with funding and/or direction from government agency		By government agency	
<i>Focus on offender rehabilitation</i>				
Almost none	One of many aspects of the process		Main focus on offender rehabilitation and recidivism prevention	
<i>Focus on reparation</i>				
Central and essential focus on reparation	Reparative measures are included in the outcomes, but mostly incidentally		Limited focus on reparation for the victim	

Table 2.
Common attributes of restorative justice programmes

Crime victims are provided with an opportunity to:	Offenders are provided with an opportunity to:
<ul style="list-style-type: none"> • Be directly involved in resolving the situation and addressing the consequences of the offence • Receive answers to their questions about the crime and the offender • Express themselves about the impact of the offence • Receive restitution or reparation • Receive an apology • Restore, when appropriate, a relationship with the offender • Reach closure 	<ul style="list-style-type: none"> • Acknowledge responsibility for the offence and understand the effects of the offence on the victim • Express emotions (even remorse) about the offence • Receive support to repair harm caused to the victim or oneself and family • Make amends or restitution/reparation • Apologize to victims • Restore their relationship with the victim, when appropriate • Reach closure

Best practices and a careful consultation process should inform all the decisions made in developing a programme. It is also often the case that the introduction of restorative programmes in a particular social, legal or cultural setting must be accomplished progressively or even iteratively, starting with more modest initiatives that have the potential to create the experience of success, strengthen community resources, conquer remaining hesitations within the criminal justice system and prepare everyone for some more challenging initiatives.

2.3 Victim-offender mediation

Victim-offender mediation programmes (also known as victim-offender reconciliation programmes) were among the earliest restorative justice initiatives. These programmes are designed to address the needs of crime victims while insuring that offenders are held accountable for their offending. The programmes can be operated by both governmental agencies and not-for-profit organizations and are generally restricted to cases involving less serious offences. Referrals may come from the police, the prosecutors, the courts and probation offices. The programmes can operate at the pre-charge, the post-charge/pre-trial and post-charge stages, and involve the willing participation of the victim and the offender. The programmes can also offer a pre-sentencing process leading to sentencing recommendations. When the process takes place before sentencing, the outcome of the mediation usually is brought back to the attention of the prosecution or the judge for consideration. The victim-offender mediation process can also be used successfully during the offender's incarceration and can become part of his or her rehabilitation process even in the case of offenders serving long sentences.

The mediation process is more likely to fully meet its objectives if the victims and offenders meet face-to-face, can express their feelings directly to each other, and develop a new understanding of the situation. With the help of a trained facilitator, they can reach an agreement that will help them both bring closure to the incident. In fact, the facilitator usually meets with both parties in advance of a face-to-face meeting and can help them prepare for that occasion. This is done to ensure, among other things, that the victim is not re-victimized by the encounter with the offender and that the offender acknowledges responsibility for the incident and is sincere in wanting to meet the victim. When a direct contact between the victim and offender is possible, it is not uncommon for one or both of them to be accompanied by a friend or supporter. The latter, however, do not always participate in the discussion. Finally, notwithstanding the merits of a facilitated face-to-face meeting, direct contact between the victim and offender is not always possible or desired by the victim. Indirect mediation processes where the facilitator meets with the parties successively and separately are therefore also widely used.

There are three basic requirements that must be met before victim-offender mediation can be used:

- The offender must accept or not deny responsibility for the crime;
- Both the victim and the offender must be willing to participate;
- Both the victim and the offender must consider it safe to be involved in the process.

In victim-offender mediation, the crime victims are often referred, as needed, for help and assistance and are given maximum input into the sanction or the shaping of a resolution or a restorative agreement. They are also allowed to tell the offender how the crime has affected them and to request information about the crime. The mediation process, to the greatest extent possible, leads to reparation and some form of compensation for the victims' losses. The mediation process does not always involve direct contact between the offender and the victim. When there is a direct contact, the victim is often invited to speak first during the mediation as a form of empowerment.

The mediator assists the two parties in arriving at an agreement that addresses the needs of both parties and provides a resolution to the conflict. When the process occurs prior to sentencing, a conciliation agreement mediated between the offender and the victim can be forwarded to the court and may be included in the sentence or in the conditions of a probation order.

The role of the Czech Republic Probation Mediation Service Centre in pre-trial and court proceedings

In the Czech Republic, the Probation and Mediation Service is involved in pre-trial and court proceedings in an attempt to mediate effective and pro-social resolutions to crime-related conflicts. Mediation may only be carried out with the voluntary consent of the two parties. Mediators are skilled in effective negotiations. They help the parties in conflict to arrive at conflict settlement, and to find a mutually acceptable solution to the situation. Their task is to manage the negotiation process, to create conditions allowing understanding between the participants, the reaching of a solution, taking into account both parties' interests. The mediators neither assess the conflict, nor do they decide on the form of its solution.¹¹

Probation officers are also involved in the development of pre-sentence reports which map the current life situation of the client accused and his/her motivation to enter into the process, or to cooperate on solving the criminal matter he/she is being prosecuted for. The content structure of the pre-sentence report helps the PMS officer to focus the cooperation with clients on the given key areas on the one hand, and on the other hand it also enables the state prosecutor and the judge to find information they need easily. Based on the information established and on his/her risk assessment, the PMS officer proposes future ways of cooperation with the client, and possibly forms of adequate duties, restrictions, possibilities of community service orders for the client, etc.

When working with the accused, the PMS officer opens new topics related to solutions to the consequences of the criminal act and repair disrupted interpersonal relations. The main purpose is for the client accused to become aware of all possible legal and social connections of the criminal act committed, and to be prepared to solve the consequences proactively. Active participation of the client accused and the client victim on the court's or state prosecutor's judgement through their cooperation with the PMS may represent a preparation of both parties to accepting the judgement in the case and to be willing to participate on its execution—the accused on serving the punishment/measure or on the diversion of criminal proceedings, and the victim to accept the form of reparation he/she consented to. The PMS officer's work with the client accused in the pre-sentence phase aims at their discovering possible causes of the client's offending, and at their finding ways of how to remove such causes (e.g. through participation in a rehabilitation programme, further education, finding a job, solving a conflict in the family, etc.).

¹¹ Ouředníčková, L., Pilný, O., Rabiňáková, D., Štern, P. Preface to the Czech edition of: Riskin, L. L., Arnold, T., Keating, J. M. *Mediace aneb jak řešit konflikty (Mediation or how to resolve conflicts)*. Praha: Facia, 1996, pp 7-10.

Case study**Victim offender mediation¹²**

After approximately two hours of at times heated and emotional dialogue, the mediator felt that the offender and victim had heard each other's story and had learned something important about the impact of the crime and about each other. They had agreed that the offender, a fourteen year old, would pay \$200 in restitution to cover the cost of damages to the victim's home resulting from a break-in. In addition, he would be required to reimburse the victims for the cost of a VCR he had stolen, estimated at \$150. A payment schedule would be worked out in the remaining time allowed for the meeting. The offender also made several apologies to the victim and agreed to complete community service hours working in a food bank sponsored by the victim's church. The victim, a middle aged neighbour of the offender, said that she felt less angry and fearful after learning more about the offender and the details of the crime and thanked the mediator for allowing the mediation to be held in her church basement.

2.4 Community and family group conferencing

This model in its modern form was adopted into national legislation and applied to the youth justice process in New Zealand in 1989, making it at the time the most systemically institutionalized of any existing restorative justice approaches. The majority of cases are handled by the police through “restorative caution” and by police-directed or court family group conferencing. It is based on the centuries old sanctioning and dispute resolution traditions of the Maori, the New Zealand aboriginal group. The model is now also widely used in modified form as a police-initiated diversion approach in South Australia, South Africa, Ireland, Lesotho, as well as in cities in Minnesota, Pennsylvania and Montana.

Each conferencing process has a convenor or facilitator. The focus of the conferencing process is somewhat broader than that of regular mediation programmes. It involves bringing together the family and friends of both the victim and the offender, and sometimes also other members of the community to participate in a professionally facilitated process to identify desirable outcomes for the parties, address the consequences of the crime and explore appropriate ways to prevent the offending behaviour from reoccurring. The mandate of family group conferencing is to confront the

¹² Bazemore and Griffiths, 1997, p. 25.

offender with the consequences of the crime, develop a reparative plan, and in more serious cases (in the New Zealand model), determine the need for more restrictive supervision and/or custody. In Australia and the United States, police officers generally serve as primary gatekeepers, while in South Africa it is the prosecutors.

Because they involve a wider circle of concerned people, including individuals who may be in a position to work with and support the offender, these conferencing processes are particularly effective as a means of ensuring that the offender follows through on agreed outcomes. In fact, other members of the circle frequently have a continuing role to play in monitoring the offender's future behaviour and ensuring that he or she complies with the rehabilitative and reparative measures that he or she has agreed to.

Community conferencing is also used sometimes as alternative measure programme to which an offender can be diverted from the criminal justice system. Such programmes tend to be managed by community groups or agencies, with or without financial support from the government. The circle usually consists of those most concerned about the offender and the victim and any other member of the community with an interest in the process (e.g. a school teacher in the case of a young offender, or an employer). The agency or community group to which the offender is referred is also responsible for monitoring the offender's compliance with the terms of the agreement and may or may not function under the direct oversight of law enforcement or justice officials.

Case study

Family group conference¹³

After the offender, his mother and grandfather, the victim and the local police officer who had made the arrest had spoken about the offence and its impact, the youth justice coordinator asked for any additional input from other members of the group of about ten citizens assembled in the local school (the group included two of the offender's teachers, two friends of the victim and a few others). The coordinator then asked for input into what should be done by the offender to pay back the victim, a teacher who had been injured and had a set of glasses broken in an altercation with the offender, and pay back the community for the damage caused by his crime. In the remaining half hour of the approximately hour long conference, the group suggested that restitution to the victim was in order to cover medical expenses and the costs of a new pair of glasses and that community service work on the school grounds would be appropriate.

¹³ Bazemore and Griffiths, p. 25.

Peace making committees, *Zwelethemba (South Africa)*

In 1997, the Community Peace Programme launched a “model building experiment” aimed at mobilizing local knowledge and capacity around issues of dispute resolution and community building. The project was with a local community in Zwelethemba, a township near Worcester. The peace committees are made up of local township residents who undertake both peacemaking and peacebuilding. Peacemaking revolves around resolving specific conflicts, whilst peacebuilding aims to address the underlying problems in the community such as poverty or lack of access to services. Peacemaking activities deal with a range of legal disputes—including both civil and criminal matters.

The peace committees initially received almost all of their referrals directly from the community, not from the police or the courts. As the project evolved, however, there has been increased interaction with state agencies, notably the police. The process does not follow strict procedural rules, though there are “steps in peacemaking” that are followed as guidelines rather than rules. The committees have developed their own code of good practices, and all problem-solving techniques must be legal and adhere to the code. The peacemaking process does not involve adjudication, but rather focuses on discovering what can be done to reduce or eliminate the problem. The outcomes of peacemaking meetings are restorative in nature: apologies, restitution and compensation.

Peacebuilding initiatives take the process even further, looking at the wider issues affecting the community and trying to resolve these problems with a view to avoid a reoccurrence of the conflict.

2.5 Circle sentencing

Sentencing circles are conducted in many aboriginal communities in Canada. In circle sentencing all of the participants, including the judge, defence counsel, prosecutor, police officer, the victim and the offender and their respective families, and community residents, sit facing one another in a circle. Circle sentencing is generally only available to those offenders who plead guilty. Discussions among those in the circle are designed to reach a consensus about the best way to resolve the conflict and dispose of the case, taking into account the need to protect the community, the needs of the victims, and the rehabilitation and punishment of the offender. The sentencing circle process is typically conducted within the criminal justice process, includes justice professionals and supports the sentencing process.

Circle sentencing is perhaps the best example of participatory justice in that members of the community can become directly involved in responding to incidents of crime and social disorder. This is done through the formation of a Community Justice Committee (CJC) that may also include representatives from justice agencies. The common objective of the members of the CJC is to find more constructive ways to respond to conflict in their community. The CJC plays an integral role in the overall circle process, including liaising with criminal justice agencies, community organizations as well as with the various stakeholder groups in the community. Cases are referred to the CJC, generally from the police, prosecutors and judges, although cases may also come from the schools, victim services programmes and families.

There are four stages to the circle process:

Stage 1: Determining whether the specific case is suitable for a circle process

Stage 2: Preparing the parties that will be involved in the circle

Stage 3: Seeking a consensual agreement in the circle

Stage 4: Providing follow-up and ensuring the offender adheres to the agreement

The CJC is involved throughout the circle process, from determining the suitability of a case to ensuring that agreements are adhered to. The CJC also mobilizes community support for the victim and the offender throughout, and following the circle process.¹⁴

The outcome of the circle is generally submitted to the judge, who may or may not have participated directly in the circle, and is not binding on the court. The court takes the plan developed through the circle very seriously, but it does not necessarily adopt or ratify it completely. The court may also adopt the plan in addition to another sentence that it may order. Offenders who have their cases heard in a sentencing circle may still be sent for a period of incarceration; however, there are a wide range of other sanctions available, including restitution and compensation, probation, house arrest and community service.

The box below highlights some of the differences between the criminal court process and the process typically followed in a sentencing circle, reflecting the differences between the traditional justice system and restorative processes.

The operation of the circle sentencing process is community-specific, meaning that it may (and should) vary between communities. In fact, the circle sentencing process relies heavily upon community volunteers for its success.

¹⁴ Pranis, Stuart, and Wedge, 2003, p. 128.

Differences between criminal courts and circle sentencing¹⁵**Criminal courts**

- The conflict is the crime
- The sentence resolves the conflict
- Focus on past conduct
- Take a narrow view of behaviour
- Receive an apology
- Avoid broader concern with social conflict
- Result (i.e. the sentence) is most important
- Relies on professionals

Community circles

- The criminal incident is regarded as a small part of a larger dynamic/conflict
- The sentence is a small part of the solution
- Focus on present and future conduct
- Take a larger, holistic view
- Focus on social conflict
- Result is least important—the process is most important, as the process shapes and sometimes heals the relationships among all parties
- Empowers the community

Circle sentencing pursues several objectives, including addressing the needs of communities, victims, offenders and their families through a process of reconciliation, restitution and reparation. A fundamental principle of circle sentencing is that the sentence is less important than the process used to arrive at an outcome or a sentence. Because a consensus around an outcome is desired and valued, members of the circle are all playing an active role in facilitating a healing process. The circle itself is often involved in monitoring the compliance of the offender with the agreed upon outcome and in providing him or her with continued support after the sentence has been pronounced.

Circle sentencing is an example of how the principles of restorative justice can be applied within a holistic framework in which justice system personnel share power and authority with community members. In contrast to the formal and often adversarial approach to justice, circle sentencing can help:

- reacquaint individuals, families and communities with problem-solving skills;
- rebuild relationships within communities;
- promote awareness and respect for values and the lives of others;
- address the needs and interests of all parties, including the victim;
- focus action on causes, not just symptoms, of problems;

¹⁵ Adapted from Griffiths and Cunningham. 2003. *Canadian Criminal Justice: A Primer*. 2nd edition. Toronto: Thomson Nelson, p. 212.

- recognize existing healing resources and creates new ones;
- coordinate the use of local and government resources;
- generate preventive measures.

To date, the majority of offenders who have had their cases disposed of through sentencing circles were adults. However, an increasing number of cases of young offenders are now being handled as well. Circle sentencing has spawned a number of variations, including community sentence advisory committees, sentencing panels and community mediation panels.

Case Study

Sentencing circle¹⁶

The victim, the wife of the offender who had admitted to physically abusing her during two recent drunken episodes, spoke about the pain and embarrassment her husband had caused to her and her family. After she had finished, the ceremonial feather (used to signify who would be allowed to speak next) was passed to the next person in the circle, a young man who spoke about the contributions the offender had made to the community, the kindness he had shown toward the elders by sharing fish and game with them and his willingness to help others with home repairs. An elder then took the feather and spoke about the shame the offender's behaviour had caused to his clan noting that in the old days, he would have been required to pay the woman's family a substantial compensation as a result. Having heard all this, the judge confirmed that the victim still felt that she wanted to try to work it out with her estranged husband and that she was receiving help from her own support group (including a victim's advocate). Summarizing the case by again stressing the seriousness of the offence and repeating the Crown Counsel's opening remarks that a jail sentence was required, the judge then proposed to delay sentencing for six weeks until the time of the next circuit court hearing. If during that time the offender had: met the requirements presented earlier by a friend of the offender who had agreed to lead a support group and had met with the community justice committee to work out an alcohol and anger management treatment plan; fulfilled the expectations of the victim and her support group; and completed 40 hours of service to be supervised by the group, he would forgo the jail sentence. After a prayer in which the entire group held hands, the circle disbanded and everyone retreated to the kitchen area of the community centre for refreshments.

¹⁶ Bazemore and Griffiths, 1997, p. 25.

2.6 Restorative programmes for juvenile offenders

In most jurisdictions, restorative justice processes are most extensively developed for use with youth in conflict with the law. These programmes have often provided the basis for the subsequent development of programmes for adult offenders.

Restorative programmes offer some very real and effective alternatives to more formal and stigmatizing youth justice measures. In particular, because of their educational value, they are particularly useful for promoting diversionary measures and for providing alternatives to measures that would deprive a youth of his or her liberty. Many such programmes offer unique opportunities to create a community of care around youth in conflict with the law. Public support for restorative justice programmes for youth is usually relatively easy to garner.

In many countries, juvenile justice legislation provides specifically for the creation of diversion programmes for youth. Many of these programmes can be developed in line with restorative and participatory justice principles.

Furthermore, many programmes developed completely outside of the criminal justice system, in schools or in the community, can provide an opportunity for the community to provide an appropriate educational response to minor offences and other conflicts without formally criminalizing the behaviour or the individual. A number of programmes already exist in schools that facilitate a response (peer mediation, conflict resolution circles, etc.) to minor youth crime (e.g. fights, violent bullying, minor theft, vandalism of school property, extortion of pocket money) that may otherwise have become the object of a formal criminal justice intervention.

Examples of restorative programmes for youth

The following programmes illustrate the types of initiatives that have been developed worldwide:

BRAZIL

There are a number of youth-centred mediation and conferencing projects throughout the country that incorporate the philosophy and principles of restorative justice.

Youth Justice System, Porto Alegre

This system is experimenting with conferencing for young offenders. The Children and Adolescent Act of 1990 allows the presiding youth court judge to suspend the legal proceedings for first-time offenders involved in less serious crimes and for the use of sanctions such as community service and reparation. The Porto Alegre youth justice system is piloting the use of *câmaras restaurativas* for these offenders.¹⁷

ENGLAND

Youth Offenders Panels

In England and Wales, a widely-used method which has some restorative features is the "referral order". Young offenders, aged 10-17, appearing in court for the first times are referred to youth offender panels (unless their offence is so serious as to require custody). A panel consists of two trained members of the community, one of whom acts as the chairperson and one professional. The panels are attended by the young person and a parent or guardian. The victim, if any, and a person who may have a good influence on the young person may also be invited. The panel decides on an action plan through which the young person can make reparation and address his or her problems. It meets again at the end of the order to assess progress. The level of involvement of the victims is, however, dependent on the way in which the process is explained to them, and so far, it has been low.

Young persons who offend again may be given a reparation order. The victim may be invited to meet the offender to express his or her feelings about the offence and consider what form reparation should take, but the decision remains with the court.¹⁸

Oxfordshire Youth Offending Team (YOT)

The Oxfordshire YOT aims to consult each victim in every case offering an opportunity for contact with the young offender, or the chance to decide the focus of their reparation; and the YOT aims for reparation to form part of every young offender's sentence. Victims who do not want to meet the young offender or receive reparation can choose from a booklet which local reparative project they want the offender to participate in. Acting as mentors to young offenders, the role of supervisors is crucial. Guidance is tailored to the offender's individual needs, taking the young person away from their friends and peer influence. An especially positive element of the YOT scheme is its emphasis on making reparation visible to the public. In seeking to engage the community, the YOT distributes a reparation newsletter to interested professionals and holds public meetings to celebrate achievements.¹⁹

¹⁷ Parker, 2002.

¹⁸ Newburn *et al.*, 2001.

¹⁹ Source: Home Office, 2003.

Case Study | Robbery by a youth

James was a 17 year-old boy who was charged with robbery following an incident that took place in November 2000. James held up a cab driver while holding a knife to his throat. James was soon apprehended and the cab driver's wallet was retrieved. The case was referred to us through a judicial pre-trial with judge, defence and crown all agreeing that this was an appropriate referral.

We met with James and his mother who was very distraught about her son's 'out of character' behaviour. She required support to cope with the fact that her son had become involved in the criminal justice system. James sincerely expressed remorse and responsibility. I explained the goals of the project and they agreed to participate.

We contacted the victim and, although somewhat sceptical, he agreed to meet. The victim is a young immigrant who was deeply impacted by the robbery. At this point in the process, he wanted nothing from the accused. He did, however, want to convey to the accused how this had affected him, i.e. his increased fear, his growing bias against teenagers and what the loss of his immigration card would have meant to him.

We relayed this information to James who seemed to gain a fuller comprehension of the issues the victim was dealing with. He offered to write a letter of apology to the victim.

The victim was open to receiving a letter. He seemed to be somewhat surprised at the level of sincerity expressed in the letter. The victim began to share more of what this experience had meant to him and admitted that he had missed work the week following the robbery due to his fear. As a result he lost wages amounting to \$800.00.

James (and his mother) agreed that the victim should not lose any money as a result of something James had done. James offered to make monthly payments until this debt was covered. The victim agreed to this and the payments began.

We continued to work with James regarding the root causes of his behaviour and to assist him in recognizing the impact his behaviour had, not only on the victim and his family but on James and his family as well. He began addressing his problems; he started school and soon found part time work. His mother reported that their relationship had much improved and James' behaviour at home had become much more cooperative.

We also worked with the victim regarding employment issues. I connected him with Employment Support Services, with Jewish Family Services and with the Ottawa-Carleton Immigration Services Organization.

Although the victim and accused did not meet, a resolution agreement was developed that included the restitution and the letter of apology. This agreement was presented to court at James' sentencing and became part of the information gathered to assist the judge in sentencing. James was sentenced to two years probation with strict conditions. One of the conditions was to continue making the restitution payment to the victim as their resolution agreement stated. Both parties felt that the sentence was fair and satisfactory.

2.7 Indigenous and customary justice forums

Aspects of the restorative justice approach are found in many cultures. In Australia and Canada, indigenous informal participation in sentencing procedures has been occurring in remote communities for some time. In Australia, since the late 1990s, this practise has been transposed to urban areas with the advent of indigenous sentencing and circle courts. Indigenous people, organizations, elders, family and kin group members are encouraged to participate in the sentencing process and to provide officials with insight into the offence, the character of victim-offender relations and an offender's readiness to change. With these developments, court processes may have become more culturally appropriate and greater trust may have grown between indigenous communities and judicial officers.²⁰

Community based informal systems, or as they are sometimes called, non-state justice systems can take many forms and produce different outcomes in terms of access to justice as well as equity and fairness. A distinguishing feature of many of them is their informal and deliberative process. The outcome, however, is often decided by arbitration rather than mediation and the offender's consent to participate is not always a requirement. A critical question is: do such systems offer a viable alternative to state-run systems and, if so, can they be inspired by restorative goals and principles?

²⁰ Marchetti and Daly, 2004.

In many African countries customary law may provide a basis for rebuilding the capacity of the justice system. In these countries, the primary aim of customary law is conciliation and dispute, reconciliation between the wronged and the wrongdoer. “The underlying aim, proved through millennia of experience, is to ensure a sense of justice and resolution amongst the disputing parties and through this means, to restore or maintain social responsibility”.²¹

In South-Eastern Nigeria and many parts of West Africa, the “age grade” systems encourage reconciliation within communities through peer group interventions. Though some of these processes are arbitrary, it may be a useful strategy to identify positive aspects of such existing structures and build upon their strengths to make them more restorative.

In the Philippines, the Barangay justice system consists of a locally elected Barangay captain and a “peacekeeping committee” hearing cases involving conflicts between residents. There is a mediation session that is facilitated by the captain or another member of the committee. Agreements reached through this process are legally binding and are recognized by the courts. The system has been criticized for failing to adequately inform participants about their rights in it, or for patronage, corruption or gender bias. To alleviate some of these shortcomings of the process, a programme has been initiated to train community leaders, many of them women, as Barangay justice advocates.²²

A recent review of three broad forms of Shalish (community-based justice system) in Bangladesh and the Baranguay justice system in the Philippines noted that the outcomes of such systems are far from consistent, with frequent problems of unjust outcomes, gender bias, corruption, domination of the process by the local elite and political patronage. Reform and enhancement of such systems can no doubt be integrated into broader development, institutional development and empowerment initiatives. However, purely technical reforms that do not address the structural problems at the root of corruption and bias or do not address the power imbalances that typically characterize these informal processes are unlikely to produce fair restorative justice outcomes.²³

In Uganda, the local council courts have been institutionalized by statute and have the power to grant remedies such as compensation, restitution, reconciliation or apology, as well as more coercive measures.²⁴

²¹ Jok, Leitch, and Vandewint, 2004, p. 16.

²² Parker, 2004.

²³ Golub, 2003.

²⁴ Stevens, 2000.

Building on customary justice practices

In many countries still, most people live in the countryside. They live in communities where everyone knows each other and minds each other's business closely. A criminal act committed by A against B may have its roots in a long-standing dispute between the parties of which the criminal act is but a symptom. Therefore, adjudication in the instant case will not resolve the dispute and so produce more cases on a tit for tat basis. In many post-conflict societies, the justice system has all but collapsed leaving ordinary people no remedy other than to sort out disputes among themselves. It is possible to build on customary justice practices based on the application of restorative justice principles.

- In the Democratic Republic of Congo, most people apply to their chiefs and elders for settlements of disputes and judgment even in serious criminal matters (due to the absence of courts) and only apply to the State justice system when an official stamp is needed (e.g. in civil matters concerning guardianship and adoption). However, due to the displacement of communities and corruption of traditional chiefs and elders, new mechanisms have been developed by NGOs and faith groups to assist people in resolving their disputes. For example, *Héritiers de la Justice*, a non-governmental organization, has set up *Comités de Médiation et Défense* which have been established throughout South Kivu. The members of the committees and of their individual cells are trained in human rights and mediation skills and provided with basic introduction to the relevant laws.
- In Bangladesh, the primary distinction between the traditional *salish* (traditional dispute resolution mechanism at the village level involving village headmen or elders) and NGO-coordinated *salish* is that the former relies on arbitration while the latter is a mediated process. In the one, parties are bound by the decision of the officiating individuals, while in the second the NGO training enables the decision-makers to actively engage both parties in settling the dispute, with the goal of reaching a mutually agreed solution. The process is highly participatory and results are usually complied with because: (a) they have been agreed to by both sides; and, (b) the maximum participation of villagers and the role played by the local mediators further vests ownership in them to ensure compliance between the parties (i.e. social pressure).

3. Principles and Safeguards



3.1 Basic principles on the use of restorative justice programmes in criminal matters

The *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters* (see annex II) was adopted in 2002 by the United Nations Economic and Social Council. Their purpose is to inform and encourage Member States to adopt and standardize restorative justice measures in the context of their legal systems, but there was no intention to make them mandatory or prescriptive. The core part of the *Basic Principles* deals with setting the parameters for the use of restorative justice and the measures that should be adopted by Member States to ensure that participants in restorative processes are protected by appropriate legal safeguards. Specifically, parts II and III of the document deal respectively with trying to define the appropriate use of restorative justice (e.g. when there is sufficient evidence against the offender to justify an intervention and when the offender and the victim consent) and the nature of the legal safeguards that should be set in place.

The *Basic Principles* refers to the following fundamental safeguards (para. 13):

The right to consult with legal counsel: The victim and the offender should have the right to consult with legal counsel concerning the restorative process and, where necessary, to translation and/or interpretation.

The right of minors to the assistance of a parent or guardian: Minors should, in addition, have the right to the assistance of a parent or guardian.

The right to be fully informed: Before agreeing to participate in restorative processes, the parties should be fully informed of their rights, the nature of the process and the possible consequences of their decision.

The right not to participate: Neither the victim nor the offender should be coerced, or induced by unfair means, to participate in restorative processes or to accept restorative outcomes. Their consent is required. Children may need special advice and assistance before being able to form a valid and informed consent.

The *Basic Principles* does not assume that legislation will always be necessary to ensure that fundamental legal safeguards are in place to adequately protect participants in the restorative justice process and ensure the overall fairness of the process.

In addition, other important safeguards (see paras. 14 to 17) in law or in policy should be set in place:

Participation is not evidence of guilt: Participation of an offender in a restorative justice process should not be used as evidence of admission of guilt in subsequent legal proceedings (para. 8).

Agreements should be voluntary and be reasonable: Agreements arising out of a restorative process should be arrived at voluntarily and should contain only reasonable and proportionate obligations (para. 7).

Confidentiality of proceedings: “Discussions in restorative processes that are not conducted in public should be confidential, and should not be disclosed subsequently, except with the agreement of the parties or as required by national law” (para. 14). Other human rights instruments also aim to protect children’s privacy and the confidentiality of proceedings involving children. They are also relevant here.

Judicial supervision: “The results of agreements arising out of restorative justice programmes should, where appropriate, be judicially supervised or incorporated into judicial decisions or judgments” (para. 15). Whenever that occurs, the outcome should have the same status as any other judicial decision. This means that in most systems the outcome could therefore be appealed by the offender or the prosecution. These outcomes should preclude prosecution in respect to the same facts.

Failure to reach an agreement: Failure to reach an agreement should not be used against the offender in subsequent criminal justice proceedings.

No increased punishment for failure to implement an agreement: Failure to implement an agreement made in the course of a restorative justice process (other than a judicial decision or judgement) should not be used as justification for a more severe sentence in subsequent criminal proceedings.

The *Basic Principles* recommends that Member States consider establishing guidelines and standards, with legislative authority when necessary, to govern the use of restorative justice programmes. There are always questions about whether legislation is necessary in order to introduce restorative justice programmes. In most instances, the question commands a local response that takes into account the current system and legislation and the nature of the restorative justice initiatives to be implemented. This will be discussed further in chapter 4.

The *Basic Principles* makes it clear that, in some cases, it may be sufficient to adopt policies and clear guidelines to guide the new programmes and establish the necessary normative framework. They stipulate (in para. 12) that such guidelines should cover inter alia:

- (a) The conditions for the referral of cases to restorative justice programmes;
- (b) The handling of cases following a restorative process;
- (c) The qualifications, training and assessment of facilitators;
- (d) The administration of restorative justice programmes;
- (e) Standards of competence and rules of conduct governing the operation of restorative justice programmes.

In some countries, the law regulating mediation processes prescribes the establishment of an ethical commission. Such a commission can have two functions: providing a complaints procedure for victims, offenders and others involved within the restorative process on the one hand, and elaborating ethical principles and guidelines for restorative justice practitioners on the other hand.

Within the Council of Europe, *Recommendation No. R (99) 19 of the Committee of Ministers to Member States Concerning Mediation in Penal Matters* contains very similar dispositions and recommends that legislation be adopted by Member States to facilitate mediation in penal matters.

3.2 Examples of guidelines and their contents

In many jurisdictions, the specific legal authority for restorative interventions is supplemented by the publication of other texts having legal or quasi-legal force. Such texts typically prescribe or advise the adoption of certain protocols governing the conduct of the intervention.²⁵ There exist several examples of guidelines that have been developed by government agencies or professional groups. One of them is reproduced below for ease of reference.

Outline of a statement of principles for a code of ethics in restorative justice²⁶

Principles relating to interests of parties (needs and rights)

Those relating to all parties

- Voluntary participation and informed consent
- Non-discrimination, irrespective of the nature of the case
- Accessibility to relevant helping agencies (including restorative practice agencies)
- Protection of vulnerable parties in process
- Maintaining accessibility to conventional methods of dispute/case resolution (including the courts)
- Privilege should apply to information disclosed before trial (subject to public interest qualification)
- Civil rights and dignity of individuals should be respected
- Personal safety to be protected

Those relating to parties who have sustained loss

- Their needs and feelings to be taken seriously
- Their losses to be acknowledged
- Their right to claim recompense to be vindicated

Those relating to those liable for loss imposed on others (including those facing criminal sanctions)

- Right to offer reparation before it is formally required
- Right to due process in trial (including presumption of innocence in any subsequent legal proceedings)

²⁵ Miers, 2001, 79.

²⁶ Source: Mackay, 2004, pp. 63-64.

- Reparative requirements, where imposed, should be proportionate, primarily to the capacity of the perpetrator to fulfil, and secondarily to the harm done
- Reparative requirements should be consistent with respect for the dignity of the person making amends.

Principles relating to the interests of the local community and society

- Community safety should be promoted by measures to bring about crime prevention, harm reduction and social harmony
- Social solidarity should be promoted by respect for cultural diversity
- Social solidarity should be promoted by upholding public morality and respect for the law

Principles relating to agencies working alongside the judicial system

- Consideration should be given to settlement of the case without prosecution except when the level of harm done, the risk of further harm, issues of public policy, disagreement about the facts or the appropriate outcome, requires open court action
- The exercise of discretion either individually or systematically should not compromise rights under the law or lead to discrimination
- Restorative justice measures should not be subordinated to other criminal justice objectives such as diversion or rehabilitation

Principles relating to the judicial system

- Reintegration of the parties should be the primary aim of court proceedings
- Repairing the harm should be the key objective in disposal of the case
- Restorative requirements should be proportionate to the case (see above)
- Where a restorative requirement is possible and proportionate, it should be imposed regardless of the wishes of the parties in criminal cases. Where a victim refuses to participate, a surrogate should be found
- Genuine willingness on the part of the perpetrator to repair harm should be taken into account in disposal
- The content of mediation/conferences to be considered privileged, subject to public interest qualifications.

Principles relating to restorative justice practice agencies

- Commitment to rights-based practice, including a requirement that parties are advised of rights, and are encouraged to seek advice before commitment to mediated agreements
- Impartiality of mediators
- Neutrality of mediators

- Confidentiality as between parties and with regard to other agencies, including “Chinese walls” with another part of the same agency having a distinct function in respect of the case (this is to ensure that restorative practices are not undermined by drives towards system integration)
- Facilitating the participation of a weaker party in a negotiation
- Upholding public moral standards of behaviour in the mediation/conferencing process and in proposed settlements
- Mediators to have no other role in respect of the case
- Adherence to best practice guidelines within the restorative justice movement
- Commitment to initial and continuing accreditation training
- Commitment to an ethos of constructive conflict resolution within the workplace (this is to ensure internal integrity)
- Commitment to improving practice through monitoring, audit and participation in research
- Commitment to improving practice through reflection upon practices and personal growth on the part of mediators

4. From principles to practice: implementing restorative justice programmes

Most observers would acknowledge that the application of restorative justice measures is still at the exploratory stage and that more information on their application and operation is needed. Successful implementation of restorative justice programmes requires strategic and innovative initiatives that build on the collaboration of governments, communities, non-governmental organizations, victims and offenders. In addition to new programmes, existing justice structures and processes may be adapted to incorporate elements of restorative justice.

There are a number of crucial steps that contribute to the effective implementation and sustainability of restorative justice initiatives. They include: legislation; leadership and organization; securing a buy-in by the criminal justice system; identifying and mobilizing community assets; carefully designing the programme to build on the existing strengths of the community and the justice system and account for existing contingencies; and careful planning and monitoring of the implementation process. This section will discuss each one of these questions.

In addition, a number of key factors associated with the successful implementation of restorative justice programme²⁷ include:

- A strategic approach;
- Strong leadership from senior criminal justice managers;

²⁷ See Miers, 2003.

- Effective communication about and support for restorative processes among justice personnel;
- The integration of restorative processes into the justice system, rather than these processes being, or being viewed as, an “add on”;
- Effective communication strategies to educate and inform the community, the police, the judiciary, correctional authorities and others involved in the delivery of justice services;
- Utilizing local resources and experience, including the voluntary sector;
- Collaborative partnerships between criminal justice agencies and personnel and community-based organizations;
- Collaborative partnerships between criminal justice personnel and the voluntary sector;
- A clear operational framework, including protocols that define areas of jurisdiction and responsibility;
- The development of criteria that guide the referral of cases to restorative processes, including determining which cases/offenders/ crime victims would derive the most benefit from such referral;
- Effective and comprehensive training for criminal justice and community-based programme staff;
- Well developed skill sets and areas of expertise among justice and community-based personnel;
- The creation of valid performance measures or indicators.

4.1 Strategic approaches

The *Basic Principles* (para. 20) recommends that Member States “consider the formulation of national strategies and policies aimed at the development of restorative justice and at the promotion of a culture favourable to the use of restorative justice among law enforcement, judicial and social authorities, as well as local communities.”

Clearly, when major organizational changes are being proposed to the criminal justice system, a strategic approach to their implementation is recommended. When the changes that are contemplated represent a marked departure from existing philosophies, procedures and practices, it is best to be inspired by the experience of others, to enquire about best practices in the field, and to proceed openly and strategically in order to build a strong support base for the proposed changes. Experience shows that a broad consultation process is usually the best basis for the development of successful programmes. In some cases, national consultations precede local and more specific ones. Criminal justice leaders and key stakeholders should be provided with genuine opportunities to have an

Lessons learned about programme development

The experience of restorative justice programme development is that it is best when:

1. Programmes are developed on a collaborative basis, involving where appropriate, criminal justice agencies, social service agencies, non-governmental organizations, community associations, and the private sector. In the absence of collaborative arrangements, it is likely that difficulties will be experienced in securing referrals from the police, gaining the support of the prosecutor's office, and other required supports.
2. Effective communication strategy is used to create an organizational environment that is amenable to incorporating and/or collaborating in the development of restorative justice practices and to educate the community about this approach.
3. Consultation takes place with stakeholder groups and advocacy groups in the community.
4. There is clear agreement on the criteria to be used in referring clients to restorative justice programmes.
5. The victims of crime, including women who are victims of violence and persons from other "vulnerable groups", are given a true choice as to whether to participate in a restorative justice process. This is the notion of "informed choice" and includes specific requirements for confidentiality, presentation of the advantages and disadvantages of the restorative process versus the conventional justice system, information on the right to obtain legal advice and to have legal representation at any stage of the process, the support resources that are available, and access to the facilitator's credentials.
6. Training standards and oversight of volunteers, facilitators and mediators have been developed and agreed upon.
7. An evaluative component is incorporated into every restorative justice programme.
8. Careful thought has been given to the resources required to sustain the programmes. In the case of low income countries, consideration is given to what can be done with little or no additional resources, building upon existing capacities.

input in the development of new strategies and to build upon existing processes that have the potential to become restorative in approach and outcome. As well, these professional and community members must be encouraged to develop a personal sense of ownership over the new programmes. Proper planning of such initiatives usually includes careful preparation of every step of their implementation process and the development of a strategy for their monitoring and evaluation.

4.2 Programme design and implementation planning

For the sake of simplicity, this handbook is focussed on individual programmes. However, one should acknowledge that implementing restorative justice within any given context is not simply a matter of creating a new self-contained programme. Restorative justice can inform every aspect of the criminal justice process and, when appropriate, build upon traditional practices.

At the programme design stage, proper and extensive consultations are crucial. They can help all stakeholders develop a sense of ownership over the new programmes and will ensure the legitimacy of proposed new approaches in the eyes of the victims, the offenders, and all other important stakeholders. The design phase involves a number of basic choices that are better made on a consensus basis informed by up-to-date information on best practices. These choices cannot be described here in any detail, but they include the following:

- Type of programme and model (including decisions about the appropriate setting, the types and levels of intervention, the relationship between the programme and the criminal justice system, etc.). In many instances, this may require an assessment of community needs, strengths and challenges.
- The organization and location of the programme.
- Defining the outcome/agreement that will be sought through the process and how compliance with that agreement will be monitored.
- Setting priorities.
- Securing the commitment of partners and stakeholders to refer cases to the programme and determining the eligibility criteria for cases.
- Determining the assessment method or process that will be used to determine case eligibility for the programme.
- Providing the programme with a sound governance structure and adequate leadership.
- Planning for the effective management of the programme.
- Costs forecasting, budgeting and addressing programme sustainability issues. This includes anticipating cost-effectiveness questions.
- The recruitment, training and role of volunteers.
- Recruitment and training of facilitators and other personnel.

Other manuals and tools are also available to facilitate the development and implementation of restorative justice programmes in different contexts.²⁸

Choice of a model: The choice of an appropriate programme model is one of the most crucial decisions that will be made when designing a new initiative. That decision should of course be informed by best practices in the field, but it must also remain conscious of the parameters and contingencies (legal, financial, cultural, public attitude, etc.) within which the programme is expected to operate. Broad consultation at that stage, on the basis of good information on programming options and their implications, is usually an excellent place to start. In many countries, this can also be part of the implementation of a national strategy (with its own sense of direction) based on national consultations.²⁹ Identifying the needs and struggles of the community is usually also a necessary step. Finally, it is important to note that the most essential features of a new programme will be flexibility and creativity. It is therefore important to include in the programme design the ability to adapt to changing needs and circumstances and to learn from its own experience. The differences between community mediation, family-group conferencing or community-based processes may thus become progressively obscured.

Defining the outcome/agreement to be attained: Some of the outcomes of the restorative justice processes can include: apologies; verbal and/or written agreements/undertakings; promises about future behaviour; restitution/compensation; or community service. However, defining the outcomes that will be sought through the restorative process is a lot more complicated than choosing a few from the above list. It also involves defining how these agreements will be monitored, whether they will be judicially sanctioned or not, and if so, how the judicial supervision of the agreement will take place and what compliance monitoring mechanisms will need to be established and which agency will be responsible for them. It also means developing agreed upon procedures about what will happen in cases where there is a failure to implement the agreement and who will be responsible for taking action, notifying the victim and the community and ensuring the referring agency is made aware of the situation.

A distinction is sometimes made between deep versus surface approaches to resolving disputes. In every restorative justice programme, managers and practitioners have a critical choice between taking a deep approach or a surface approach to the way their processes and meetings are run. While the surface approach is focused on reaching tangible agreements and certain fairly specific outcomes, the broader objectives of restorative justice would include closure, reconciliation, and healing which would normally dictate a deeper approach and require a genuine empowerment of the primary participants.³⁰

²⁸ See: Aertsen *et al.*, 2004; Linden and Clairmont, 1998; and, Sharpe, 1998.

²⁹ For example: Great Britain: Home Office, 2003; and Thailand: Kittayarak, 2005.

³⁰ Barton, 2000.

Organization and location of the programme: Theoretically, a programme can be located anywhere within or outside the system. That decision often depends largely on which agency is prepared to accept a leadership role, availability of resources, strength of existing partnerships and relations with the community or political support. Decisions about the type of restorative process that will be offered by a programme and about the location of the latter are closely related.

There are two general approaches, one of which is to situate the programme within the justice system, i.e. an “embedded programme” and the other which favours a “stand alone” type of programme that takes referrals from the system and/or from the community. There are strengths and potential limitations to each model. A “stand-alone” programme may have difficulty establishing its legitimacy and getting referrals from the justice system; a programme that is embedded in the system may run the risk of being “co-opted” and having its restorative justice orientation diluted for administrative expediency. On the one hand, it seems that certain groups may be suspicious of programmes that are operated by the justice system and may thus choose not to participate. On the other hand, it is also clear that other groups will see the programme’s close links with the police or the courts as a guarantee of legitimacy and a source of protection. In fact, it would seem that the particular perspective depends on the nature of the relations between these agencies and the community and their relative credibility in the eyes of the community. Before choosing one approach over another, one ought to consider the nature of these relations and how they are likely to affect the future success of the programme.

The advantages and disadvantages of each option must be reviewed carefully in each situation and in relation to what is known about what is most likely to ensure the success of the programme and the development of the strong inter-agency partnerships that will be required. In most instances, it will be necessary to pay attention to giving the programme a governance structure capable of fostering a broad sense of ownership among all stakeholders. It is usually a good idea to include the creation of an advisory (or supervisory) committee, with participation of members of civil society groups and criminal justice officials, that can provide guidance for the programme, regularly review the progress in implementing it, identify emerging issues and provide effective liaison with the various agencies involved.

Target cases: A programme can never be “all things to all people”. Designing a new programme essentially involves making choices, preferably in consultation with all main stakeholders. Programmes should be designed in a manner that clearly specifies the types of cases it will target and how the intervention may vary depending on the cases selected. This is important for every aspect of designing a new programme, but in particular for developing appropriate referral mechanisms, planning the intervention, and training the professionals involved. Legal classifications of

offences are not necessarily the only basis upon which the appropriateness of a particular case for a restorative justice process is determined. It is often the case that new programmes must take an incremental approach and start with a smaller subset of eligible cases and build on that basis as the programme evolves and gets stronger.

On the issue of whether to target serious crimes, there is often a tendency to target problems or cases involving less serious offences or first-time offenders. There may be some good reasons for doing so at first. However, there is little basis for the view that restorative programmes are only appropriate for less serious offences or first-time offenders. In fact, restorative approaches may be too intensive and pointless in cases of victimless crimes for which other approaches can be used.

One should also keep in mind that the use of restorative justice for certain types of offences is more controversial than for others. What is most controversial in a given context depends on a number of factors, including the characteristics of the community, the cultural context or the nature of the programme. The use of restorative justice in cases of domestic violence and sexual assault, for instance, is often controversial. Some advocates of restorative justice see it as appropriate, subject to carefully thought out practices and safeguards, for all types of offences and advocate the extension of restorative justice programmes to domestic violence and sexual assaults. Others, including some women's organizations, have expressed concerns that a restorative approach may re-victimize women victims and not provide adequate denunciation of the offending behaviour.

Some programmes exist which include these types of offences in their interventions. In Austria, for example, domestic violence cases can be referred to mediation and provision is made to ensure that a male/female pair of mediators who have received special training always conducts the mediation.³¹ A new programme was also recently introduced in Thailand. The Husband Rehabilitation Clinic involves a restorative and a treatment (anger-management programme) component as well as supervision by the Department of Probation and the Bangkok Metropolitan Police Bureau.³² However, several commentators urge caution or are opposed to the extension of restorative justice processes to offences of violence against women, citing an absence of adequate safeguards and risks to the safety of victims.³³

Priority setting: Successful programmes soon have to face the issue of prioritization in the delivery of services. It is not always possible to plan on the basis of offering full mediation services to all those who might opt for them. However, it can be difficult to justify presenting some victims with

³¹ See: Aertsen et al., (2004), p. 21.

³² Kittayarak, 2005.

³³ See: Stubbs, 2004.

the opportunity and to exclude others merely on the basis of the characteristics of the offenders.³⁴ Clearly, one of the criteria that should influence priority setting should be the degree of importance that the process has for the victims, even if one must still remain careful that this principle is not applied in a manner that discriminates against certain offenders. These choices also have implications for every other aspect of programme design and operations (e.g., programme costs, cost-effectiveness, ability to generate public support, ability to generate sufficient referrals, etc.).

Standards for a programme (and in some cases national standards) are required to guide referral and case acceptance decisions to ensure both economy and effectiveness. The resources of each programme are necessarily limited as are those of other agencies involved in the process. Standards setting policies and prioritization guidelines should be based, as far as possible, on empirical information about the demand and potential demand for services, the resources required for various tasks and for each type of case.

Some services may deal with prioritization issues by developing fast-track and intensive programmes to meet the needs of the lower and higher priority cases. Other services may decide to offer different levels of services to different types of cases. In all instances, clear policies and guidelines to facilitate decision-making by the programme personnel and referral agencies will be important.³⁵ The priorities that will be established by a service should also be discussed, and where feasible, negotiated with the referral agencies. When the prioritization of cases does require assessing each different case in relation to a set of standards, adequate training should be offered to all the professionals involved both within the programme and in the referral agencies. The impact of these standards on the caseload of the programme and on its ability to achieve its objectives should be monitored carefully.

Securing the commitment of partners and stakeholders: When the roles of the various programme partners are not spelled out by legislation or policies, it will be important to specify and secure a commitment from all stakeholders. When possible, it is desirable to develop inter-agency protocols and formal agreements (e.g. on matters such as governance, programme policy setting, public communication, case referrals, joint training, cost-sharing, information flow, data sharing, protection of privacy and confidentiality of information, dispute resolution among partners, governance of the programme, etc.).

Governance structure: A solid and resilient programme is usually one with a clear and manageable governance structure that meets the concerns and requirements of all partners (including the community) and

³⁴ Marshall, 1999, p. 25.

³⁵ Marshall, 1999, p. 25.

Funding for community-based processes

A judge who was involved in developing the practice highlighted as follows the need for adequate funding for community-based processes:

“When I shifted to supporting community-led processes, I expected these processes to be carried fully on the backs of volunteers. Mistake. Community processes need funding, training, and staff to be effective. While volunteers must lead the process, they cannot take on all the responsibilities that come with the work of circles. If volunteers are to step up and assume significant responsibility, they need staff, resources, and training. Without this support, they’re reduced to glorified gofers for justice professionals. Moreover, the support must be significant: otherwise circles and other similar community initiatives are set up to fail.”

Basic skills of facilitators

- Case management and general organizational skills
- Leadership skills (particularly when the community is involved in the process)
- Knowledge of services and support networks available to victims and offenders
- Ability to maintain good working relationships with law enforcement and criminal justice officials
- Ability to communicate effectively with representatives of the media

funding providers. It should be a governance structure that clearly delineates the responsibility and accountability of all participants. These would include the responsibility for: (a) daily operations of the programme; (b) recruitment, training and supervision of administrators, personnel and professional facilitators; (c) financial management and budgeting; (d) setting programme directions and priorities; (e) determining operating policies; (f) securing adequate and stable funding; (g) communication with the media and community relations; and, (h) performance monitoring and evaluation.

Management of the programme: Once a good governance structure is in place a number of policies should be set in place, again in collaboration and consultation with partners and major stakeholders, including operational policies and procedures on information management and data privacy protection, case referral procedures and processes, case management, professional development, public relations, programme performance, and programme evaluation and monitoring.

Costs forecasting, budgeting and funding: There are inevitable costs associated with any organizational change or new programme, even when they are implemented in order to achieve economy or maximize cost-effectiveness. Cost-effective approaches are not usually cost-free. Programme design should include a realistic assessment of the costs involved (e.g. by types of tasks or projected number of cases that will be handled in a set period of time). In the case of independent agencies, developing a proper business plan for the programme is usually the basis for good relationships with stakeholders and funding agencies. The working assumptions upon which a programme is designed and the estimated costs should be spelled out clearly and any factor that may affect these costs in the future should be identified. When possible, the development of resource management and utilization policies, adequate cost accounting and monitoring mechanisms, and performance indicators will all help put the programme on a sound financial footing.

The facilitators: The *Basic Principles* insists that facilitators should receive training to ensure they have the expertise to carry out their role and, where required, should have an understanding of the local culture and communities. It is desirable that a structure and process be established for certifying facilitators and to put in place a system for regulating mediators who are involved in restorative justice programmes.

It is often said that facilitators or mediators, together with programme managers, can either make or break a programme. So much of the success of the process depends on their skills and their commitment to the programme. Their recruitment and training therefore becomes an essential component of the each new programme and remains a concern throughout the existence of the programme.

There are obviously questions about recruitment of facilitators (volunteers or professionals) that are by no means trivial, but are better addressed on a case-by-case basis. Some programmes are able to use the services of professionally trained and/or accredited professionals who offer their services to facilitate a given process. This has the advantage of allowing a programme with few cases to have access to trained professional without having to employ them on a full time basis. Professional associations or government agencies can create a roster of available facilitators and mediators, sometimes with reference to an accreditation scheme.

Each programme should carefully identify the skills it needs to see in its facilitators/mediators and integrate that information in its recruitment and training activities.³⁶

The *Basic Principles* (para. 19) emphasizes that facilitators should “possess a good understanding of local cultures and communities and, where appropriate, receive initial training before taking up facilitation duties”. Facilitators and programme administrators must also take every step possible to reduce the likelihood of bias and discrimination in their interactions with offenders, victims and members of the community from different cultural or ethnic background. As a means to increase positive interactions, programmes should consider offering cultural skills training for restorative justice practitioners.³⁷ Facilitators can be trained to identify whether participants would like particular cultural practices or needs to be accommodated within the restorative justice process. They should also be trained to work in situations where the participants are not all of the same cultural background. Some of the means and strategies available to facilitators include: seeking advice from cultural advisers or elders; working with facilitators of the same ethnicity as the participants; using an interpreter; holding meetings in a culturally significant venue; ensuring that participants are aware of cultural differences and how these may or may not be accommodated.³⁸

Victim-sensitive training should also be offered to all facilitators³⁹ and criminal justice and other practitioners involved in restorative justice programmes should also receive training on how to handle sensitive and complex cases. These skills are particularly required in cases where a risk assessment has determined that there is the potential for further harm to the victim during or outside of the restorative process. The need is

³⁶ In a manual entitled *Best Practice Guidance for Restorative Practitioners and Their Case Supervisors and Line Managers*, the Training and Accreditation Policy Group in the UK (2004) identified a number of core competencies for criminal justice personnel involved in restorative interventions.

³⁷ Umbreit and Coates, 2000, p. 13.

³⁸ See: New Zealand Ministry of Justice, *Restorative Justice in New Zealand: Best Practice*. <http://justice.govt.nz/restorative-justice/partb.html>

³⁹ See, for example, the recommendations for training included in the *Guidelines for Victim-Sensitive Victim-Offender Mediation* published by the US Department of Justice, Office for Victims of Crime: Umbreit and Greenwood, 2000.

particularly critical for those persons who are involved in facilitating and mediating cases involving women and children who have been victims of abuse. Mediator training should emphasize the safety of women and children, and an understanding of systemic gender discrimination and power imbalance.

Despite the proliferation of restorative justice programmes, relatively little attention has been given to the issue of accreditation or certification of facilitators and mediators. There is a need in many countries for an agreed way of ensuring occupational proficiency in restorative justice, and a set of agreed upon standards for restorative justice practice and a shared framework for quality control and accountability. Legal mechanisms may also be required to assure mediator accountability, including an accessible grievance process, and a discipline process with consequences. An agreed approach for accreditation can also serve to raise standards by encouraging more practitioners to seek accreditation and meet its training prerequisites

Use of volunteers: There are clearly some great advantages to involving community volunteers, sometimes in collaboration with professionals, in the delivery of the programme. Efforts should be made to ensure that volunteers are recruited from all segments of the community, with appropriate gender, cultural and ethnic balance. Their presence will help forge deeper links between the community and the justice system. In Thailand, for example, members of the community are recruited as volunteer probation officers who can also act as facilitator of a restorative justice process.

The use of volunteers can also enable community members to develop skill sets and to assume a major role in the response to crime and social disorder in their community as well as to facilitate problem solving and offender and victim reintegration.⁴⁰ Volunteers can also be used as trainers and as facilitators. For example, in Lambeth (in South London), an outside trainer provided the first training course for volunteer mediators and volunteers who had gained practical experience with the programme organized subsequent training courses.

One should also note that many new programmes are developed and funded on the basis of an assumption that the community will get involved and provide a great share of the resources required, mostly in the form of volunteers. That assumption needs to be verified carefully. Not all communities have excess resources to devote to new programmes or to build restorative practices into existing into existing community-based justice processes. The prevailing local attitudes towards volunteering in general or volunteering within the criminal justice system can be very different from one community to the next or from one culture to another.

³⁹ Judge Barry Stuart, cited in Pranis, Stuart, and Wedge, 2003, p. 252.

The receptivity of the local criminal justice system to the idea of working closely with volunteers may not necessarily be at its highest. Finally, a restorative programme cannot function without having secured the necessary resources to support its volunteers. In brief, even community-based programmes relying heavily on volunteers need resources.

The role of volunteers needs to be carefully defined and explained to all concerned and a good screening process must be in place at the time of recruitment. Clear criteria for the recruitment of volunteers should be articulated and made known. Finally, the recruitment must not allow a certain segment of the community to take over the programme or to create a perception that the programme is controlled by it. The selection and training of facilitators and mediators for restorative justice programmes is a pre-requisite for protecting the rights of the victims and the offenders and for maintaining the integrity of the restorative process. The *Basic Principles* (para. 18 and 19) stresses that facilitators must perform their duties in an impartial manner, with due respect to the dignity of the parties and should make every effort to reach an agreement that addresses the interests of the victim, the offender, the justice system, and the community.

4.3 Addressing the need for legislation

There is considerable variation worldwide in the legal status of restorative justice processes, with some programmes enshrined in law and others having no formal legal status. It should be noted that countless programmes have been successfully established without any new legislation. Examples of the latter include the peace committees in Pakistan, and the *sulha* peacemaking process in the Middle East and the community-based mediation programmes in Guatemala.⁴¹ South Africa began restorative justice programmes without any specific legislation to empower such work. Diversion, whilst not provided for in law, was achieved through prosecutorial discretion. Programmes have been developed and run through a partnership between the prosecuting authority and non-governmental organizations. The law on sentencing already allowed postponed, suspended and community based sentences and the space created by these have allowed for restorative justice sentencing.

On the other hand, when the initiative aims to radically transform how the system responds to certain categories of offenders (e.g. young offenders) or certain types of offences and to introduce alternative responses (e.g. diversion, restorative programmes, etc.), it is usually the case that a new legal framework is required. Sometimes, legislation will add to the perceived legitimacy of a programme.⁴²

⁴¹ See: Jabbour, 1996; Parker, 2004, and Van Ness, 2005.

⁴² Fellegi, 2003, pp. 74-76.

The need for legislation to provide a framework for restorative justice programmes has been summarized as follows:

“But when restorative justice programmes are developing in a given country, one feels the need for some regulation. This regulation does not necessarily take the form of a formal law. Mediation practice is also directed by decrees, ministerial circulars and—probably the most common method—by good practice standards drawn by mediators and their organizations. Moreover, the formal regulation of mediation is not exclusively the realm of criminal law, mediation programmes can also be regulated by administrative authorities and regional governments. But since mediation concerns criminal offences, one should not neglect its relation to criminal law and criminal justice. This type of mediation—in a broad sense—is part of criminal procedure. Therefore, victim-offender mediation and other restorative justice programmes should be recognised (and supervised) by official bodies. Before, during and after the process of mediation, legal protection and safeguards should be available”.⁴³

Restorative justice programmes generally operate within the context of or alongside the larger criminal justice system. As such, these programmes must negotiate a substantive role in, or as an alternative to, the formal justice system or otherwise risk being marginalized and underutilized. In the absence of statutory requirements, it may be difficult for a restorative justice programme to insert itself into the daily routine of the criminal justice system. Legislation may be useful in providing the impetus for a more frequent use of the restorative justice process. It can also be used to promote predictability and certainty in the use of the restorative process as well as to establish all of the necessary legal safeguards.⁴⁴

Paragraph 12 of the *Basic Principles* contains a reminder that legislative action may also be necessary, depending on the legal context, in order to set some standards and provide some mandatory legal safeguards for participants.

4.4 Legislative provisions

Clearly worded legislation and policy statements can mandate, give preference to, or make certain funding contingent on the use of restorative practices. For example, a prominent feature of the federal *Canadian Youth Criminal Justice Act* is that it directs that all means should be explored in an attempt to reduce the number of youth being sent to custody.

⁴³ Aertsen et al., 2004, p. 46 ; see also Fellegi, 2003, p. 74.

⁴⁴ Groenhuijsen, 2000.

In some instances, legislative amendments may be required to establish a discretionary authority for justice officials to divert cases away from the normal justice process or to refer them to a participatory, restorative justice process. Many innovative and promising programmes fail to meet their objectives because of a lack of sufficient case referrals by criminal justice officials. It is clear that the proper use of discretionary decision-making by law enforcement and justice officials at all levels is crucial to the success of most programmes. The proper use of discretionary authority has to be facilitated and guided, often by legislation. In many criminal justice systems, law enforcement and criminal justice officials already have sufficient discretionary powers within the existing legal framework to refer cases to an alternative process or to establish such a process. In other instances, it may be necessary to establish that authority and to provide an accountability framework. In all cases, it is important that the decision-making process concerning referrals to alternative programmes be as transparent as possible and monitored. An accountability framework, sometimes grounded in legislation or in official procedures and policies, is usually required in order to ensure that discretionary powers are not abused and do not become either a source of unacceptable discrimination or a temptation for corruption.

The legislative framework providing for the use of restorative justice may enable that use, require that it be considered, or make it mandatory. Where it is enabling restorative justice programmes (Australia, Belgium, Chile, Colombia, Finland, France, Ghana, The Netherlands, the Philippines, Russian Federation, Uganda), the law gives criminal justice personnel (most often the police and prosecutors) the discretion to divert certain offenders, under certain clearly defined conditions, from the conventional justice system to a restorative programme. When the law requires that a restorative justice measure be considered (Austria, Czech Republic, Denmark, Germany, Norway, Portugal, Slovenia), criminal justice personnel are required to consider the potential for diverting an offender to a restorative justice programme.⁴⁵ There is one notable example of a mandatory use imposed by the law, in New Zealand, where the police or prosecutor are required to refer young offenders to mediation or to another diversion-type programme. The Justice (Northern Ireland) Act, 2002, provides that, save for certain specified exclusions, children are to be diverted to Family Group Conferences. The plans agreed upon at the FGC are to be approved by the court.

It has been suggested that there are a number of questions that policy makers should consider prior to developing legislation on restorative justice.⁴⁶ These include asking whether legislation is required in order to:

⁴⁵ Miers, 2001, p. 78.

⁴⁶ Van Ness, 2005.

- eliminate or reduce legal barriers to the use of restorative justice programmes (including, when necessary, establishing the discretionary decision-making authority of law enforcement and other justice officials)
- create legal inducement for using restorative programmes
- provide guidance and structure for restorative justice programmes
- ensure protection of the rights of offenders and victims participating in restorative programmes
- set out guiding principles and mechanisms for monitoring adherence to those principles

Depending on the legal system, a law may be required to provide judicial control procedures to evaluate the mediation process and its outcome in light of certain legal principles such as, for example, equality, proportionality, and no double-jeopardy (a person cannot be prosecuted twice for the same offence).⁴⁷ The right to appeal decisions/agreements not consented to freely or otherwise the result of a poorly managed process should exist in law. The right to resort back to the normal criminal justice process when one of the parties is no longer able to consent to the restorative process or wishes to withdraw from it should be assured. This may or may not foreclose further options which may be restorative in nature.

In some countries, a legislated mandate for new programmes is required in order to engage government funding and to ensure that sufficient funding is provided to sustain restorative programmes.

Jurisdictions may also supplement the legal authority for restorative processes with various types of policy that encourage the use of restorative approaches and set out the procedures for how this is to be accomplished.

Legislation and policy on the use of restorative processes generally include provisions for both juvenile and adult offenders, although in most jurisdictions the provisions for juvenile offenders are more extensively developed.

4.5 Leadership, organization and programme structure

The development and implementation of effective restorative justice programmes requires effective leadership and a strong management team. As well, there must be a cadre of professionals in the criminal justice system and key individuals in NGOs and the community who can be tasked with developing and implementing the agreements, sustaining the partnerships,

⁴⁷ Aertsen, et al., 2004, p. 47.

and assuming responsibility for the ongoing operation of restorative justice programmes. Every level of the organization must be clear about the objectives.

Leadership is required to help criminal justice personnel and stakeholder groups within the community alter their perceptions of “justice” and how justice is best achieved. This requires thinking “beyond the box” and extending the range of the justice system’s response beyond the reactive, adversarial and retributive approaches to include such notions as healing, forgiveness and reintegration. Similarly, for community members, restorative practices can be viewed as even more effective than traditional adversarial approaches in holding offenders accountable for their actions and providing an opportunity for crime victims, and the community, to be directly involved in the process. The community can be educated to understand how some well guided participatory and restorative justice processes may help to build its strength while developing its ability to resolve various conflict issues. As well, restorative justice processes can strengthen competencies and enhance important skills among community members.

The challenges of creating the conditions within an organization to facilitate the introduction of restorative processes should not be underestimated. Changes are required in the structure and culture of criminal justice organizations to create a supportive environment for restorative justice practices. This includes the provision for police officers to engage in restorative problem solving and to focus on peacemaking and conflict resolution, rather than merely order maintenance and law enforcement. For judges, it means being authorized to explore the development of alternative forums for dispute resolution. A corresponding change is required in organizational values, including a focus on peacemaking, conflict resolution and community building. This, in turn, requires that criminal justice agencies and personnel engage in a consultative process with all stakeholders in the community, e.g. the private sector, non-governmental organizations, interest groups, to determine the most appropriate programmes and processes.

4.6 Securing the support of criminal justice agencies

It is important to recognize that new restorative justice programmes and changes to existing programmes require a communication strategy. The aim is to effectively promote restorative justice approaches to both criminal justice professionals and the community. This communication strategy can be initiated from a number of sources, including the government and NGOs.

Mobilizing and sustaining government interest and support

While restorative justice processes represent, variously, an alternative approach to addressing criminal behaviour and social conflict and may include extensive community involvement, governments must provide the legislative and policy framework within which these initiatives can be developed, implemented, and sustained.

This requires that senior government officials themselves be educated on the principles and practice of restorative justice and understand the issues, and challenges, associated with the use of restorative processes. This is particularly important as the professional training of senior criminal justice managers often does not include exposure to the theory and practice of restorative justice.

Funding for restorative justice programmes may be provided by a number of sources, including the central government, local government, and charities.

The incorporation of participatory processes in the justice system can easily be perceived as a challenge to the status quo. One should avoid making the mistake of underestimating the resilience of the status quo, the system's own force of inertia or the active and passive resistance that the proposed changes are likely to face. The proposed changes, if successfully implemented, will necessarily affect spheres of professional influence and spans of power and control, or encroach on various people's "turf". Measures that are essentially meant to empower victims and the community are likely to be initially perceived by justice professionals as threatening. At first and unless such perceptions are managed effectively, the adoption of participatory justice approaches is bound to be interpreted by many as a zero-sum game, one in which they must lose some of their power for others to be empowered.

Criminal justice personnel must be trained in the principles and practice of restorative justice. Notions of forgiveness and healing, for example, may be relatively foreign to members of the judiciary trained in legal procedures and substantive law. Police officers may be reluctant to refer cases to a restorative justice programme due to a lack of information about restorative principles and practice generally and, in particular, the specific restorative programme being implemented. If police are not educated about restorative justice they cannot inform victims about the benefits of participating in a restorative justice process. Probation supervision personnel and other front-line workers should be encouraged to utilize restorative approaches in carrying out their work. This may require them to acquire new skills.

Criminal justice practitioners and community volunteers involved in a programme require effective training on the techniques and skills that they will need in order to feel confident participating in the new processes. An additional strategy that can be utilized to overcome the reservations of criminal justice professionals as to the value of restorative practices is to convince them to participate in a restorative process. On this personal level, reportedly sceptical senior police executives, prosecutors and judges may soon become zealous advocates. On the other hand, one issue that occurs is that organizations may "symbolically" adopt restorative justice processes by labelling current practices as "restorative", thus avoiding the required changes in policy and orientation that are required by true restorative justice practices.

It is also important to identify and recruit allies who will actively support the proposed changes. It is equally important to identify individuals in key positions in the justice system who are amenable to adopting participatory and restorative approaches and championing them. Key stakeholders must themselves get involved in planning and implementing the changes to existing processes at an early stage of programme development. Prosecutors, for example, are in a key position to refer cases to new

programmes and should receive particular attention. It should be recognized that justice personnel will be taking some risks in order to support a new restorative justice initiative and may not all be amenable to assuming those risks.

Finally, it is also important for persons involved in developing and implementing restorative justice programmes, be they from within or outside the justice system, to build networks of support in the community, the private sector, among NGOs, the churches and other civil society organizations, as well as in the justice system. This will assist in ensuring the long-term viability and sustainability of the new programmes.

4.7 Mobilizing the community

Community participation and community building are two of the intended overarching goals of restorative justice. Although it is possible to set out the basic principles of restorative justice and to identify the requirements for establishing, operating, and sustaining restorative justice programmes, the specific form that restorative practices will take will necessarily depend upon the specific environment (cultural, social, political) in which the criminal justice system operates.

It has been observed that the question always arises of “who and what is the community?” Bazemore and Umbreit have observed that “the way community is defined and involved in restorative conferencing models is a critical factor affecting the nature and extent of citizen participation and ownership”.⁴⁸ As well, it has been noted that, in many approaches to community in restorative justice, there is a “romanticized and moralized view of community that may prove problematic in practice”.⁴⁹ However, in many contexts, the question of “who and what” is the community is not an issue, as individual clearly understand what comprises their community.

To a certain extent, the concept of community is open to definition and must be approached very cautiously. Community mobilization starts with an identification of those individuals and groups who are affected by conflicts and who in the community is in a position to participate in resolving them. An understanding of the needs of the community as well as its assets will provide an important foundation component to this process. In some cases, it may lead to the realization that the communities most in need of healing are also those least able to successfully mobilize themselves and to participate fully in community-based restorative processes.⁵⁰

Mobilizing and sustaining the involvement and support of criminal justice personnel

The potential benefits of restorative justice approaches are enhanced appreciably when there is an understanding of the principles and practice of restorative justice among people working in that organization.

Soliciting and securing their support requires the development of a communication strategy that includes the use of media, presentations to various stakeholder groups in the community, a training curriculum, “team” meetings of justice and community-based personnel who are involved in the restorative initiative, and a mechanism for receiving continual feedback on the operation of the restorative process. These strategies must be components of an overall plan for sustaining the momentum to support restorative processes; in the absence of these strategies and a periodic renewal of the initiative, the effectiveness of the restorative processes will be compromised.

Criminal justice managers who set out to implement restorative programmes can expect to encounter both active and passive resistance to their efforts. They must therefore develop ways to take into account and accommodate concerns without compromising the integrity of restorative justice partnerships, agreements and processes.

⁴⁸ Bazemore and Umbreit, 1999, p. 8.

⁴⁹ Dickson-Gilmore and LaPrairie 2005, p. 10.

⁵⁰ Dickson-Gilmore and LaPrairie 2005, p. 10 and ff.

A number of restorative justice practices provide the opportunity for a transformation in the relationship between the government/criminal justice system and the community. The community assumes an active role in responding to issues of crime and conflict and, in so doing, the problem solving and informal social control capacities as well as the social cohesion of that community are strengthened. However, it cannot always be assumed that restorative justice practices will necessarily have a healing and transformative effect, irrespective of the situation in which a community finds itself. In some instances, existing social tensions, inequities and inequalities, power differentials and various forms of exclusion, discrimination or ostracism may possibly be exacerbated rather than alleviated by introducing a participatory justice programme. At the very least this possibility should be taken into account in designing and implementing a new programme.

There are a number of issues to be considered in order to fully involve the community in restorative justice practices. They include:

- What are the power hierarchies and dynamics in the community that may affect which members of the community become involved and their impact on the restorative process?
- What guidelines will define who should be included in the restorative process?
- What strategies can be utilized to mobilize community support and sustain the involvement of community residents in restorative justice programmes as mediators, facilitators and mentors?
- What strategies can be developed to minimize any potentially negative impacts of community involvement in restorative justice initiatives?
- What training and skills are required so that community residents can participate in restorative justice programmes?
- To what extent are community residents who do not have specialized training able to participate in restorative justice processes?
- What existing structures and processes can provide the basis for restorative justice programmes?

In some restorative justice programmes, citizen involvement in problem solving can also be promoted by assigning responsibilities to some participants to serve as a support for an offender or a victim, or to provide a job or service opportunity for the offender.

5. The dynamics of restorative justice interventions



5.1 Participants in the restorative process

There certainly are many differences in the situation and motivation of the various participants in the restorative justice process. Restorative justice approaches provide for different levels of participation and this must be factored into the design of new programmes or existing traditional practices whose restorative elements can be enhanced and strengthened. The following diagram illustrates the relationship between the key stakeholders and many restorative justice approaches.

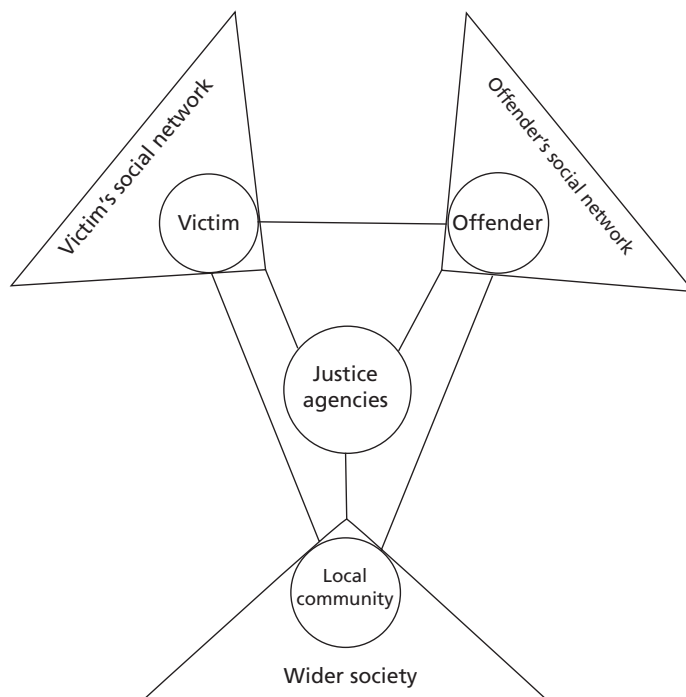
The following discussion examines the role of key participants in a restorative justice programme. Note that some of the participants discussed below may not be relevant or present, depending upon the specific model of restorative justice and or the specific context within which the programme is operating. All participants need to be informed of their role in the process, as well as the role of all other participants.

5.1.1 Crime victims

In all restorative justice processes, it is important to protect the interests of the victim and to ensure that re-victimization does not occur. This may require that a considerable amount of preparatory work be undertaken with the victim prior to any encounter with the offender. This may take weeks, months, or, in the case of very serious offences that have resulted in the incarceration of the offender, years. This pre-meeting preparation is

designed to ensure that the victim is emotionally and psychologically prepared to engage in a dialogue with the offender. The *Basic Principles* (para. 8) states that restorative justice processes should be used only with the free and voluntary consent of the victim and further, that the victim should be able to withdraw such consent at any time during the process.

The relationships of restorative justice⁵¹



Some cases involving very serious offences are highly sensitive and require extensive preparations prior to a face-to-face encounter. It is at that stage that the risks of re-victimization are, perhaps, the highest. In some recorded cases, preparations for a restorative session between the offender and the victim extended over a period of several years.

Consideration must be given to supporting victims, both during and after the process. Victims must be allowed to tell their story. This may require that victims speak first in any forum in order to avoid an imbalanced focus on the offender's issues that may result in the victim withdrawing from the discussion or challenging the offender. In circle sentencing, for example, the telling of the victim's story is viewed as important, not only for the victim, the offender and their supporters, but also for the community as a

⁵¹ Source: Marshall, 1999, p. 5.

whole. Alternatively, a victim or a relative may speak on behalf of the victim. Where possible, victims should be accompanied by, and have ongoing support from, family members and friends, and, where available, victim support agencies.

One should remember that many crimes do not have an individual victim and that others are committed against legal persons (e.g. a firm or company, a school). Sometimes it may be possible to find a person who can represent the organization or the legal person for the purposes of the restorative process. This is often referred to as a “surrogate” victim. Victims may also include the survivors of a homicide victim.

As well, it must be acknowledged that some victims may not, for a variety of reasons, want to participate in a restorative process. And, it is important that the victims not be coerced into participating in the restorative justice process and that they be informed of their right to legal advice, when available, and to withdraw from the process at any time.

In cases involving child-victims particular care must be taken to protect them and ensure that their consent is truly voluntary. In some restorative process involving child victims, or other vulnerable groups (e.g. illegal immigrants, or a mentally challenged individuals), legal counsel is provided to the victim with the express purpose of ensuring that they fully understand the process that they are invited to participate in, that their consent is informed and given freely, and that they are aware that they are free to withdraw from the process at any given point in time.

5.1.2 Offenders

Many observers argue that, in the conventional criminal justice system, offenders are not required to confront the full consequences of their decisions and their actions. In many systems, an offender can be processed through the entire justice system, from arrest, detention, trial, sentencing, and perhaps incarceration, without speaking more than a few sentences. The *Basic Principles* (para. 7) recommends that restorative processes should only be used where there is sufficient evidence to charge the offender and with the free and voluntary consent of the offender, who should be able to withdraw such consent at any time during the process. Offenders also require access to legal advice and/or information.

For the offender the process is far from over with the conclusion of an agreement with other parties. Fulfilling the commitment that he or she has made as part of the agreement is, perhaps, even more important. This second aspect is one which must engage the offenders directly. This is where they must demonstrate that they have accepted responsibility for their conduct and are prepared to be accountable for it in a very real and practical way.

5.1.3 Police

The police role in the restorative process will differ significantly depending on the type of restorative model considered. In some of them, the police have virtually no role to play, in others they can participate fully in the intervention. In some instances, police officers can act as a facilitators or convenors of the process and may even help participants reach decisions and resolutions consistent with community views. Care should be taken to ensure that the role of the police is balanced and that the statutory requirements of their position do not compromise the restorative process. As well, it is important to point out that the police enjoy greater discretionary powers in some jurisdictions than in others.

Viable options for police involvement in restorative programmes include:

- Serving as a referral source to restorative programmes;
- Explaining the restorative justice process to victims, offenders and other participants;
- Participating among many others in a community-based process;
- Facilitating restorative justice processes;
- Conducting restorative justice sessions and conferences;
- Using restorative approaches for resolving disputes and conflict at street level;
- Playing a role in monitoring the execution of restorative agreement and reporting breaches.

Legislation can provide the framework within which the police can become more extensively involved in restorative policing practices, although the specific nature of this involvement has yet to emerge. In Canada, for example, the *Youth Criminal Justice Act* has specifically increased the involvement of the police as front-end referral agents to restorative programmes, and in police-sponsored restorative practices, marks a return to the original role of the police as peacekeepers.

The use of restorative practices by police officers can represent a logical step in community policing and police reform generally. It can, under the right circumstances, contribute to the improvement of police-community relations. This may be particularly important when the police, through their participation in restorative justice programmes, are entering into new relations with minority groups with whom they must interact and whom they must serve and protect. New participatory programmes can encourage a form of direct accountability of the police to the community they purport to serve. Police forces can apply the principles of restorative justice to develop sustainable collaborative partnerships with the community and thereby increase the effectiveness and efficiency of their efforts to prevent and respond to crime and social disorder.

Within the framework of community policing, police officers can also utilize a variety of restorative practices outside a programmatic framework. For example, a police officer can mediate conflicts between youths in school by bringing together the offending parties and their parents for an informal conference. The potential for the use of restorative practices in policing on the street is limited only by the imagination and skill sets of the officers who must be given the discretion by their supervisions to decide how to proceed with such matters. Normally, the police officer still retains the right to take further action should the efforts to resolve the conflict through restorative means prove unsuccessful.

In some jurisdictions, e.g. Thames Valley Police, officers are trained to conduct restorative conferences that may involve the offender and the victim, their family and support persons and, potentially, community residents.

In some situations, police corruption or the lack of public confidence in the police may seriously compromise the ability of the police to participate in restorative justice programmes. Yet, restorative justice can be also used in cases of alleged police misconduct.

5.1.4 Prosecutors

In most jurisdictions, prosecutors play a key role in the operation of restorative justice programmes and, in the absence of legislation or other guidelines, they exercise considerable discretion in determining which cases are suitable for a particular restorative process. A recent review of restorative processes in a number of common law and civil law nations found that public prosecutors were the most common gatekeepers to restorative programmes.⁵² In both common law and civil law countries, prosecutors are able to refer cases to restorative processes, the latter role having more recently emerged with the enactment of legislation in a number of jurisdictions. While the use of restorative processes at the post-charge stage is within the discretionary purview of the prosecutor in common law countries, in civil law countries, referral at this stage has generally remained within the purview of judges. Many jurisdictions now include prosecutor-level referral processes for both juveniles and adults.

In establishing restorative processes in a jurisdiction, it is imperative that prosecutors be involved in discussions from the outset and that training and information be provided to prosecutors so they can both understand the principles of restorative justice and appreciate the potential advantage of the use of this option for juveniles and adults.

⁵² Miers, D., 2001

5.1.5 Defence lawyers

Defence lawyers are a potential source of referrals of offenders to restorative justice programmes. Such referrals can assist in ensuring that the conflicts are addressed in an expeditious manner and can help reduce the backlog of cases scheduled for court appearance. Defence lawyers can play an important role in explaining to offenders the potential benefits of participating in a restorative justice process. They can help ensure that the rights of the offender are protected and that avenues of appeal remain available. They can also play a significant role in cases involving juvenile offenders by ensuring that their consent to participate in a restorative justice process is informed and freely given.

5.1.6 Judiciary

Judges and magistrates also play a critical role in the potential success of restorative justice processes. However, they can be a most challenging group in terms of securing their interest and participation in, and support for, restorative schemes. The legal training of judges and magistrates does not always expose them to the principles and practices of restorative justice. They will welcome further training and the opportunity to participate directly or indirectly in various restorative justice approaches.

The involvement of judges in restorative justice processes varies considerably, depending upon the specific programme considered. In circle sentencing, for example, the judge plays an integral role in the hearing, disposition, and monitoring of the case, while in other instances, such as victim-offender mediation programmes, the judge is only a referral source. In both common law and civil law jurisdictions, members of the judiciary can play a key role in referring cases to a restorative forum, participating themselves in the restorative process, and/or monitoring the agreements that are reached. Even in situations where an offender has entered a guilty plea or has been found guilty of an offence, the judge may suspend the imposition of a sentence pending the outcome of a restorative process. In common law jurisdictions, one way to bring this to their attention is through a pre-sentence report. If, in the view of the judge, an appropriate agreement is reached, then no further action may be taken, or the agreement may be incorporated into the sentence that is imposed on the offender.

5.1.7 Correctional officials

Although restorative justice processes have operated primarily at the pre-charge or post-charge, pre-sentence stages of the criminal justice system, in recent years there has been increasing use of these processes in corrections and throughout the various stages of the execution of the offenders' sentence. Restorative justice process, including victim-offender mediation, can be utilized for offenders who are on probation or

who are under other types of supervision in the community. As well, restorative processes can also be utilized for offenders who are currently in custody in order to provide them an opportunity, when appropriate, to meet with the victim of their crime and/or the victim's family. The use of restorative practices can extend to parole. Parole boards can consider the participation of offenders in a restorative process as a potentially positive factor in making release decisions. Parole officers can facilitate mediations as part of the conditions of parole or refer offenders to a restorative programme. In some countries, the Ministry of Justice adopted a policy to integrate the victims in the management of prisons. In Belgium, this was accomplished by appointing a restorative justice advisor in each prison.

Restorative processes can also be used within correctional institutions to mitigate the more negative attributes of life inside correctional institutions, including providing forums for inmates to resolve their differences peacefully and to create an alternative means of conflict resolution.

5.1.8 Community members

Many restorative justice approaches provide for an expanded role for community members in the resolution of conflict and in constructing agreements to be adhered to by offenders and sometimes also by other parties. It has been noted that “‘community involvement’ can designate very individualistic modes of collaboration or a powerful or national lobby”.⁵³ There is considerable variability in the nature and extent of community involvement in the various restorative justice approaches. For example, in victim-offender mediation (VOM) the community is absent and the process consists of a mediator, the offender and the victim. In circle sentencing, on the other hand, the process is open to all members of a local neighbourhood, village or indigenous group.

Many members of the community are likely at first to view restorative justice processes as more lenient and less effective at preventing crime than the traditional criminal justice system and its reliance on punishment. An innovative programme may be seen to allow the offender to get off “lightly”, particularly when a more serious offence is involved. It is therefore always important to develop materials and design initiatives to educate the community about the principles and practices of restorative justice and the potential role that community members can play.

5.1.9 Facilitators

It is almost impossible to overemphasize the importance of the role of the mediator or facilitator in ensuring the success of restorative justice interventions. The basic skills required of facilitators include:

⁵³ Faget, 2000, p. 43.

- An ability to create an environment in which the parties may have free and safe interactions;
- Communication skills (including special language skills, when members of minority groups speaking a different language are often involved);
- Active listening skills;
- Ability to manage and help people deal with emotional intensity;
- Ability to help parties say and hear difficult things;
- Ability to balance the interests/power of participants;
- Ability to express support and empathy.

5.2 Types of processes in restorative justice programmes

The nature of the interactions between the various participants during the restorative process and the kind of facilitation that is required varies according to the type of programme considered. The box below illustrates the various kinds of dialogue that can take place and be promoted by different programmes as part of the restorative justice process.

5.3 Cautions

Restorative processes are never risk free, neither are they always without failings or difficulties. Some risks and pitfalls with these processes have been identified through experience and evaluation. These include, but certainly are not limited to, the following:

From the perspective of the victims

- There is a danger of burdening the victim with numerous unnecessary, traumatic or intimidating meetings.
- There is a risk, particularly within small communities with close relationships between individuals, that some victims may be pressured into participating in a process with which they do not really agree.
- Difficulties in ensuring the safety of the victim in the restorative process.
- Difficulties in ensuring the confidentiality of the process when necessary.
- Preventing the re-victimization of the victim. There is some evidence to suggest that some victims of crime may experience increased fear of re-victimization after participating in a restorative justice process.

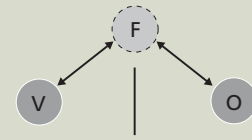
Families of restorative processes⁵⁴

1. Indirect dialogue

Victim and offender interact indirectly (shuttle diplomacy, letters, videos, etc.)

More settlement driven than process driven

Examples: some VOM programmes in Europe; programmes that assist victim and offender dialogue in crimes of severe violence; situations of severe power imbalances where in-person dialogue is not possible

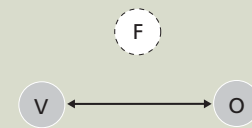


2. Facilitated dialogue between victims and offenders

Dialogue between victims and offenders

Facilitator creates safe environment, prepares parties and writes up agreement

Examples: VOM

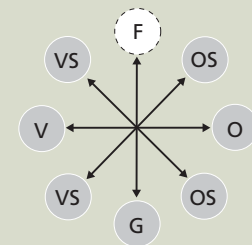


3. Facilitated dialogue between victims, offenders, supporters and government officials

Dialogue expands to include supporters of victim and offender; government officials may also participate

Discussion tends to expand beyond specific incident to underlying issues of victims and offenders

Example: Family group conferencing; community conferencing

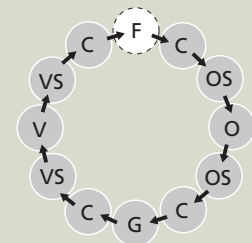


4. Facilitated dialogue between victims, offenders, supporters, government officials and community members

Dialogue expands to include community members (who may or may not know the other parties)

Discussion tends to expand beyond specific incident and underlying victim and/or offender issues to community issues as well

Examples: Some sentencing circles; some peacemaking circles



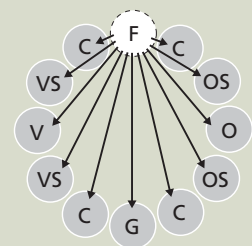
5. Directed dialogue between victims, offenders and other parties

This could take place in any of the three models above, either as a substitute for the methods described or as one of several methods used in a particular process

Victim and offender, at least, are present; any of the others may be as well

The role of the facilitator changes from facilitation to more directive and settlement oriented

Examples: VOM or conferencing if facilitated in a civil mediation fashion; some sentencing circles; some peacemaking circles

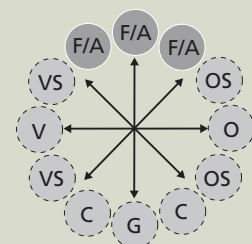


6. Arbitrated dialogue between victims, offenders and other parties

Victim and offender, at least, are present; any of the others may be as well

The facilitator(s) organize conversation among the parties, but in the end the facilitator(s) the decision

Examples: Some reparative boards; some tradition or customary practices of aboriginal groups



- The support extended to the victim may be perceived to be incommensurate with the support offered to the offenders.
- The victims may be concerned about the lack of consequences imposed on offenders who fail to live to their commitment (or terms of the agreement). Victims may also be pressured into failing to reveal that the offender has not complied with the negotiated agreement.

From the perspective of offender

- The potential for the offender to be shamed (e.g. in a non-reintegrative manner).
- Consequences of a failure of the offender to fulfil the negotiated plan (agreement).
- Offenders viewing the restorative process as a “way out” of the justice system.
- Subtle pressure on the offender to participate in a restorative process so as to avoid a harsher sanction in the conventional justice system.
- Potential lack of due process protection and the issue of vengeful/lenient victims

Potential concerns about the restorative meeting itself

- Potential domination of the meeting/process by one or a few participants.
- Potential domination of the meeting by the victim who may place vindictive demands on the offender.
- Inclusion of inappropriate persons in the restorative process
- Manipulation of the meeting by the offender.
- Threatening behaviour by the offender toward other participants.
- Power imbalances. As emphasized in the *Basic Principles*, it is important that restorative processes consider the impact of power imbalances between the victim and the offender that may, potentially, place one of the parties at a disadvantage during the restorative process. Among the disparities that must be considered are cultural differences, age, intellectual capacity, racial, ethnic or cultural factors, or any other attribute that may significantly compromise a person’s ability to participate equally in the restorative justice process. Such power imbalances, as was seen earlier, must be taken into account in referring cases to the restorative justice process.

From the perspective of the system

- Widening the criminal justice net. This refers to the potential for restorative justice to bring persons into the criminal justice system

⁵⁴ Source: Johnson and Van Ness, 2006.

who would otherwise not be involved in the system. Expanding the use of restorative processes, a desirable goal, should not be accomplished by widening the criminal net and increasing the potential for unnecessarily stigmatizing certain individuals. Another concern is often also that the “net widening effect” occurs at the detriment of members of minority groups or vulnerable or disenfranchised individuals.

- Domination of the process by criminal justice professionals and neutralization of the potential benefits of a restorative justice approach.
- Routinization and bureaucratization of restorative processes. This may result in a loss of the capacity to adapt restorative processes to the needs of crime victims, the offenders and the community.
- The referral of inappropriate cases to a restorative programme.
- Insufficient training of persons who play key roles in referring, assessing, and facilitating restorative justice processes be provided with proper training.
- The absence of due process protections and procedural safeguards. There are concerns that the informal nature of many restorative justice processes, including the absence of lawyers and more lax rules of evidence, may result in the violation of the human and civil rights of participants.
- Overstating the potential impact of restorative justice programmes. It is important that, in establishing restorative processes as one component of the criminal justice system’s response to criminal offending, the potential of this approach be assessed realistically, and, more specifically, that expectations are not raised beyond what available resources can deliver.
- Increasing the supervisory load or overall workload of the conventional justice system.
- Failing to contribute to the rehabilitation of the offender.

From the perspective of the community

- In some jurisdictions, there has been tension over the extent to which power sharing with the community should be limited and whether, by involving community residents in the disposition of cases, statutes are being violated.
- The extent to which restorative processes can “restore” or “heal” communities.
- Difficulties in mobilizing and sustaining community involvement in restorative processes.
- Some communities may not have the strength to participate in a restorative process.
- In the wrong context, a restorative programme may exacerbate power imbalances and tensions within the community.

5.4 Addressing potential pitfalls

Those who develop or manage restorative justice programmes make take various measures in order to alleviate some of the above-mentioned concerns and to avoid the obvious potential pitfalls of a restorative process. Generally, programmes have found effective strategies to address these cautions and limitations.

The issue of power imbalances is particularly important in cases of domestic and sexual violence. Facilitators must be very conscious of subtle manipulation and intimidation of the crime victim by the offender prior to, during and following a restorative process. Otherwise, there is a high likelihood of re-victimization. This requires that facilitators receive extensive training, not only on the principles and practice of restorative justice, but also on the dynamics of violence, domination and power. As well, facilitators should be trained in the art of ensuring that the dynamics of the restorative meeting remain positive and non-threatening and that a balance is maintained during the discussions.

In building on the restorative features of traditional justice practices and customary law, specific attention must be given to the rights and interests of vulnerable groups, including women and children.

Potential power imbalances and the likelihood of re-victimization can be reduced through extensive preparatory work by the facilitator prior to the restorative meeting of the victim and the offender. A balance must be maintained at all times between addressing the needs of the offender and those of the victim. And, with programmes such as circle sentencing, the needs of the community, however that notion is defined, are also to be considered.

To manage these and other risks, it is important that specific attention be given to the selection of participants for restorative processes and to the preparation and organization of the meetings. This includes giving attention to the number and identity of persons invited to participate in the session and ensuring the safety of the victim, the offender and other participants.

As well, it is important that personnel involved in facilitating restorative forums involving victims and/or offenders be very cognizant of the great responsibility they are assuming in terms of the emotional and psychological well-being of the participants. Personnel must be trained to recognize signs that participants are experiencing anxiety or stress in the encounter and to be prepared to halt the intervention if need be or refer them to services for assistance.

Touchstones for restorative justice programmes

A restorative programme is faithful to its purpose when it:

- Holds victims' involvement as central
- Ensures preparation and safety for all participants
- Facilitates dialogue among persons involved
- Strives for reintegration along with accountability
- Ensures adequate resources for reparation and reintegration
- Addresses systemic pressures toward crime

Source: Sharp, 1998, p. 39

6. Programme operation

6.1 Context for the successful operation of a programme

A recent review⁵⁵ of restorative justice programmes in several common law and civil law countries found that there were several identifiable attributes of the contexts in which successful restorative justice programmes operate. A facilitative context for a restorative process is one which tends to be characterized by:

- A strong and sustained impetus for reform;
- A common ideology among those pressing for action;
- Open-mindedness and the political will of successive governments;
- Attention to practical detail in the formulation and implementation of the chosen interventions;
- A combined and continuing effort on the part of all relevant agencies;
- Reliance on validating research from the outset;
- Sound financial planning and support;
- Inclusiveness;
- Supervision by a responsible coordinating agency.

Most programmes, particularly those which lead to criminal justice decision-making, need to operate within a framework of procedures,

⁵⁵ Miers, 2001, p. 80.

precautions and values which have primarily been developed for criminal justice.⁵⁶ This means thinking hard about the suitability of cases, about promoting appropriate referrals, or about privacy, voluntary participation, or what informed consent is in a variety of situations.

6.2 The use of police, prosecutorial and judicial discretion

Many well-designed restorative justice programmes are not implemented to their full potential and remain marginal because they have not succeeded in attracting sufficient referrals from the justice system. In fact, it is precisely for that reason that some programmes had to be abandoned completely or fundamentally restructured. Achieving referrals has been the “Achilles’ heel of almost all restorative justice schemes”.⁵⁷ This is often because the programme proponents have neglected to take into account the key role of discretionary powers of various elements of the criminal justice system.

In many countries, prosecutors are the main sources of referrals to restorative justice programmes. However, the level of discretionary powers enjoyed by prosecutors with respect to a decision to prosecute varies amongst legal systems, depending in large part on whether these decisions are to be guided by the principle of legality (mandatory prosecution), which creates an obligation for the prosecutor to prosecute and considerably limits the discretion of the prosecutor, or the principle of opportunity/opportuneness which allows for some discretionary decision making. The principle of legality does not always make it impossible to divert some cases, but in the absence of legislation, it sometimes makes it difficult to divert a case to a restorative justice programme before the case has reached the court.

In Thailand, the introduction of restorative justice practices into the juvenile justice system has been made possible by a provision in the *Juvenile Procedure Act* which allows the prosecutors to drop a charge if the director of the juvenile training centre recommends it. The provision, however, had never been used until the Department of Juvenile Observation and Protection introduced a diversion programme based on a restorative process. The Family Group and Community Conference was thus introduced for first time.⁵⁸

Often programmes are built on the basis of a misguided assumption that “if we build it, they come”. However, programmes are generally only successful if attention has been given to developing strong and clear referral

⁵⁶ Shapland, *et al.*, 2004, p. 55.

⁵⁷ Shapland, *et al.*, 2004, p. 49.

⁵⁸ Kittayarak, 2005.

Suitability checklist

Determining whether a case is suitable for a restorative justice process requires an assessment of the risks involved for the parties.

Such an assessment includes factors beyond those used in the conventional criminal justice system. Questions that might be asked include:

- Is the programme appropriate for youth and/or adults
- How serious was the offence?
- Were there aggravating factors involved in the commission of the offence?
- What is the offender's prior record of criminal offending?
- Is the offender amenable to participating in the process? (Is he likely to consent to participate?)
- What is the offender's mental and emotional state and what are his cognitive abilities?
- Have there been any recent threats (or other forms of intimidation)
- Is the offender part of a criminal organization?
- Is the offender related to the victim and, if so, how?
- Is the victim an individual or a legal person?
- Are there multiple victims and, if so, do they all agree to participate in the process?
- Is the victim an adult or a child?
- Is the victim amenable to participate in the process? Does he or she consent?
- What are the victim's mental state and cognitive abilities?
- Is there an immediate risk of re-victimization for the victim?
- Have other support persons been identified who could be involved in the process to support the offender or the victim?
- Has either the victim and/or the offender previously participated in a restorative process and, if so, what was the outcome of that process?
- Is the offender admitting guilt for the offence (or at least not denying it)?
- Are the facts of the crime still in dispute?
- Is there any documentation on the losses or damages suffered by the victim(s)?

mechanisms and procedures as well as clear agreements among law enforcement and criminal justice officials on how and when they will use their discretion to refer cases to a restorative process. When designing a new programme, one must take very seriously, and address, the legitimate concerns of officials who ultimately are accountable for these referral decisions and how they are perceived by the victims and the community. Ideally, these officials should themselves be involved in the development of the programme and its referral criteria and procedures so that they may themselves develop a personal sense of ownership over the programme and its future success.

Clearly, making it compulsory for officials to refer individuals to a programme to which the latter must first consent to participate raises some practical difficulties. Some countries have chosen to encourage or increase discretionary referrals by making it compulsory for certain officials, at certain points in the criminal justice process to consider referring a case to a restorative programme. This may be helpful, but it is not a satisfactory substitute for the articulation of clear referral guidelines, procedures and criteria.

Another way in which referrals can be encouraged in the long term is by ensuring that referrals to the programme always lead to timely feedback and communication with the individual or agency responsible for the referral. These communications should include information about the outcome of the cases that were referred, the reasons why a particular case may not have proceeded successfully, the nature of the agreements that were reached, testimonials from the victims (and not just the positive ones), and whether compliance with the agreement was achieved.

Finally, members of referring agencies can sometimes be invited to participate in the process or part of it. They can also be provided periodically with statistics, analytical reports and programme evaluation findings that will raise their comfort level about referring more cases to the programme. In brief, the managers or the agencies responsible for a programme must carefully cultivate its relationship with the law enforcement and criminal justice officials on whom it depends for referrals.

6.3 Promoting appropriate referrals to a programme

Restorative programmes vary as to what party is responsible for selecting cases. Referrals to restorative justice programmes can originate from the police, prosecutor, corrections officials, non-governmental agencies and other community sources. In many jurisdictions, the guidelines for referring cases are set out in legislation, while in others, the referral

process is established in policy or in agreements. The way the offer is made to a victim and offender to participate in a restorative justice programme is very important, whether made by police officers, made by a police officer familiar with the programme, a counsellor, a victim service worker or a respected community member

Because the success of any restorative justice programme is dependent to a great extent upon receiving suitable referrals, the referral process should be enhanced by ongoing consultations and by communication campaign to encourage justice personnel to refer appropriate cases to a restorative programme and by proactively seeking cases via a search of agency files.

The Basic Principles (para. 7 and 9) identifies three major criteria for designing a referral process within the criminal justice system:

- **Sufficient evidence:** The referral should only be made where there is sufficient evidence to charge the offender;
- **Consent:** The referral should only be made with the free and voluntary consent of both the victim and the offender. At the time of the initial referral, however, the consent of both parties may not have as yet been determined and that securing that consent then becomes the first pre-requisite to be met before proceeding any further.
- **Power imbalances and cultural differences:** Disparities leading to power imbalances, as well as cultural differences among the parties, should be taken into consideration in referring a case to a restorative process. In cases where the referral is made in spite of potential power imbalances, this fact must be brought to the attention of the programme facilitators and must be taken into consideration in the conduct of the restorative process. Referrals criteria, procedures and forms should be designed in such a way that they facilitate the examination of this factor by those responsible and accountable for the referral decision. In some cases, it may be incumbent on the referring agency to exercise due diligence and to establish that a referral to a community-based process is not placing the victim or the offender at risk of victimization or intimidation.

Poor referral mechanisms and poor referral rates are often responsible for the poor performance or the failure of restorative justice programmes. As was just mentioned there are different ways in which programme managers can promote effective referrals from the community and from the various levels of the criminal justice system.

Specific interagency protocols can be established preferably in advance of launching the programme, or as the latter is being designed. These protocols can guide the selection of cases for referral and set out eligibility criteria. It will also determine the procedures to be followed in various circumstances (e.g. when the consent of one of the parties cannot be

obtained, when an agreement cannot be arrived at, when one of the parties decides to withdraw from the process, or when an offender fails to comply with the terms of a mediated agreement). As well, crime victims may serve as de facto gatekeepers by refusing to participate in sessions with certain types of offenders.

Experience has shown that it is particularly important to develop data-sharing protocols with criminal justice agencies to facilitate the identification of potential cases and participants. There are frequently problems relating to the non-disclosure of victim details and offenders details (particularly when they are children and youth). This can impede the success of a programme, the frequency of referrals and the quality of collaboration between agencies.⁵⁹ These issues ought to be clarified as much as possible as the programme is being developed and inter-agency agreements are being negotiated.⁶⁰

There may be considerable variation in the selection criteria used across jurisdictions for the same type of restorative process. For example, eligibility for and admission to VOM may range from those in which courts or intake departments refer only first offenders, to those programmes in which crime victims themselves make a direct request for mediation to programme staff. It is important to develop a procedure for assessing the suitability and risks for each case that is being considered for a restorative process.

Many jurisdictions also require that the offender voluntarily participate in restorative justice programmes. And, although offenders are generally required to admit responsibility for their actions, this admission is generally not equated to a finding of guilt as in a criminal court. In some cases, e.g. family group conferencing, it may be sufficient at the time of the referral to the programme for the offender to “not deny responsibility”. On the other hand, programmes that offer interventions at the sentencing or post-sentencing stages (e.g. circle sentencing) are generally only available to those offenders who were found guilty or have entered a guilty plea. Furthermore, as was mentioned previously, the *Basic Principles* (para. 8) states that, in itself, the participation of the offender in a restorative process should not be used as evidence of admission of guilt in subsequent legal proceedings.

6.4 The role of NGOs and civil society

Non-governmental organizations (NGO's) have played a major role in the development and implementation of restorative justice programmes worldwide. Their effectiveness in creating restorative forums stems, in large measure, from their being closer to the communities than criminal

⁵⁹ See, for example, the evaluation of youth justice pilots in Great Britain; Dignan, 2000.

⁶⁰ See the model agreement and the case study presented in the Home Office's consultation document: Home Office (2003), pp. 71-73.

justice personnel usually are. Similarly, NGOs may have more credibility in some cases than the police, public prosecutors and judges and be held in higher regard. In many countries, NGOs are also free from the taint of patronage and corruption and this gives further legitimacy to their programmatic initiatives. This legitimacy is very important for restorative programmes, many of which rely on the involvement of community residents and, in particular, assurance on the part of the victims of crime that their case will be handled fairly with little chance of re-victimization.

NGOs may also partner with government, but in doing so, should assure themselves that doing so will not compromise the integrity of the programme or introduce political or other agendas into the process.

6.5 Programme outcomes

The *Basic Principles* defines a “restorative outcome” as “an agreement reached as a result of a restorative process”. Restorative outcomes include responses and programmes such as reparation, restitution and community services, aimed at meeting the individual and collective needs and responsibilities of the parties and achieving the reintegration of the victim and the offender.

In addition to the dialogue itself, an important objective of restorative justice processes is the quest for an agreement. Whenever possible, it is important that agreements be reached by consensus and that all of the relevant stakeholders, e.g. the crime victim, the offender and, where relevant, the community, contribute to and approve the agreement. Further, the agreement should be tailored to the specific needs of the crime victim, the offender and the community.

There is considerable variation in the types, scope and components of agreements that are created from restorative processes. An agreement may or may not include specific behavioural directives. What is important is that there is access to relevant resources, programmes and sanctions that are deemed to be required in the case at hand. This, in turn, requires that the necessary protocols be in place to provide crime victims and offenders with access to programmes and services.

The *Basic Principles* (para. 15) explains that “the results of agreements arising out of restorative justice programmes should, where appropriate, be judicially supervised or incorporated into judicial decisions or judgements”. Where that occurs, the outcome should have the same status as any other judicial decision or judgement. This is clearly more possible in some cases than in others, depending on the structure of the programme and its relation to the criminal justice system. The advantage of

incorporating the agreement into a judicial decision or judgment is that the courts or an enforcement agency can then become duty bound to monitor the agreement and intervene if and when an offender fails to fulfil the requirements of the plan agreed upon.

It is possible for a restorative process to be successful without an agreement. A victim, for example, may be satisfied with having had a chance to express to the offender how he/she was affected by the crime and to hear an acknowledgment of responsibility from the offender. Para. 16 of the *Basic Principles* recommends that “where no agreement is reached among the parties, the case should be referred back to the established criminal justice process and a decision as to how to proceed should be taken without delay”. It also adds that failure to reach an agreement alone shall not be used against the offender in subsequent criminal justice proceedings.

6.6 Compliance monitoring

It is important that mechanisms be in place to monitor the conditions of any agreement that is reached in the restorative process. Depending upon the specific restorative strategy used, there may be an extensive list of reparative responsibilities, treatment requirements and (in indigenous communities) traditional healing and community building rituals. *Basic Principles* (para. 7) states that “agreements should be arrived at voluntarily and contain only reasonable and proportionate obligations”.

Each restorative programme must determine how it will monitor compliance by offenders, and by other parties, with the terms of the agreement reached during the restorative process. There are several ways of establishing such mechanisms. The monitoring mechanism does not necessarily have to fall under the programme itself. The task may be assigned to another agency such as the police or a probation office or an organization working with the offenders to help them implement their rehabilitation plan (e.g. a drug treatment agency, a counselling service or a financial institution). In many low-income countries, reliance is placed upon societal self-regulation influence and members of the community themselves to monitor compliance with the agreement of the parties.

In the case of sentencing circles, for example, agreements are subject to review by a judge who will ask for regular reports from the justice committee (responsible for administering the process) and the support groups. Judges may strengthen the enforcement process at the conclusion of the circle by assigning or reaffirming the assignment of community monitoring responsibilities and may withhold a final decision about jail terms or other sanctions pending completion of obligations to be verified at a follow-up hearing.

Paragraph 17 of the *Basic Principles* stipulates that “failure to implement an agreement made in the course of a restorative process should be referred back to the restorative programme or, where required by national law, to the established criminal justice process and a decision as to how to proceed should be taken without delay”. Failure to fulfil an agreement, other than a judicial decision or judgement, should not be used as justification for a more severe sentence in subsequent criminal justice proceedings. An interview can be held with the offender as to what happened and to determine whether there was a failure on the part of support agencies.

For example, in Austria, when an offender fails to make the financial payments agreed upon as an outcome of a victim-offender mediation agreement, the social worker/mediator responsible the case will contact the offender and enquire about the reasons for the failure to pay. Generally, a solution can be found to the situation. However, if there is no response from the offender despite repeated interventions and written reminders, the case is referred back to the state prosecutor’s office for continuation. The mediator informs the victim of the possibility of claiming compensation either in the course of the criminal procedure or by initiating civil proceedings.

6.7 Programme support services

To the extent that a restorative justice programme is directly concerned with attempting to create a community of care, offering support and assistance to the victims, or assisting the offender in his rehabilitation and social reintegration, there will be a need for the programme to rely on other support services and community resources. When these services exist, it may simply be a matter of creating the right partnerships or developing the appropriate inter-agency agreements and services exchange protocols. In many other situations and communities where adequate services do not exist or are not accessible to the offenders or the victims, it may become essential to develop them in tandem with the restorative justice programme.

6.8 Community relations and relations with the media

Keeping the community informed of the progress and operation of a restorative justice programme is usually a precondition to its success. A community may still harbour some misgivings about the impact and the legitimacy of a programme and that must be taken into account in all public communications. Addressing the concerns expressed by members of

the community as they emerge and inviting them, whenever possible, to participate and become involved in the programme will go a long way in creating a broad basis of support for it. Keeping up a line of communication through regular consultations and the sharing of information will also help maintain a positive community disposition towards the programme.

In most situations, however, communication with the community is done through the intermediary of the mass media. The importance of working with the media to explain a programme to the community and keep it informed of new developments cannot be overestimated. Negative and fear-mongering stories can lead to bad press, which can lead to poor public perceptions, which in turn can lead other agencies to progressively turn off the tap on referrals to the programme.

Successful programmes are likely to have solid communication plans based on honesty and transparency, even if the latter may be limited at times by the need to protect the privacy of programme participants. Hyperbolic public statements, unnecessary or unjustified criticisms of other agencies or other components of the justice system, as well as exaggerated claims about the merits and success of the programmes must be avoided and replaced by sober presentations of the facts and honest human stories to which the public can relate. Various opinion leaders in the community and spokespersons for other justice agencies can also be mobilized to ensure that they publicly express their support for the programme.

Finally, every programme should have a contingency communication plan ready to be unrolled in the event that one of its cases goes wrong or one of the offenders involved somehow draws negative attention unto the programme. In fact, every programme should take it for granted that there will be at least one case, sooner or later, which is going to be very problematic for either the victim or the community. Failure to prepare for such instances has spelled out the demise of many a fledgling new programme.

7. Programme monitoring and evaluation



The *Basic Principles* (para. 22) encourages Member States, in cooperation with civil society where appropriate, to promote research on and evaluation of restorative justice programmes in order to “assess the extent to which they result in restorative outcomes, serve as a complement or alternative to the criminal justice process and provide positive outcomes for all parties.” In addition, the *Basic Principles* also recognizes that restorative processes may undergo change over time and that “the results of research and evaluation should guide further policy and programme development.”

7.1 The need for programme monitoring and evaluation

Despite the proliferation of restorative justice programmes worldwide over the past few decades, it is only in recent years that evaluation studies have been conducted. This makes it difficult to determine the effectiveness of the restorative approaches that have been developed. It also hinders a discussion of the conditions that support or limit programme effectiveness. This has precluded the development of anything more than a tentative list of evidenced-based “best practices” to guide the development and implementation of new programmes.

To provide for the possibility of a systematic evaluation, the data needed for evaluation purposes be identified and gathered on a systemic, ongoing

basis, starting early in the development of the programme, even before the programme is implemented. Programme performance standards and targets must be set and monitoring mechanisms put in place.⁶¹

Both statistical and qualitative information should be gathered as part of the monitoring process. Statistical information that can be gathered might include:

- The number and types of cases referred to the restorative programme (including the nature of the offence committed);
- The sources of the referrals;
- The length of time required for case preparation;
- The time required to conduct the restorative process;
- The nature and contents of the agreement;
- The rate of successful completion of outcome agreements;
- The rate and type of re-offending among offenders who have participated in restorative processes;
- The number of volunteers and volunteer hours contributed to restorative processes;
- Information on costs;
- The attributes (e.g. age, gender, ethnicity) of crime victims, offenders, and community residents who participate in restorative processes;
- The perceptions of participants and their satisfaction with their experience of the process.

Qualitative data can also be gathered through observation of the restorative process and interviews with parties and other participants in the restorative process.

7.2 Challenges in evaluating restorative justice programmes

There are a number of challenges in attempting to evaluate the effectiveness of restorative justice processes. These include, but certainly are not limited to, the following:

- The difficulty of securing adequate control groups of crime victims and offenders who participated in the conventional criminal justice system.
- The myriad of restorative programmes and the variety of goals and objectives of these programmes.
- The wide variability among restorative programmes in the nature and number of cases processed.

⁶¹ See Galaay's practical guide on "Evaluating Restorative Community Justice Programs", 1998.

- The lack of adequate controls and comparability of the referral criteria, the competence and training of facilitators, the legislative and policy framework within which individual restorative programmes operate, and the various benchmarks that are used to assess outcomes.
- The variability in the indicators that are used to measure programme success.
- Variations in the time period used to assess recidivism among offenders who participate in restorative programmes.
- The specific measures that are used by programme evaluations to assess crime victim and offender “satisfaction”, the levels of “fear” among crime victims, and the expectations that offenders and victims had of the restorative process. There are, for example, a variety of indicators that can be used to assess victim satisfaction, including satisfaction with: (a) the way their case was handled; (b) the outcome of the case; (c) with the facilitator; (e) the fairness of the process; and, (f) the interactions with the offender.
- The manner in which any assessments of crime victim and offender experience with the restorative process are conducted.
- Controlling for the wide variety of contexts, i.e. urban/rural; highly troubled/highly integrated communities, in which restorative processes operate.
- Controlling for the diversity in the types of training that programme staff and facilitators receive.
- Controlling for the variety of legislative and policy frameworks within which restorative processes operate.
- Quantifying processes that are highly subjective, personal and interactive.
- Developing measures to assess the extent to which restorative processes enhance community, family and system capacities.
- Developing measures to assess victim empowerment, offender remorse and rehabilitation.
- Operationalizing concepts such as “community capacity”, “family capacity”, “system capacity”, victim “empowerment” and “community engagement”.
- Developing measures to assess the cost effectiveness of restorative justice initiatives, particularly vis-à-vis the conventional criminal justice system.

As well, the majority of evaluations conducted to date have focused on the experiences of crime victims and offenders. Less attention has been given to the views of politicians and senior law enforcement and criminal justice personnel. Their decisions, actions or inaction can have a significant impact on the development and implementation, and ultimate success, of restorative justice processes. Similarly, there has been little if any focus on

the role that facilitators play in the success of restorative practices, including the impact of training, the facilitator's particular personality and "style", and their experience in producing a positive outcome. The experience of the process by crime victims and offenders may be as much a function of the legislative and policy context within which the interaction occurred and of the skills of the facilitator, as of the particular restorative approach itself.

There are a variety of possible measures of programme outcomes, including more qualitative indicators such as the levels of satisfaction of victims, of offenders and of third parties, including community residents and more quantitative measures such as levels and severity of re-offending and the levels of fear of crime in the community. Furthermore, to meet the standards of evaluation, it would be important to compare the experiences and attitudes of a group of offenders and victims that participated in a restorative process with a matched group of offenders and victims who were subjected to the standard criminal justice response.

7.3 Measuring the impact of programmes on recidivism

A key feature of most restorative justice approaches is their intent to consider the crime or conflict within a holistic framework and to identify and address the underlying causes of the event. Constructing an evaluation framework that measures the extent to which any one restorative intervention is effective in addressing underlying problems is quite difficult and requires extensive follow-up work. This type of impact is less amenable to statistical analyses and requires a research design centred on information gathering from the parties involved in the restorative intervention.

Despite the clear evidence that there is on various aspects of the positive impact of restorative justice programmes, researchers, practitioners and policy makers still want to know whether restorative justice interventions can reduce crime and, if so, how and when. The picture that emerges from the growing empirical research literature on restorative justice and reoffending is still not totally clear.

Advocates may point to satisfied and fairly treated victims and offenders to demonstrate that restorative justice works. But how a criminal justice initiative impacts future offending continues to be at the heart of discussions on programme success. There is remarkable variation in how reoffending is conceptualized and measured in different studies. These variations likely contribute to the variable outcomes observed.⁶²

⁶² Hayes, 2005.

A recent analysis of restorative justice programme evaluations indicated that restorative justice interventions, on average, are associated with relatively small but significant reductions in recidivism. Interventions seemed to be more effective with low-risk offenders; the analysis indicated that restorative justice interventions were not showing reduction in recidivisms for higher risk offenders.⁶³

Research on recidivism after a restorative conferencing intervention shows that the best predictors of re-offending are things associated with offenders, for example, age, age at first offence, gender and prior offending. Males are more likely to re-offend than females and, when young people begin offending at an early age, recidivism is more likely.⁶⁴ It is much more difficult to assess the impact of restorative justice processes on non-offender dimensions, such as the extent to which the existence and operation of such programmes serves to empower communities and their residents. These are qualitative types of indices that require in-depth study.

Some recent evaluations of restorative conferencing in Australia and New Zealand are looking at the behavioural outcomes of conferencing for young offenders. In addition to looking at the impact of conferencing as compared to court or other court-based diversion programmes, some of these studies are focusing on the variable effects of offender and conference characteristics in predicting re-offending and how variation within an intervention is related to re-offending, rather than comparing the effects of two or more interventions on future offending behaviour⁶⁵. These studies show that beyond those things known to be associated with recidivism (e.g., age, gender and prior offending), there are things that occur in conferences that are associated with reduced re-offending: when young offenders are remorseful and when conference agreements (or outcomes) are decided by genuine consensus, re-offending is less likely.⁶⁶ Lower recidivism is also observed when young offenders have memorable conferences, are not stigmatically shamed, are involved in conference decision-making and comply with conference agreements, or feel sorry for their offending behaviour, and when they meet and apologise to victims and feel that they have righted wrongs.⁶⁷

7.4 Evaluation results and evidence of emerging best practices

Although only a relatively few systematic evaluations of restorative justice programmes have been conducted to date, their findings seem to indicate

⁶³ Bonta *et al.*, 2006.

⁶⁴ Hayes and Daly, 2004, p. 20.

⁶⁵ See: Hayes and Daly, 2004, Hayes and Daly, 2003; Maxwell and Morris, 2001.

⁶⁶ Hayes and Daly, 2003; 2004.

⁶⁷ Maxwell and Morris, 2001.

that restorative processes have a greater potential than the standard justice process operating alone to effectively resolve conflict, secure offender accountability and meet the needs of victims. Even in the absence of sufficient evaluation studies, there seems to be a consensus that restorative justice programmes perform no worse than any other method in terms of addressing the needs of victims and offenders and with respect to reconviction rates.⁶⁸

The following are some general findings that have emerged from the evaluations conducted to date:

- Restorative justice has a positive effect in reducing the frequency and the severity of re-offending.
- There are high levels of support among crime victims and in communities for offender reparation.
- Many crime victims would like the opportunity to meet with their offender.
- Many crime victims and offenders will participate in a restorative process if given the opportunity to do so.
- There is some evidence that restorative justice processes can reduce post-traumatic stress disorder among victims.
- In some jurisdictions, restorative approaches have reduced court costs and court processing time and improved service delivery.
- It is less certain that restorative processes can function to enhance the capacities of communities and families to repair the harm from criminal activity.

General findings

- The rate of participation of crime victims and offenders in restorative justice processes varies by type of offence, the various personal attributes of offenders and victims and the nature of the relationships between the victims and the offenders.
- Where crime victims and offenders participate in restorative processes, the rates of agreement and compliance with agreements by the offenders are very high.
- There appear to be no inherent limitations in the type of cases that can be referred to restorative processes.
- There are reports of successful resolutions in victim-offender mediation and conferencing for both property-related and violent offences, adult and youth offenders and for offenders and victims who are related as well as those who are strangers to one another.

⁶⁸ Miers, 2001, p. 85; see also McCold, 2003.

- Preliminary findings suggest that victim-offender mediation can be successfully used in cases involving severe violence.
- Both crime victims and offenders rate restorative processes as more fair and satisfying than the conventional criminal justice system.
- Several studies have reported rates of satisfaction with restorative processes among crime victims and offenders as high as 95 percent.
- Restorative processes can reduce the costs of doing justice and lead to increased efficiencies in the response to crime.
- The effectiveness of restorative justice processes is increased when agencies and programmes work together within a collaborative framework.

Police

- It is possible for police officers to conduct restorative conferences that require accountability on the part of the offender and are also viewed as fair by victims, offenders and other relevant parties.
- Restorative justice can be an integral component of an overall community policing strategy and a means to improve police-community relations.

Crime victims

- Restorative justice programmes in some jurisdictions have experienced difficulties in contacting crime victims and offering the restorative justice option.
- Restorative justice has a positive effect on the sense of closure among crime victims and their feelings of well-being.
- Crime victims report being less fearful after having met their offender in the context of victim-offender mediation than in those circumstances where they were not given the opportunity to do so.
- Restorative processes provide victims with a voice, an opportunity for material reparation, the opportunity for the crime victim to receive an apology from their offender and to receive additional information from the offender about the crime, the reasons why the offender selected the victim and committed the offence, and other details, all of which are often not available in the conventional criminal justice system.

Offenders

- There is preliminary evidence from evaluations that restorative processes can sometimes reduce both the frequency and the severity of re-offending.

- There is some evidence to indicate that the rates of re-offending among offenders is lower for those offenders who have committed crimes against the person than for property offenders.
- Offenders who have participated in a restorative process have higher rates of compliance with agreements.
- There is evidence from a number of European jurisdictions that restorative processes can significantly and positively impact the self-esteem of offenders and contribute to their acceptance of responsibility for their behaviour and the consequences of it.

Corrections

- Evaluations indicate that there is a high level of satisfaction among crime victims with restorative conferences with their offender facilitated by probation officers (United Kingdom).
- There is some evidence (United Kingdom and the United States) to suggest that restorative processes can assist in promoting a safer environment inside correctional institutions.

Community

- Restorative justice processes can increase community engagement and facilitate the involvement of community residents in the response to, and resolution of, problems of crime and social disorder.
- When properly trained, community volunteers can be as effective in facilitating restorative processes as criminal justice professionals.

Conclusion



The objective of this handbook was to provide for the reader, in a clear and concise fashion, an overview of the key issues involved in the design and implementation of restorative justice programmes. The United Nations *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters* provided the backdrop for the discussion. These principles are premised on an approach in which restorative justice programmes are most appropriately, and effectively, developed within existing criminal justice systems. It is recognized, however, that restorative justice programmes may also build upon traditional, community-based justice structures and processes. A key theme in the handbook is that the principles and practices of restorative justice can be adapted to the specific requirements of individual jurisdictions and communities.

Specific chapters in the handbook address the various types of restorative justice programmes, the need to establish legislative and regulatory guidelines for restorative practices, the key participants in restorative programmes, the various dimensions of programme operations, and the need to provide for programme monitoring and evaluation.

Throughout the handbook, examples were used to highlight the dynamics of restorative justice practice in various jurisdictions and communities around the world. These examples should only be taken as illustrative, indicating the ways in which justice systems and communities have applied the principles of restorative justice to address the needs of victims, offenders, their families and the community as a whole. The possibilities for applying the principles of restorative justice are limited only by the

imagination and creativity of criminal justice professionals, civil society organizations and community members.

The experience of stakeholder groups across the globe is that restorative justice programmes hold considerable potential to more effectively address, and repair, the harm done by criminal offending. At the same time, restorative justice programmes can provide crime victims with a more powerful voice, criminal offenders with the opportunity to acknowledge responsibility for their behaviour and receive the assistance they require to address their particular needs, and communities with a more effective strategy to not only respond to crime but to develop and strengthen their conflict prevention and resolution capacity.

Restorative justice is not a “one size fits all” approach to crime. As such, it continues to evolve and assume new forms as governments and communities implement restorative justice principles in a manner that most effectively meets the needs of crime victims, offenders and community residents. A measure of the success of the restorative approach is that it has spawned many different types of programmes and processes. It is hoped that the materials in this handbook will assist governments and communities in their consideration and implementation of restorative justice programmes.

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Annex I

Useful web-based resources

UK Home Office

<http://www.homeoffice.gov.uk/crime-victims/victims/restorative-justice/?version=1>

Centre for the Study of Violence and Reconciliation

<http://www.wits.ac.za/csvr/>

Prison Fellowship International

Restorative Justice

In English

<http://www.restorativejustice.org/>

In Spanish:

<http://www.justiciarestaurativa.org/>

In French:

<http://www.justicereparatrice.org/>

Ecole Nationale de la Magistrature

http://www.enm.justice.fr/centre_de_ressources/actes_sessions/justice_perspectives/reparatrice_restaurative/reparatrice_restaurative.htm

The Centre for Restorative Justice

Simon Fraser University

<http://www.sfu.ca/crj/index.html>

European Forum for Restorative Justice

<http://www.euforumrj.org>

Restorative Justice Consortium

<http://www.restorativejustice.org.uk/>

Restorative Justice

Healing the Effects of Crime

<http://www.restorativejustice.com/>

Australian Institute of Criminology

<http://www.aic.gov.au/rjustice/>

US Department of Justice

Restorative Justice On-Line Notebook

<http://www.ojp.usdoj.gov/nij/rest-just/>

International Institute for Restorative Practices

www.restorativepractices.org

www.realjustice.org

Correctional Service Canada

http://www.csc-scc.gc.ca/text/portals/rj/index_e.shtml

http://www.csc-scc.gc.ca/text/portals/rj/index_f.shtml

University of Wellington

Crime and Justice Research Centre

<http://www.vuw.ac.nz/cjrc/>

Australia National University

Centre for Restorative Justice

<http://www.crj.anu.edu.au/>

The New South Wales Department of Corrective Services

Restorative Justice Unit (Australia)

http://www.dcs.nsw.gov.au/offender_management/restorative_justice/

International Institute for Restorative Practices

<http://www.restorativepractices.org/>

New Zealand Government, Ministry of Justice

Restorative Justice.

<http://justice.govt.nz/restorative-justice/index.html>

Annex II

United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters

Preamble

Recalling that there has been, worldwide, a significant growth of restorative justice initiatives,

Recognizing that those initiatives often draw upon traditional and indigenous forms of justice which view crime as fundamentally harmful to people,

Emphasizing that restorative justice is an evolving response to crime that respects the dignity and equality of each person, builds understanding, and promotes social harmony through the healing of victims, offenders and communities,

Stressing that this approach enables those affected by crime to share openly their feelings and experiences, and aims at addressing their needs,

Aware that this approach provides an opportunity for victims to obtain reparation, feel safer and seek closure; allows offenders to gain insight into the causes and effects of their behaviour and to take responsibility in a meaningful way; and enables communities to understand the underlying causes of crime, to promote community well-being and to prevent crime,

Noting that restorative justice gives rise to a range of measures that are flexible in their adaptation to established criminal justice systems and that complement those systems, taking into account legal, social and cultural circumstances,

Recognizing that the use of restorative justice does not prejudice the right of States to prosecute alleged offenders,

I. Use of terms

1. Restorative justice programme. means any programme that uses restorative processes and seeks to achieve restorative outcomes.
2. Restorative process. means any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator. Restorative processes may include mediation, conciliation, conferencing and sentencing circles.
3. Restorative outcome. means an agreement reached as a result of a restorative process. Restorative outcomes include responses and programmes such as reparation, restitution and community service, aimed at meeting the individual and collective needs and responsibilities of the parties and achieving the reintegration of the victim and the offender.
4. Parties. means the victim, the offender and any other individuals or community members affected by a crime who may be involved in a restorative process.
5. Facilitator. means a person whose role is to facilitate, in a fair and impartial manner, the participation of the parties in a restorative process.

II. Use of restorative justice programmes

6. Restorative justice programmes may be used at any stage of the criminal justice system, subject to national law.
7. Restorative processes should be used only where there is sufficient evidence to charge the offender and with the free and voluntary consent of the victim and the offender. The victim and the offender should be able to withdraw such consent at any time during the process. Agreements should be arrived at voluntarily and should contain only reasonable and proportionate obligations.
8. The victim and the offender should normally agree on the basic facts of a case as the basis for their participation in a restorative process. Participation of the offender shall not be used as evidence of admission of guilt in subsequent legal proceedings.
9. Disparities leading to power imbalances, as well as cultural differences among the parties, should be taken into consideration in referring a case to, and in conducting, a restorative process.
10. The safety of the parties shall be considered in referring any case to, and in conducting, a restorative process.
11. Where restorative processes are not suitable or possible, the case should be referred to the criminal justice authorities and a decision should be taken as to how to proceed without delay. In such cases, criminal justice officials should

endeavour to encourage the offender to take responsibility vis-à-vis the victim and affected communities, and support the reintegration of the victim and the offender into the community.

III. Operation of restorative justice programmes

12. Member States should consider establishing guidelines and standards, with legislative authority when necessary, that govern the use of restorative justice programmes. Such guidelines and standards should respect the basic principles set forth in the present instrument and should address, inter alia:

- (a) The conditions for the referral of cases to restorative justice programmes;
- (b) The handling of cases following a restorative process;
- (c) The qualifications, training and assessment of facilitators;
- (d) The administration of restorative justice programmes;
- (e) Standards of competence and rules of conduct governing the operation of restorative justice programmes.

13. Fundamental procedural safeguards guaranteeing fairness to the offender and the victim should be applied to restorative justice programmes and in particular to restorative processes:

- (a) Subject to national law, the victim and the offender should have the right to consult with legal counsel concerning the restorative process and, where necessary, to translation and/or interpretation. Minors should, in addition, have the right to the assistance of a parent or guardian;
- (b) Before agreeing to participate in restorative processes, the parties should be fully informed of their rights, the nature of the process and the possible consequences of their decision;
- (c) Neither the victim nor the offender should be coerced, or induced by unfair means, to participate in restorative processes or to accept restorative outcomes.

14. Discussions in restorative processes that are not conducted in public should be confidential, and should not be disclosed subsequently, except with the agreement of the parties or as required by national law.

15. The results of agreements arising out of restorative justice programmes should, where appropriate, be judicially supervised or incorporated into judicial decisions or judgements. Where that occurs, the outcome should have the same status as any other judicial decision or judgement and should preclude prosecution in respect of the same facts.

16. Where no agreement is reached among the parties, the case should be referred back to the established criminal justice process and a decision as to how to proceed should be taken without delay. Failure to reach an agreement alone shall not be used in subsequent criminal justice proceedings.

17. Failure to implement an agreement made in the course of a restorative process should be referred back to the restorative programme or, where required by national law, to the established criminal justice process and a decision as to how to proceed should be taken without delay. Failure to implement an agreement, other than a judicial decision or judgement, should not be used as justification for a more severe sentence in subsequent criminal justice proceedings.

18. Facilitators should perform their duties in an impartial manner, with due respect to the dignity of the parties. In that capacity, facilitators should ensure that the parties act with respect towards each other and enable the parties to find a relevant solution among themselves.

19. Facilitators shall possess a good understanding of local cultures and communities and, where appropriate, receive initial training before taking up facilitation duties.

IV. Continuing development of restorative justice programmes

20. Member States should consider the formulation of national strategies and policies aimed at the development of restorative justice and at the promotion of a culture favourable to the use of restorative justice among law enforcement, judicial and social authorities, as well as local communities.

21. There should be regular consultation between criminal justice authorities and administrators of restorative justice programmes to develop a common understanding and enhance the effectiveness of restorative processes and outcomes, to increase the extent to which restorative programmes are used, and to explore ways in which restorative approaches might be incorporated into criminal justice practices.

22. Member States, in cooperation with civil society where appropriate, should promote research on and evaluation of restorative justice programmes to assess the extent to which they result in restorative outcomes, serve as a complement or alternative to the criminal justice process and provide positive outcomes for all parties. Restorative justice processes may need to undergo change in concrete form over time. Member States should therefore encourage regular evaluation and modification of such programmes. The results of research and evaluation should guide further policy and programme development.

V. Saving clause

23. Nothing in these basic principles shall affect any rights of an offender or a victim which are established in national law or applicable international law.

Annex III

Controversies and disagreements on the essential characteristics of a restorative justice programme

Restorative justice is a developing concept. People's understanding of what it is has changed over time, and that will probably continue as more is learned about its potential and risks, and as it is applied to new contexts. It is a concept that seems easy to understand but hard to define with precision. In that sense, it is like other familiar terms such as "democracy" and even "justice."

Although some observers emphasize the differences between the core principles of restorative justice and those of the conventional criminal justice system, others argue that the two approaches are complementary and compatible, incorporating elements of retribution, rehabilitation as well as more unique elements.

Over time several different conceptions, or ideas about what restorative justice is, have emerged. All agree that crime causes harm and creates needs and that justice should work to repair that harm and address the needs. They also agree that the harms and needs come in different forms: material, emotional, social, relational, physical and so forth. However, they differ in terms of emphasis. It is useful to be aware of the differences to avoid becoming confused by conflicting and sometimes opposing ideas.

One understanding is what has been called the *encounter* conception.⁶⁹ This focuses on the unique feature of restorative justice, which is the parties meeting together to discuss the crime, its aftermath and what should be done to make things right. These are what the United Nations *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters* and this handbook refer to as restorative processes. Persons who work within this conception may suggest that

⁶⁹ These are taken from Johnson, G. and D. Van Ness (2006). *The Meaning of Restorative Justice*, in Johnson, G. and Van Ness, D. (Eds.) *The Handbook on Restorative Justice*. Cullompton: Willan Publishing.

restorative processes be used even when there has not been a crime, such as when neighbours have a conflict or a family needs to solve a problem.

A second idea has been called the *reparative* conception. This focuses on the need to repair the harm resulting from crime. People who work within this conception agree that this is best done in a restorative process, but they are willing to find other ways to repair that harm even if there is no restorative process (for example, if the offender is never caught or the victim is unwilling to participate).

The third idea has been called the *transformative* conception. This is the broadest perspective of all: it not only embraces restorative processes and steps to repair the harm, but it also focuses attention on structural and individual injustice. It does the former by identifying and attempting to resolve underlying causes of crime (poverty, idleness, etc.). However, it also challenges individuals to apply restorative justice principles to the way they relate to those around them and to their environment. This can generate a kind of internal spiritual transformation even as it calls for external societal transformation.

Each of these conceptions agrees about the need for and value of restorative processes, but each also includes features that other conceptions may not accept as restorative. Examples of these include court-ordered restitution or community service, using restorative processes to solve a neighbourhood dispute, providing support and assistance to victims, and working for social justice.

There are other controversies within the restorative justice field:

1. Is there a role for punishment in restorative justice? Some argue that there is not because the purpose of restorative justice is to repair harm, not to cause more harm. Others, while agreeing with that point, believe that restorative processes and outcomes have many of the features of punishment, such as denouncing behaviour that violates society's norms and having to pay a price for having done so.
2. Are victim support services and offender reintegration programmes restorative justice? If those do not involve a restorative process, those who have an encounter conception would say that while those are valuable and important services, they are not restorative justice. Those who work within the other two conceptions would be more likely to say that they are indeed restorative.
3. What happens if a victim or offender is not willing or able to participate in a restorative process? There are a variety of ways that a party might participate. The most obvious is to do so personally, but in some instances they participate indirectly by, for example, sending a representative or communicating their views in writing or in some other way. But if they are not interested or able to participate even in those indirect ways, those who work within the encounter conception would conclude that there is no suitable restorative response. Those who work within the other two conceptions would explore other, reparative options such as those mentioned in paragraph 2, and the possibilities of inviting victims to meet with unrelated offenders (not their own offenders) to discuss general issues of crime and justice.

4. Can there be restorative justice in an unjust world? Some people are long-term victims of systemic injustice; is it fair to hold them accountable for individual acts of injustice they may themselves commit without taking substantial steps to address the underlying injustice? Those who work within the transformative conception would say that it is not, and that systemic injustices must be confronted as well as the individual injustices. Those who work within the other two conceptions, although concerned about systemic injustice, would not conclude that restorative justice compels this.

A final caution about restorative justice literature and terminology is that in the same way that the term restorative justice has somewhat different meanings, so too do names of programmes, such as victim offender mediation, conferencing and circles. For example, the name victim offender mediation is used to describe meetings between the victim and offender with a facilitator's assistance, but it is also used to describe a kind of "shuttle diplomacy" in which the parties do not meet and the facilitator goes back and forth to negotiate an agreement. The reasons for these differences often have to do with the programme history of the particular programme, but however they have come about, it is always a good idea to ask a few questions about a programme to find out more specifically how it really works.

A great deal has been written and said about these controversies and others, and the time may come when it is useful or important to understand them more fully. In that instance, the resources in annex I will be an excellent place to begin.

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Vienna International Centre, P.O. Box 500, 1400 Vienna, Austria
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