International Conference

Introduction of Restorative Justice in Ukraine: Results and Perspectives

Ukrainian Centre for Common Ground

Supreme Court of Ukraine

Ministry of Justice of Ukraine

Academy of Judges of Ukraine

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Dear Conference Participants!

We welcome you at our annual international conference devoted to Restorative Justice (RJ) introduction in Ukraine. Once again this conference became possible due to overall support from the Supreme Court of Ukraine, the Ministry of Justice of Ukraine and the Academy of Judges of Ukraine.

We decided to name the conference "Introduction of Restorative Justice in Ukraine: Results and Perspectives", because it is already possible to see some results of the work of partner organizations and legal system agencies in practical application of restorative justice programmes in criminal cases. In our conference materials you will find a summery report on the evaluation of restorative justice programs in Ukraine conducted by a team of independent evaluators from the Center for Restorative Justice & Peacemaking, University of Minnesota.

At the same time we are happy to acknowledge that positive results of experimental application of RJ in Ukraine, as well as the productive work of the Interdepartmental working group on restorative justice introduction to Ukrainian criminal justice system within the Ministry of Justice of Ukraine, provide good evidence of real perspectives for RJ in Ukraine.

We hope that active discussion by you, the conference participants of the Draft Concept Paper on Legislative Regulation of the Restorative Justice (Mediation) Programmes in Criminal Proceedings in Ukraine will generate constructive comments and suggestions for improvement of the above-mentioned document. Also, we hope that we will be able to discuss and identify main principles and norms of the law that will expectantly regulate RJ programs application in criminal proceedings as well as circumscribe the necessary provisions to be added to, at least, the Criminal Code and the Criminal Proceedings Code of Ukraine

We are happy to welcome our colleagues from Great Britain, Moldova, Poland, Russia and the USA, whose kind agreement to participate in our conference will substantially enrich our discussions and will help us to learn from their invaluable experience while making decisions about the future of Restorative Justice in Ukraine.

Also we are tremendously grateful for the cooperation with and the participation of respected representatives from the General Prosecutors Office of Ukraine, the Ministry of Internal Affairs of Ukraine, the Ministry of Family, Youth and Sports Affairs of Ukraine, the State Department of Execution of Punishment Matters of Ukraine and by no means to our colleagues from non-profit organizations from Ivano-Frankivsk, Kiev, Crimea, Lviv, Luhansk, Odessa, Sumy and Chernivtsy. It is due to their joint efforts that restorative justice in Ukraine has a clear and visible future today.

We have no doubt that this conference, with your valuable participation, will achieve the stated goal: to strengthen social partnership for sustainable development of the restorative justice movement in Ukraine and broadening possibilities for its practical application.

Finally, we would like to express our sincere gratitude towards the European Commission, "Ukrainian Citizens Action Network" (ISC-UCAN, USAID) and the International Renaissance Foundation for their continuous support to restorative justice in Ukraine in general as well as their support to this particular conference .

We wish you, dear conference participants, inspiring, constructive and useful communications during the conference, pleasant enrichment by new ideas, practical suggestions and advices as well as the strengthening of your belief into the inevitable triumph of Restorative Justice values in approaches to crime and justice.

Ukrainian Centre for Common Ground.

CONFERENCE PROGRAMME

20 April, Thursday

9:30 – 10.00	*Conference Participants Registration*
10:00 – 10:30	Opening. Video film presentation «Healing by Justice».
10:30 – 10:50	**Petro Pylypchuk.**, Supreme Court of Ukraine, First Vice Chairman. *Goals and perspectives for introduction of restorative justice in Ukraine.*
10:50 – 11:20	**Zehr Howard,** Eastern Mennonite University, professor of sociology and restorative justice. *Value basis of restorative justice and it's practical application in principles and procedures.*
11:20 – 11:40	**Inna Emelianova.,** Ministry of Justice of Ukraine, Vice Minister. *Concept paper on Legislative regulation of restorative justice programs (mediation) in the Criminal Justice System of Ukraine.*
11:40 – 12:00	**Viktor Lobach**, General Prosecutor's Office of Uktraine, Vice Head of the General Department of state accusation support in courts. *Issues of introduction of restorative justice at a pre trial stage of criminal process.*

Questions & answers

12:20 – 12:50	*Coffee break*
12:50 – 13:15	**Martin Wright,** European Forum of Restorative Justice, Board Member. *A role of community in applying restorative approach to crime in different countries.*
13:15 – 13:30	**Justice Marina Kiryuhina**, District Court of Krasnogvardeyskoe city, Autonomous Republic of Crimea, Head of the Court. *Impact of restorative Justice programs on the criminal hearing process in court in the experience of Krasnogvardeyskoe district court.*
13:30 – 13:45	**Myhajlo Tsymbalyuk**, Department of Criminal Militia of Juvenile Affairs of Ministry of Internal Affairs, Head, *A place of restorative justice programs in crime prevention work of Criminal Militia of Juvenile Affairs*.
13:45 – 14:00	**Iryna Voytyuk**, Academy of Judges of Ukraine, Rector. *Education of Ukrainian judges about application of restorative justice programs in criminal process.*

Questions & answers

14:00 – 15:00	*Lunch break*
15:00 – 15:30	**Roman Koval,** Ukrainian Centre for Common Ground, President. *Results of the Evaluation of Restorative Justice programs in some regions of Ukraine and their contemporary analysis.*

Workshops presentation

15:30 – 17:00 **Workshops. Urgent questions of perspective introduction of restorative justice in Ukraine.**

I. Legislative regulation of restorative justice programs.
Inna Fesenko, Ministry of Justice of Ukraine, Head of the Department of legislation on justice, law enforcement activity and crime prevention. *Draft law on introduction of restorative justice programs in criminal cases.*
Tetiana Vilchik., National Judicial Academy of Ukraine named by Yaroslav Wise.
Olexander Betsa, International Renaissance Foundation, Rule of Law program director.
Iryna Shalanska, Ministry of Justice of Ukraine, lead specialist of the office on criminal and procedural matters of the Department of legislation on justice, law enforcement activity and crime prevention.
Rafal Cebula , the judge of Civil Court, Poland.

II. Providing information and education on restorative justice to Legal System representatives.
Natalia Krestovska, Odessa Judicial Institute.
Larisa Shvetsova, Dergachivskiy district court of Kharkiv city, juvenile judge.

III. Perspectives of the development of local restorative justice centres as a complex system of social rehabilitation of juvenile offenders and victims in communities.
Alyona Gorova, Ukrainian Centre for Common Ground, Monitoring and Evaluation Coordinator. *Local restorative Justice Centre model*.
Galina Sadychko., Regional development agency "Harmony", Restorative justice programs coordinator, *Satisfaction of needs of the victims of crime and acceptance of responsibility by offenders in restorative justice programs. Practical examples.*
Inna Savchuk., Ministry of Family, youth and Sport Affairs of Ukraine, Head of the Department of social-legal protection of children and cooperation with NGOs of Children Affairs office. *The role of cooperation between state and civil society organizations in provision of social and legal protection of children in conflict with law*.
Anna Tikhomirova, Moscow city psychological-pedagogical University, Center of children and Youth support "Crossroad", Team leader, *An experience of restorative justice programs application in a complex system of social rehabilitation of juvenile offender and street children.*

IV. Features of Restorative Justice Use for juvenile offenders cases.
Natalia Krestovska, Odessa Judicial Institute
Machuzhak Y.V., Supreme Court Judge
Alan Skurbaty, UN Human Rights Advisor, Human Rights in Restorative Justice: *Putting them to Use in Juvenile Offender Cases.*
Manina M., senior lecturer of Dnepropetrovsk National Institute. *Restorative Justice as a basic goal of Juvenile Justice*
Slivka Z., Head of Ivano-Frankivsk municipal Juvenile Service.

17:00 – 17:30 *Coffee break*

17:30 – 18:30 **Workshops results presentation.**

19:00 Banquet.

21 April, Friday

10:00 – 10:30	**Rustem Maksudov**, Center for Legal and Judicial Reform, Moscow, President, *Relations of participation and responsibility between community and state in restorative justice introduction.*
10:30 – 10:50	**Svetlana Bolkovaya**, Vice Chairman of Commission of Juvenile Affairs and Protection of Their Rights of Urai city, Prevention of Juvenile Secondary Crime in the work of Juvenile Services of Urai city.

Questions & answers

11:10 – 11:30	**Magdalena Grudziecka,** Polish Centre for Mediation, Warsaw.
11:30 – 11:50	**Igor Dolya, Diana Popa**, Institute of Penal Reforms, Moldova.

Questions & answers

12:10 – 12:30 *Coffee break*

12:30 – 14:00 **Workshops**.

- Features of Restorative Justice Programs use in pilot projects implementation.
- Presentation of Association of restorative justice practitioners (working group results).
- Cooperation between restorative justice programs in Central and Eastern European countries, RJ implementation experience in Poland, Moldova and Russia.
- Perspectives of the Reform of the Justice System for juveniles in Ukraine.

14:00 – 14:30 Workshop results presentation.

14:30 – 15:30 *Lunch*

VALUES AND PRINCIPLES IN THE PRACTICE OF RESTORATIVE JUSTICE

Introduction of restorative justice in Ukraine: Results & Perspectives
International Conference, Kiev, April 2006

Howard Zehr
Co-Director, Center for Justice & Peacebuilding
Eastern Mennonite University
Harrisonburg, Virginia USA

Restorative justice has come a long way since the first experiments with victim-offender encounters in North America in the 1970s. The trickle has now become a river, branching out into many directions we never envisioned in those early days: situations of severe violence, school discipline, workplace conflicts and grievances, even societal-level conflicts and wrongs, to name just a few. In addition to victim offender mediation, “new” models of practice have emerged including family group conferences and circle processes. In the Ukraine, victim offender mediation is relatively new but the restorative justice stream is flowing here as well. Overall, charting the restorative justice river is both hopeful and inspiring.

But the rapid rise and spread of this river also causes concerns. The example of past criminal justice reforms, at least in the United States, sends out warning signals. So many so-called reforms have ended up being something different than what the designers intended. So often they been co-opted into something else, sometimes creating situations as bad or worse than those they were intended to improve. The alternatives to prison movement of the 1970-80s is but one example: instead of reducing reliance on prisons, the movement expanded the state’s net of punishment and control. In the United States, this has resulted in unprecedented numbers of people, especially members of minority groups, under the control of the criminal justice system.

Perhaps restorative justice will be different. It can be argued that because of its focus on healing and making things right, restorative justice is inherently more benign than previous efforts. But we cannot take this for granted. Indeed, while I believe the overall picture remains hopeful, a number of critical issues are emerging in the field – issues that pose significant challenges and even threaten the integrity and future of the field.

Let me be clear: I am a restorative justice advocate; Judge Fred McElrea of New Zealand has called me a “restorative justice prophet.” I have spent most of my career over the past quarter century introducing and consulting on restorative justice in communities not only in the United States but in many other countries (including the Ukraine). I remain committed to its principles and its practices and am energized about the overall directions it has taken. I am constantly offered examples and stories that amaze and inspire me. I am pleased and excited by the pilot projects that have been undertaken here in the Ukraine, and honored to be here to discuss them with you. So the concerns I raise here are offered because of my fundamental commitment to the field and not because of a basic skepticism. In raising these concerns, I hope that I will bring positive rather than negative energy to our dialogue together over the next few days.

Already in my 1990 book, *Changing Lenses: A New Focus for Crime and Justice* (recently translated and published here), I raised concerns and outlined some of the ways movements can go astray. In order to take stock of the field a decade or so later, in 2002-2003 I helped to organize a series of dialogues among practitioners, academics and policy-makers in the United States, Canada, England and New Zealand. Prior to that I was part of a “Listening Project” in the United States that explored the perceptions of and concerns about restorative justice on the part of victim service providers in seven American states. (Mika, et.al. 2002) Based in part on what we learned from these processes, Barb Toews and I then asked writers from around the world to explore these problems and challenges in the book, *Critical Issues in Restorative Justice.* (2004) We asked questions like this: Will restorative justice live up to its promise to victims? Has it adequately addressed offender perspectives and needs? What is the implication of the growing state role? Is restorative justice as a field of theory and practice appropriately interacting with indigenous or traditional perspectives and

contributions? Is it adequately addressing issues of social and systemic injustice? Is restorative justice taking too few or too many risks?

We should not be surprised, of course, that a movement such as this would be under pressure. In addition to the usual distorting forces that any movement faces, we are trying to move toward restoration in a context that is anything but restorative. The following list identifies a few general characteristics of this context:

- Most of us live in a culture of punishment, a world where justice – whether on the street, in the courtroom or in international politics – is seen as tit-for-tat. This is especially true in my own country at present, as can be seen both in our justice system and in our foreign policy, but it is true generally of much of the world as well.
- We live – at least in the United States – in an "argument culture," an adversarial and competitive culture, and this helps to shape our ideas about how justice should be done, how truth should be found or how human rights should be pursed.
- Many of our societies have become highly state-centered, with the state claiming a monopoly of power and sometimes actively working to neutralize the power of intermediate and community-based organizations.
- Many aspects of our societies have been professionalized. Overall, the tendency is to "problemize" (i.e. make problems out of) phenomena, then develop professions around them. As a result, it is more difficult for individuals and communities to solve their own problems and to control their own destinies.
- Powerful economic and political interests tend to shape and co-opt new inputs into social processes and phenomenon. Globalization has accentuated this.
- Structural injustices including racism, poverty and privilege persist and are even deepening in most of our societies.
- Dominant cultures continue to co-opt and impose themselves on minority and indigenous cultures.

Such realities will inevitably tend to distort and divert restorative values and approaches. Many argue, as I do, that restorative justice also holds the potential to counter these forces and help transform our communities and cultures in a positive way. But if we are to resist these forces, and perhaps even be the yeast the helps transform them, we will have to face up to hard realities. We will need to live in the tension between what we know to be the promise of restorative justice and the reality that often we will not live up to that promise. This is often hard for restorative justice advocates to do: to admit that there may be problems in "the beautiful thing." In the early 1980s, when the movement was very young, I addressed a group of victim-offender conferencing practitioners on this theme – warning of the challenges ahead and the need to be vigilant. The audience was hostile.

The following are six suggestions for how we might face up to the challenges confronting our field.

1. The first is a matter of attitude: We can cultivate an ability to temper our enthusiasm with realism and a willingness to take criticism seriously. This means that we have to collect not only what our critics have called "butterfly stories" – the best specimens – but what my former student Craig Spaulding calls "bullfrog stories" – those stories where things did not go so well. This attitude also requires an ability to live with paradox and ambiguity, a quality that I believe to be essential for restorative justice practice.
2. We can seek to learn from our failures as well as our successes. Our "bullfrog" stories can teach us as much as our "butterfly" stories.
3. We can proactively pursue dialogues across barriers and divisions, as the Listening Project above did with the victim services community.
4. We must be accountable to those who have a stake in what we do. In fact, I would argue for *structured accountability.* For example, programs should routinely have victims and victim service

providers not only on our boards but on our start-up committees. Ex-offenders too should be part of these structures.

5. It is essential that we embrace evaluation. While it is true that the field has yet to establish clear benchmarks, we need to evaluate not only the processes and outcomes of our practices, but our organizations as well. Are we living up to what we claim? Do all the players in our program have the same vision? Are we all pursuing the same goals? In my experience, we as a field have often been too reluctant to have such evaluations done or to take seriously the results.
6. Finally, the field is most likely to stay on track if we articulate and are guided by clear principles and values, and this brings me to the specific subject of this talk.

I am increasingly impressed by the importance of establishing clear principles and signposts, then structuring ways to be held accountable to them. Many would agree. Often this takes the form of standards of practice, and efforts to establish such standards are occurring in many places. However, when we move toward such standards, I have several concerns.

Although we have thirty years of practice in restorative justice, we are still very early in the movement; we are very low on the learning curve. Can we write standards that do not cut off possibilities we have not yet imagined? For example, there are legitimate and serious concerns about the dangers of mediation and conferencing with domestic violence. Yet, a few programs are carefully taking on such cases with very promising results. How do we write standards that provide appropriate caution, yet do not close doors? How do we avoid being too cautious? To our question above, “Are we taking too few or too many risks?”, author Dave Gustafson answered “Yes.”

Second, who shapes the vision that underlies our standards? Restorative justice has claimed to have roots in indigenous values. While some critics have called this a “myth of origin,” my own experience with graduate students and practitioners from many indigenous cultures and traditions suggests that it is not simply a myth. While some have misrepresented the connections between indigenous approaches and restorative justice, restorative justice principles and values do seem to have deep resonance with many traditions. Still, the theory and practice so far have been predominately shaped by white men of European origin – aging men like me – and this causes inevitable and often unconscious biases. Until the conversation is more inclusive, can we write standards that do not perpetuate those biases?

Finally – and this is a complex issue – what should the state’s role be in establishing and safeguarding standards? The answer to this will invariably depend on the context. My own perspective is undoubtedly shaped by my experience as an American and by my membership in a minority religious community, the Mennonite community, that has historically kept some distance from the state (and by the way, my wife’s ancestors come from that community here in Ukraine). Nevertheless, I will offer several comments for your consideration.

The state has a legitimate concern to safeguard due process and basic rights. However, the state also has a tendency to expand its power and authority; it is what sociologist Lewis Coser has termed a “greedy institution.” (1974) Will state-sponsored standards play into a process of taking power from communities and centralizing it in the state? This is especially a danger if standards are maintained through state certification of practitioners. But certification raises another concern as well: will it tend to professionalize the field, making it more unlikely that the community will be involved through volunteerism? This seems to have happened, at least to some extent, in the field of mediation, at least in the U.S.

The state also tends to be cautious, seeking to minimize risks. While this tendency is understandable, it can quash flexibility, innovation and community initiative. It can undermine a key characteristic of restorative justice, i.e. that justice must be contextualized, shaped from the bottom up by the specific communities in which it resides.

Indigenous people have raised important concerns that restorative justice, like other “innovations,” will become another form of neo-colonialism, another way of imposing state power on their communities. In Canada, for example, I have heard claims that the state has appropriated a process claiming to have originated in the indigenous culture of New Zealand, shaped in turn by the context of Australia, then imposed it on the indigenous cultures of Canada in a way that maintains state power. In our *Critical* Issues book, Chris Cunneen warns that restorative justice may be as much a globalizing force as the dominant western justice system. (Zehr & Toews, 2004, p. 343)

I cannot offer simple answers or solutions to the issues I have raised about standards, but here are some suggestions:

1. I do think that in most contexts, the state does have an important role in restorative justice but at this stage of the field, it is primarily in enabling and guiding more than mandating or controlling the field.
2. Ultimately, the state has a role in safeguarding restorative justice and due process, but as Braithwaite has written, safeguards and standards must be contestable “from the community up.” (2002, “Standards”) There must be flexibility, wiggle-room, based on real-world practice. In my opinion, the ideal would be a partnership between state and community in which the state takes its cues from the community. (As one example of this overseeing role, Braithwaite has argued that as long as the two models of justice co-exist – a restorative one and the more punitive criminal justice one – the state should ensure that outcomes of restorative processes are not more onerous than what would have been the case in a normal criminal justice process.)
3. National and international associations of restorative justice theorists and practitioners are essential. Such associations allow for the exchange of ideas, mutual encouragement. They also allow the field to speak with more clout vis-a-vis the state. Such associations can take the lead in establishing whatever standards are appropriate.
4. Ultimately, however, I am less interested in standards of practice – at least as they are often conceived – than in what I have come to call “principled practice.” By principled practice, I mean practice that is shaped in an ongoing way by regular reference to a limited set of clearly-specified principles and values more than specific regulations. The legislation that established youth justice in New Zealand is an example. This legislation lays out seven principles and seven goals that are intended to guide not only program design but daily practice. (MacRae and Zehr, 2004) Allan MacRae, a former youth justice coordinator who now supervises youth justice conferences on New Zealand’s South Island, argues that if practitioners keep these principles in their pockets, using them to guide each decision, then the intentions and standards will be maintained. Where youth justice in New Zealand has gone astray, it can be argued that it is in large part because these principles were not used as guides.

Principled practice requires a limited and clearly-articulated set of principles and values, in easily-accessible form, without layers of interpretation that obscure them. In my view, they should allow flexibility and go beyond a specific model of practice in order to allow situations to be shaped to the needs of the situation. The principles establishing New Zealand’s youth justice system, for example, mandate that the process should be culturally-appropriate for the people involved but do not mandate the exact form of the encounter.

The two sets of principles or values on the New Zealand Ministry of Justice’s website are a good start in this direction, although they need consolidation and simplification. (http://www.justice.govt.nz/restorative-justice/parta.html) I especially like the Statement of Restorative Values and Processes developed by the community-based Restorative Justice Network that is included there and in our *Critical Issues* book. The Network statement identifies eight core values of restorative justice: participation, respect, honesty, humility, interconnectedness, accountability, empowerment and hope. After briefly exploring each of these values, the statement then identifies eleven “values in practice.” They do this by starting each value statement like this: “A conference process may be considered ‘restorative’ if….” They then go on to say what is *not* restorative for each value.

For example, "a conference process may be considered 'restorative' if… [it] aims at transformative outcomes." They describe these outcomes like this:

The process should aim at outcomes that meet present needs and equip for the future, not simply at penalties that punish past wrongdoing. Outcomes should seek to promote the healing of the victim and the reintegration of the offender, so that the former condition of both may be transformed into something healthier."

The statement goes on to add: "The process is not restorative if the outcomes are irrelevant to the victim or aimed solely at hurting the offender."

Principled practice also requires training and regular reinforcement that accustoms practitioners to using the principles on a daily basis. Important also are regular evaluations and audits using standards derived from those principles.

Basic to restorative justice is the recognition that "truth" is always shaped by context, and that justice needs to be contextual, shaped by the needs and perspectives of the communities in which it is to be played out. Clear principles and values can provide signposts, therefore, while allowing an important element of flexibility.

A cookie cutter is clearly not the right metaphor for restorative justice. More appropriate is a road, a journey, with many curves and forks. On such a road we need choices but also signposts.

I end with what has become my mantra: the importance of grounding restorative justice in values, and three values in particular. Two of these are values included in the New Zealand statement above; the third is not, and probably should not be, although I would hope it would underlie our view of the world in general.

The first, and perhaps most fundamental, is *respect.* I am persuaded that issues of respect and disrespect help explain much offending as well as the negative ways that offenders so often experience justice. Likewise, issues of respect and disrespect play important roles in victims' trauma and recovery as well as the way they often experience justice. Restorative justice, in a word, is about respect. If we take that a value seriously, seeking to profoundly respect the perspectives, needs and worth of all involved, we will inevitably do justice restoratively.

The second key value is *humility*. Within the meaning of humility I include its common usage, the idea of not taking undo credit. Indeed, this is an important value for restorative justice practitioners. But by humility I primarily mean something more basic and more difficult: a profound recognition of the limits of what we "know." Humility requires caution about generalizing and applying what we think we know to others' situations. Humility also requires a deep awareness of how our biographies shape our knowledge and biases. Our gender, culture, ethnicity and personal and collective histories all profoundly shape how we know and what we know, and in ways that are often difficult to bring to consciousness. Humility calls us, then, to a deep appreciation for and openness to others' realities. Such openness is imperative in an increasingly polarized world. Only if we are humble can we hope to keep our "improvements" from becoming a burden on others.

The third value is *wonder*, awe. The western way of knowing has been deeply influenced by the philosopher Descartes. Descartes' primary epistemological approach was doubt. Doubt everything, he said, until you can find something that is certain; for him, the one thing that couldn't be doubted was the axiom, "I think, therefore I am." This stance of doubt has strengths – indeed, I argued above that humility requires us to maintain some skepticism about what we know and do - but an overall attitude of skepticism can lead to a great deal of cynicism.

My college philosophy professor began the semester by acknowledging this stance in western thought, then suggesting a corrective: the proper approach to the world, he said, is wonder. This perspective is increasingly important to me and, I believe, to the field. Wonder involves an appreciation of mystery, of

ambiguity, of paradox, even of contradictions. As those who have worked with victims, offenders and communities on their difficult journeys know well, an ability to live with the unknown, with surprises and with the seemingly irreconcilable is essential to good restorative justice practice.

David James Duncan, in his book *My Story as Told by Water* (2001), defines wonder like this: "...wondering is unknowing, experienced as pleasure." Given that, the field of restorative promises a great deal of pleasure! Even though the contemporary field restorative justice now has over a quarter century of experience, even though it has deep roots in our histories, we are still very early on the learning curve. There is still very much we do not know.

I experienced this wonder when sitting with a group of women prisoners in Pennsylvania several weeks ago. Most of these were serving real life sentences for murders in which they were involved – they have no realistic expectation of release. They have been meeting as a group to explore restorative justice and have found it transforming. Most inspiring to me is that they have learned to both support each other and to hold each other accountable with a simple question: "What is the RJ (restorative justice) way?"

Writing in the mid-1980s, I described restorative justice as an indistinct destination on a very long and winding journey. Now, several decades later, I can confidently say that although it is still a journey with many curves, many detours and wrong turns, the road and its destination are not as indistinct as they once were. If we set out on this journey with respect and humility, with an attitude of wonder, if we establish clear signposts to keep us on track, perhaps we and those we serve can experience a justice that is truly restorative.

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THE ROLE OF THE COMMUNITY IN APPLYING RESTORATIVE JUSTICE

Martin Wright

Paper to international conference 'Introduction of restorative justice in Ukraine: results and perspectives,' at the Taras Shevchenko Institute of Postgraduate Education, National University, Kyiv, 20-21 April 2006

When I was young, if your house needed a new coat of paint, unless you were very poor, you employed a painter. Now, as wages of manual workers have increased, you are more likely to 'do it yourself' (DIY): you buy your own paintbrush and paint from the DIY shop (магазин «умелые руки» ?). Some people claim that they do a better job than professionals, because they can take as much time and trouble as they need; others have faith in the skill and experience of those who do it for a living. If you live in municipal housing you may (in Britain at least) take the attitude that the local authority is your 'landlord' (домовладелец ?) and should do all the repairs, even those which you could easily do yourself. As for social services, when people in the community need to be taken care of, it may be left to individuals: if someone in your family is ill, you may look after them yourself, perhaps with help from neighbours; you may do it with professional help, from a doctor or a nurse, or you may have to let your relative be cared for in a nursing home or hospital.

What can be done about crime? In small communities where people know each other well, they can often rely largely on informal social control; in large, anonymous cities, there is a greater need for formal agencies such as park wardens, concierges and police. Sometimes the offender is a large company, and if many people combine to apply public pressure, the company can be forced to compensate its victims, as the Australian criminologist John Braithwaite (2002) has shown. Even a government can be influenced if enough people oppose it with great determination, as Ukrainians know. In Britain there is a demand for police to be visible in the streets (on foot or bicycle, not in police stations or cars). But police are expensive, so 'community wardens' or assistant police are being introduced: they have fewer powers, less training and less pay. This may increase community confidence; or people may feel that looking after their safety is someone else's job, so that they need not make an effort. In some places there is 'Neighbourhood Watch', in which members of the community are encouraged to report anything suspicious to the police, and in the process they get to know each other, which strengthens informal social control. Is this empowering people, or is it asking members of the community to do things for which the government should be directly responsible?

As usual, the answer is probably not at the extreme but in the middle. If the state does too much, people lose their skills. In Britain we talk of the 'nanny state' which 'wraps people in cotton wool' – although nannies are also sometimes excessively strict disciplinarians, and our nanny state has that character as well! In addition, the state often does not do enough, because it wants to gain popularity by reducing taxes, or because it has not been efficient enough in collecting them. But if the state does too little, things which need doing will often not be done at all, especially in those areas that need them most. In this neo-capitalist period, one tendency is for the empty spaces to be filled through the action of market forces: shopping centres employ security guards, and wealthy individuals live in 'gated communities', which are the mirror-image of prisons: they have walls or fences to keep criminals *out*. But of course this protection is only available to those who can afford to pay for it. Perhaps the ideal answer is in between the two extremes: rather than assume responsibility for everything, the state could make it easier for people to establish and maintain non-governmental organizations (NGOs, in Britain usually called 'voluntary organizations').

To change the metaphor, the way in which a seed develops depends not only on the seed, but on the soil in which it grows. The criminal justice system sometimes acts as if the way to encourage an individual to become a law-abiding citizen is to concentrate solely on him or her; but the environment is also important. To some extent communities just grow, but they can also be cultivated, and NGOs are part of the way in which we can decide whether to have a garden or a jungle. With this in mind, let us consider three aspects of providing a constructive response to crime: whether it should be done by state agencies or NGOs, whether the process in individual cases should be facilitated by professionals or volunteers, and how members of the community can

be involved in the process itself. This can be regarded as a philosophical question: is it *right* that the state and professionals should provide services and consequently have power over our lives; or it can be a pragmatic one: which method *works* better?

State agencies or non-governmental organizations?

Providing services through a state agency has obvious advantages. Their official status and closer contacts with the criminal justice system make it easier to interact with other officials, and for example to persuade prosecutors to refer cases to them. There are further advantages if their position is supported by legislation.

An example is the referral orders introduced in England and Wales[1] by the Youth Justice and Criminal Evidence Act 1999. This creates 'youth offender panels' including two members of the community, and it compels the courts to send all young offenders aged 10 to 17 to a panel if they are appearing in court for the first time and admit guilt, unless the offence is too serious or not serious enough. As a result, over 26 000 cases a year are referred to these panels. But in these youth offending panels the decision-making power remains with the panel rather than the participants, and in practice few victims take part. So we have a measure which is widely used, and includes some involvement of members of the community, but is not as restorative as it might be. In some countries there are measures which are more restorative in some ways, but do not involve the community, or have difficulty in attracting enough cases. Is it possible to have the best of all worlds? Dignan (2005: 113-4) has argued that if mediation services try to maintain the pure ideals of restorative justice, they find it difficult to obtain enough referrals, even when they have cultivated good relations with the criminal justice agencies. Do they have to sacrifice their independence, and even some of their restorative principles, in order to attract enough cases to justify their existence? One possibility would be for legislation to require all cases (with defined exceptions such as victimless or very minor offences) to be referred to an independent mediation service for assessment of their suitability for a restorative process; the more serious cases, as in the New Zealand juvenile justice system, would return to a court for sentence after going through the restorative process.

Furthermore, it is not always easy to persuade parliaments to pass legislation that is genuinely restorative, and once it has become law, it is difficult to change it. For this reason it may be best to try to introduce legislation which enables (or even requires) restorative procedures to be used, but does not prescribe the details. These can be in official guidelines, which can be modified in the light of experience, or better still in guidelines compiled by a national NGO responsible for restorative justice.

The legislation should also require funding for restorative justice programmes: an advantage of putting restorative justice on a statutory basis is that stable funding is more likely. In to-day's market-driven financial climate this is however by no means certain; in England, for example, short-term funding is common, and the government has even invited profit-making commercial companies to bid against established state agencies for the provision of services. There is also pressure on both state and commercial agencies to limit costs, and hence the number of staff, and consequently the number of cases that can be handled.

What can NGOs offer? They often use volunteers, and although they cost money (for recruitment, training, support and supervision) it is possible to recruit more of them without significantly increasing the cost. They also have other advantages (to be described below). NGOs have more flexibility than statutory agencies; they can diversify, for example by undertaking work in schools, the workplace, the family.

An example of providing a service through NGOs, in co-operation with the state, is the British organization Victim Support. In 1974 one local service was established, and with the help of television publicity the idea spread to over thirty other places. A national association, or 'umbrella body', was established to provide support, set standards, and lobby on behalf of victims, with the help of a small government grant. More local services were established, until within twenty years the whole country was covered. The funding of these local

[1] England and Wales have one legal system, Scotland a separate one. Together, the countries are referred to as Britain or Great Britain.

groups was however precarious, until in the late 1980s the Home Office was persuaded to provide funds for them, provided that they met standards which were agreed with the national association. This means that the Home Office can influence the policy of the association, but the association still obtains funds from other sources, so that it retains some independence; and the fact that it has a large number of volunteers throughout the country means that it can also influence the Home Office.

Local and national NGOs of this kind need to ensure accountability. This can be done by publishing annual reports showing, for example, the number of cases handled, the funds spent, and the extent to which both the people served and the volunteers are representative of the local population. Each country will have its own legal safeguards; in England, NGOs normally register as charities and often also as not-for-profit companies, which have to make regular reports about their activities and finances.

There also needs to be accountability as regards the process itself (Froestad and Shearing, in press). Power should not be given to individuals, hierarchies or small groups: decisions should come from the bottom up (Ross 1996: 55). Informal procedure has virtues, but it also opens the door to poor practice. The primary safeguard is good training of facilitators, so that they absorb restorative values. There should also be regular 'refresher courses', comparable to the continuing professional education of lawyers. In the South African Zwelethemba programme (described below) an important component is the Code of Good Practice, setting out the principles in simple terms. In some mediation services two facilitators work together, and evaluate each other's performance after every session. Roche (2003) suggests that the conferencing process itself provides a safeguard, because when there are many people taking part, there is more chance that one of them will be aware that unfairness has taken place and will have the confidence to say so. They should also be told what is good practice; otherwise if (for example) a facilitator dominated the proceedings is a judgmental way, participants might think that this was normal, because they were not aware that it is not good practice. When the process becomes too standardized, it becomes part of the problem (Ross 1996: 233); but there is a need for more formal safeguards, with a written grievance procedure, which should include an offer of mediation at an early stage. This is comparable to an appeal to a higher court, and participants should be informed of it. Although it is generally felt that lawyers should not take a direct part in the restorative process, because the participants should be encouraged and enabled to speak for themselves, they do have a role as 'professional bystanders to a community-driven process, where their role is to make sure that none of the parties are being deprived of their procedural … rights' (Ross1996: 216). Similarly a New Zealand judge, Fred McElrea, has commented that the role of the judge is 'to facilitate the strengths of others and bring them to the fore [which] is radically different to the controlling position of the traditional judge (McElrea 1994: 96).

Facilitators: volunteers or professionals?

Volunteer facilitators were used in the early American victim/offender reconciliation programs. Their use is being considered in Germany. In England they are used in community mediation. What are their advantages?

Volunteers are available out of office hours and at week ends, when most professional workers prefer not to be on duty. It should not be assumed that they cost nothing; in most cases paid staff time is necessary for their recruitment and training. Their out-of-pocket expenses should be reimbursed, and in some countries, such as Norway and Poland, they receive a small honorarium. In the South African Zwelethemba project this is a matter of principle: poor people should be enabled to handle their own security and should be paid for doing so (Froestad, personal communication). But as the cost is much less than that of professional salaries, it is more economic for them to work in pairs - often a more experienced and a less experienced one together. In Poland, volunteers even undertake much of the administrative work, but this is only possible because they have a high level of commitment, and it means that if a mistake is made, it may not be discovered quickly. In theory, the number of cases can always be increased, because whenever more volunteers are needed, they can be recruited and trained at little extra cost. This may not be possible, however, in places where salaries are low and people work long hours; then it may be necessary to pay them at least a nominal fee. It has been found that volunteers can do a very professional job. However, they are human and need support and supervision –

sometimes more than professional workers. The motivation of volunteers is a skill which professionals themselves have to learn.

Professionals, on the other hand, are generally there when they are wanted. It has been found in England, however, that they often come from professions that are accustomed to work with offenders, and are trained as police, social workers and so on. They are not accustomed to work with victims, and have shown some reluctance to do so. Their primary training has not included mediation, and even if they are re-trained, they are likely to follow the ethos of their original profession first, and of restorative justice second. Roche (2003: 233) warns particularly against the use of police and judges as facilitators of conferences. One way of tackling this problem has been used in Austria: to use specially trained probation officers as facilitators of the restorative process, but to require them to do only this work, so that they do not have to change backwards and forwards from one role (and professional ethos) to another. Professionals tend to come from a limited cross-section of the community, and therefore to have less knowledge of the background from which many offenders come. Ross (1996: 263, 267) suggests that leaving everything to professionals undermines families and communities: solutions should be found by the people actually involved, not by professionals who are strangers, and the experts should step down from their thrones. A good mediation service will find out the main communities (ethnic, linguistic and so on) in its area and try to recruit volunteers from those groups. Already in the early days of mediation, it was found that 'the best results were obtained when the characteristics of the mediators did not markedly differ from those of the disputants themselves' (Grönfors 1992: 420).

Members of the community as participants in the process

The third way in which the community can be involved in the restorative process is as participants: the families and friends of victims and offenders are also members of the community. The best-known way of including them in the process is 'conferencing.' There are different ways of doing this. In the juvenile justice system in New Zealand the extended family of the offender is invited to take part, and at one stage of the proceedings they are given 'private time', with no officials or social workers present, in which to propose an 'action plan'. This is a sort of contract with the young person, which may include reparation to the victim; sometimes the relatives contribute to ensuring that the young person fulfils the contract. Another method, called 'community conferencing', also includes other members of the community; thought is needed, however, as to the selection of these persons: do thy really represent the community or are they self-selected?

The idea is taken a stage further in parts of Canada, especially in areas where Indigenous people live. Here, the 'conference' also includes the judge, prosecutor and defence lawyer; hence, the circle can deal with any case which the judge has power to decide. Often the custom of using a 'talking stick' is followed: it is passed round the circle and only the person holding it is allowed to speak. Although ultimately the procedure is subject to law, it is strongly influenced by the Indigenous philosophy. It does not emphasise particular actions of individuals, but rather the relationships between people: 'When people cause problems, for instance, this law of interconnectedness requires that a justice system investigate all the factors that might have contributed to the misbehaviour' (Ross 1996: 62, 64). The emphasis is not on what has been done wrong, but on what needs to be done to put it right. The Navajo people do not speak of 'right' and 'wrong' but of consequences: if you do not tell the truth your fellows will not trust you and you will shame your relatives (Ross 1996: 107; cf Wright 1982: 255-8, 262-3). They say that 'adversarial trials have given way to co-operative problem-solving aimed at the restoration of harmony, and punitive prison sentences have been replaced by community healing programmes'; and 'deterrence cannot be permitted to get in the way of healing (Ross, 1996: 217. 216).

An interesting programme in South Africa starts the process in the community, and only passes it on to the criminal justice system if it cannot be resolved at the community level. The prototype is in a township near Cape Town called Zwelethemba (meaning 'place or country of hope), and the model has been used in several other townships (and one in Argentina). There was dissatisfaction with existing institutions, and a new model was evolved over two years, with the endorsement of the minister of justice and the national commissioner of police.

While some countries have judges of the peace[2], the South Africans introduced two new institutions, organized by Peace Committees. When a conflict comes to light, they arrange a Gathering of the persons regarded as most able to contribute to a resolution. They consider the people involved as ‘participants’ rather than ‘victims’ and ‘offenders’, recognising that to-day’s offender may have been yesterday’s victim. The goal is not to decide guilt and punishment, but to reduce the likelihood that this conflict will continue: to ‘make for a better to-morrow’ by establishing a plan of action for those involved. It may include preventive work, for example trying to resolve a conflict that is in danger of leading to serious violence *before* it does so.

The second, probably unique, institution is called ‘peace building’. For every case handled by the peace committee, a payment is made to it, part of which covers its administrative costs, and part is ploughed back into local development projects which may provide small loans to start businesses and thus reduce unemployment, playgrounds for children, environmental improvements, and so on. Each new case is ‘an opportunity to build local knowledge about causes and conditions that make violent conflicts emerge, and to develop ideas of how generic problems, collective disadvantages and issues of social inequalities can be approached’, in other words to address structural problems which some restorative justice programmes have been criticized for neglecting. (Froestad and Shearing (in press).

In this way, these authors say, the Zwelethemba programme puts into practice some of the basic principles of restorative justice, including:

- focusing attention on options for future peace more than on issues of restoration or re-integration
- organising restorative forums so that responsibilities, resources and control are moved from state-sponsored restorative professionalism to local communities and laypeople, and
- establishing systems of rules, procedures and review mechanisms that are required to keep local practice within limits and tuned toward core values.

Conclusion

Involving the community sounds like a good, democratic thing to do. Someone once said that the word ‘community’ is like an aerosol which social policy-makers spray over problems. That already raises questions about how effective it is; and even more when we spray it over someone else’s problems! I am conscious that I have been writing from a British point of view, and that social and economic conditions and the legal system are different in Ukraine in many ways. But there are similarities; and you will be able to judge how much of what I have said applies here – or could apply in the future.

We have considered three aspects of providing a constructive response to crime. Should it be done by state agencies or NGOs? State structures may provide a more permanent structure, but even they are subject to short-term funding; and if an NGO loses its funding, its members are able to speak out in protest, and/or to seek funding from other sources. NGOs have more flexibility, provided that they do not receive all their funding from one government department.

The actual provision of services can be by professional or volunteers. Professionals usually have more formal qualifications; volunteers have shown that they can work to professional standards, provided that they have adequate training, support and supervision, and they may have closer contacts with the communities they serve. There is a case for using a combination of professionals and volunteers. People with a low income may have good mediation skills, but may not be able to afford to give time to voluntary activities; in that case, paying them for their work for the community may make it possible for them to take contribute in this way. By being involved, they can gain a better understanding of the pressures that lead to crime, and thus add their voice to pressures

[2] In England, ‘justices of the peace’.

A distinctive feature of restorative justice, and especially conferencing, is that members of the community, including relatives and friends of the victim and the offender, can be involved in the process itself. This can also have advantages which the conventional justice system does not offer: Safeguards are however needed; in some ways the process itself is a safeguard, because it encourages people to speak up for themselves if they feel that something is not fair. This in turn depends of the facilitators , who also need to be supervised.

When a service is needed, there are four main ways in which it can be provided. We can pay taxes to the state (nationally or locally), and ask it to provide a service. . In some cases we can pay professionals, such as doctors or lawyers, or profit-making commercial firms to provide the service. We can pay a NGO to provide the service, and it in turn may use paid staff, volunteers or both. In Britain to-day, NGOs have elaborate ways of asking members of the public to give money to their work Lastly, we can do it ourselves, either by working as volunteers for an NGO, or on an individual basis, as individuals throughout the centuries have cared for their families and their neighbours. There are advantages and difficulties with all of these methods; a healthy community will be one which finds the right balance between them.

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HUMAN RIGHTS IN JUVENILE JUSTICE REFORM IN UKRAINE: RESTORATIVE PRINCIPLE AS A DESIDERATUM

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OUTLINE

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Only for those without hope that hope is given to us

I. Introduction: What is Restorative Justice and what are the Implications for Juvenile Offenders?

The essence of restorative justice is its focus on crime as an act against another individual or community rather than the state. While the concept of a crime as an offence against the state presupposes punishment of the offender, including incarceration and even death sentence, the mail focus under restorative justice is the victim and/or the affected community receives some type of restitution from the offender, like money, community service in general, community service specific to the deed, self-education to prevent recidivism, and/or expression of remorse. Offenders are given the opportunity to tell their story of why the crime occurred and how it has affected their lives and they are given a chance to make things right —to the degree possible—with the victim or/and community.

Thus, the following features are the hallmarks of the restorative justice: it is a future-focused model that emphasizes problematic problem-solving and re-integration into society instead of punishment or ‘revenge’; the offender is held directly accountable to the individual victim and the specific community affected by the criminal act; the community obliges the offender to take direct/personal responsibility to compensate the victim to the degree possible; the community is encouraged to become directly involved in supporting the victims and provide for offenders opportunities to reintegrate into the community.

Historically, the restorative justice was the most common form of justice, and the paradigm shift occurred when Henry I, the son of William the Conqueror, issued laws (after the Norman invasion of Britain) in which the offenders were described as persons committing crimes – not against another persons – but against the “king’s peace”, i.e. a state (or realm, kingdom). Thus, crime was no longer perceived as injurious to persons, but rather was seen as an offense against the state.

In terms of applicability of the principles of restorative justice to children, it should be kept in mind that society should take into account and address the many social injustices experienced by our children and focus on the development of programmes and initiatives focusing on the life experiences and life chances of our children.

And the most important thing is not to 'punish' the juvenile offender, but to make him/her to somehow "restore" something: restore the victim; restore the damage caused by crime to community and – most importantly - to restore the offender to a law abiding life in a community.

II. Current Situation with Ukrainian Youth: Precipitating Factors for Juvenile Delinquency

According to statistics, Ukraine has a population of about 51 million inhabitants, which is slowly decreasing due to various socio-economic problems faced by the country. The social, economic and political transition which Ukraine has been undergoing during last fourteen years has had a negative impact on the most vulnerable sections of population, especially on families with low income and children. The lack of resources available to the government has had a sinister implication in that there was a critical deficiency of the necessary social and welfare infrastructure to assist poor families and children within those families at the very time they needed it most. The still ongoing process of transition, while traumatic for adults, has especially adverse effect on children who have to face, if not experience: a) abject poverty; b) violence and abuse in the family; c) homelessness; d) family break up; e) sexual and commercial exploitation; HIV/AIDs. Statistics corroborate this grim reality: there are officially 6000 families in Ukraine where parents have been deprived of their parental rights , while 82,000 families and 153,000 children have been registered as "vulnerable". Moreover, 35,000 children are registered as homeless and many of those on the streets come not only from vulnerable families but also - from institutions, like foster homes. And, not the least , one should always keep in mind the effects on the health of many children and their families caused by Chernobyl disaster.

It is against this backdrop that the relative advantages/disadvantages of the restorative vs. retributive justice should be weighed and appreciated.

III. Situation with Juvenile Justice in Ukraine: Persistent Human Rights Concerns

The breakdown of the previously existing infrastructure for addressing problems posed by juvenile offenders meant, *inter alia,* the failure to develop new – and updated – means of addressing the offences committed by children, which, in turn, could have served as an additional causative factor for exacerbating the very problem the Ukrainian government failed to address. Thus, we have a vicious circle of self-regenerative patterns of responses that either keep up the status quo of the situation with juvenile justice, or make it even worse (see Appendix 1). From this perspective, the overall aim of all the actors dealing with juvenile justice in Ukraine could be represented as a ***breakaway from the vicious circle of a retributive justice and on to the virtuous circle of a restorative justice (See Appendices 1 and 2)***. Situation on the ground is a good illustration of the self-regenerative nature of the defective patterns in juvenile justice system of Ukraine.

Among the primary goals of the legal and judicial reform in Ukraine in 1992 was establishment of 'courts for reviewing family and juvenile cases'. However, this part of the reform, has - along with few others - failed to be materialized, and statistical data and court materials show that the absence of a prevention-oriented juvenile justice system can partly be blamed for the increase of social problems among youngsters in Ukraine. The statistics on juvenile delinquency in Ukraine corroborates this thesis: in 1992, 11,629 adolescents (between 14 and 18 years of age) were convicted for committing crimes, of which 2,851 were imprisoned. In 2004, the number of crimes committed by adolescents increased to 21,806, and 4,384 of them were imprisoned, i.e. a doubling over just 12 years. More than 50 per cent of these adolescents were convicted for stealing, 25 per cent for theft and robbery, and 10 per cent for serious physical assault. One in three children was sentenced for a period between one to three years; half of all juvenile offenders (JOs) were sentenced to a term of three to five years; and almost 18 per cent - for more than five years. Since 2002 many JOs have been getting sentences as high as 10 to 15 years – a relatively new and alarming phenomenon with little or no previous precedence. This demonstrates both the tendency towards heavier crimes being committed by adolescents, as well as the continuous prevalence of the punishment modality in the Ukrainian juvenile justice system.

In addition, younger children aged 11 to 14 years who have not yet reached the legal age for criminal responsibility are committing more socially dangerous acts: while in 1994 the reported figure of the crimes committed by these JOs was 1,551, the one reported in 2004 was 3,287. Some of these children are sent by courts to special schools; however, about 80 per cent of them are usually sent back to their families for social rehabilitation, with social services assigned to facilitate the process. The court decisions, however, are rarely executed due to lack of social services provided by the government, and this puts into question the credibility of the courts and the whole issue of restorative justice.

As a result of the deficiencies of existing legislation, as well as the juvenile justice reform implementation process, Ukraine has emerged as a country with no separate judicial system to address the particular needs of children and youth. As practice has shown, this situation has adverse effects on several levels: first, the focus of the legal and judicial system vis-à-vis youth at risk or convicted of crimes has remained on punishment rather than prevention or rehabilitation; second, the law enforcement officials have also been reverting to punishment and incarceration in view of the limited options the juvenile justice system could offer them; third, the justice officials have failed to receive specialized training on a systematic and continuous basis for dealing with juvenile issues; and fourth, the juvenile cases have come to be considered within the regular court system and – as statistics show – pre-trial detention can last from several months to several years.

To compound the problem, the administration of juvenile justice is spread loosely between different administrative and judicial bodies with no effective coordination amongst them, and juvenile detention centres are rife with human rights violations, including denying the adolescents such rights as medical care, education, access to facilities fostering individual development, etc. Thus, the need to render help to Ukrainian authorities to organize and deliver juvenile justice services in a coordinated, cooperative and effective manner *with a focus on restorative justice principles* is more than obvious.

IV. Human Rights in Administration of Juvenile Justice of Ukraine: UN Standards and Recommendations of the UN Human Rights Monitoring Bodies

IV. 1. Ukrainian Juvenile Justice-Specific Regulatory Framework

Ukraine has already taken the first steps towards the implementation of international legal provisions and standards for the introduction of a human rights oriented juvenile justice system. In particular, several new laws were approved by the Supreme Court of Ukraine in 2001: laws 'On Protection of Childhood', 'On Social Work with Children and Youth', and 'On Prevention of Violence in Family', as well as the new Criminal Code of Ukraine. Although these documents are both significant and consistent with the principles of restorative justice and the UN standards on the rights of the Child, there is a consensus of opinion (voiced, *inter alia,* by the UN Committee on the Rights of the Child) that there are significant gaps in the Ukrainian legislation related to juvenile justice, especially what concerns the monitoring and implementation of the relevant legal provisions.

For example, the Law 'On Prevention of Violence in Family' is focused on specific issues pertaining domestic violence, but it mainly stresses mechanisms of administrative control (in particular, by the police) rather than more appropriate judicial mechanisms guaranteed by the Constitution of Ukraine or advanced international practices.

Article 3 of the Law 'On Protection of Childhood' guarantees equal access to free legal aid necessary for protecting the child's rights. However, in practice, this right is not realized due to the absence of real mechanisms (including funding) enabling the children (or their parents/guardians) to enjoy it.

Ukraine's new Criminal Code is on the whole consistent with the international standards. Chapter XV is devoted exclusively to criminal liability and punishment of minors, stipulating correctional work, suspended sentences combined with obligatory education, and pre-term discharge as punishments. Unfortunately, in spite of these legal provisions, special courts for minors have not been set up, nor are there any judges specializing in such cases. The number of lawyers, social workers, civil activists and officials practicing in the

area of juvenile justice is very limited. Practices, like long period between the arrest and until the detainee's family is informed, from detention to interview with the judge (72 hours), and the duration of pre-trial investigation (18 months) are strenuous for children and legally unjustified.

The issue of social adaptation, in the sense of providing conditions that make a child less vulnerable and more resistant to criminal behaviour and committing crimes, though of primary importance, is commonly neglected.

In 2004, the Supreme Court adopted two Decrees on: *'Court Use of Legislation on Liability for Involvement of Minors in Crimes and other Anti-Social Activities'* and *'Court Use of Legislation in Cases Concerning the Crimes of Minors'* (NB! Verify the translation!). Some of the provisions in these documents, it should be stressed, constitute a positive shift towards the implementation of international standards on juvenile justice. They provide for:

- an increase of criminal liability for those who involve minors in criminal activity;
- different approaches to juveniles and adults in court proceedings;
- a necessity of paying more attention to the socio-psychological determinants of a crime;
- measures that strengthen the role of restorative justice; and
- strengthening collaboration with NGOs.

Overall, the deficiencies of the Juvenile justice system in Ukraine can be summarized in the following points:

- custodial measures have clear precedence over the non-custodial one;
- there is a wide-spread reliance on punitive measures and deprivation of liberty is not used as a measure of last resort, as stipulated in international standards;
- children get disproportionately long sentences for relatively minor offences;
- pre-trial detention is in clear violation with international standards;
- there are no courts specifically dedicated to juveniles;
- the juvenile detention centres are designed to punish the juvenile offenders rather than to accord them treatment that would foster their re-integration;
- there is a stark deficiency of community-based measures to socially rehabilitate the young offenders;
- the key actors in the juvenile justice system, like judges, the law enforcement and social workers, do not get special knowledge and training on juvenile justice on a systematic and ongoing basis;
- the juvenile justice system is more of a reactive than proactive nature and needs to incorporate an effective set of preventive strategies

IV. 2. UN Standards and Recommendations of the UN Human Rights Monitoring Bodies

Children have long been identified within the international framework of human rights as deserved of special consideration because of the nature of childhood, of vulnerability to abuse and exploitation, and the absence of the political platforms to articulate their special needs and rights. The Universal Declaration of Human Rights proclaims that "[m]otherhood and childhood are entitled to special care and assistance ", and that "[a]ll children, whether born in or out of wedlock, shall enjoy the same protection" (Article 25(b).

The Convention on the Rights of the Child (CRC)[3] was adopted unanimously by the United Nations in 1989 and has achieved the highest level of acceptance of any human rights instrument. An almost universal ratification of this UN instrument provides it with an unprecedented legitimacy as a tool for change for children.

As restorative justice could be phrased as *an approach having the best interests of the child and the affected victim and community as the primary consideration* (in contrast to *attribution of a punishment as primary consideration*), we can find this provision in Article 3(1) of the Convention on the Rights of the Child, which reads as follows:

[3] See G.A. Res. 44/25 of 20 Nov. 1989

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

Another important provision of the Convention on the Rights of the Child, which has implication for application of the restorative justice principle to juvenile offenders, is Article 12 providing for the right of the Child to be heard. According to this article:

> "1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

With regard to *the adjudication and disposition of juveniles,* Rule 14(2) of the Beijing Rules[4] also provides that

> "The proceedings shall be conducive to the best interests of the juvenile and shall be conducted in an atmosphere of understanding, which shall allow the juvenile to participate therein and to express herself or himself freely."

The Committee on the Rights of the Child (CRC) stated in its concluding observations to the second periodic report of Ukraine (CRC/C/15/Add.191, 9 October 2002), that the legislation of Ukraine on the Convention "has been considered to be of a declaratory nature and thus has not been fully implemented" and recommended that "the State party review, amend and renew, where necessary, the legislation in order to ensure full compliance with the rights contained in the Convention and strengthen the mechanisms for the implementation of all legislation relevant to the Convention."

Addressing the specific issue of administration of juvenile justice in Ukraine, the Committee welcomed the adoption of the 1995 Act on 'Juvenile Affairs, Agencies, Services and Special Juvenile Institutions', which provides a basis for social protection and prevention of crime with respect to children, as well as the establishment of Juvenile Police Units. The Committee, however, remained particularly concerned by the following omissions in the administration of juvenile justice in Ukraine**:**

a) the absence of specialized juvenile courts and juvenile judges despite the legal provisions for these bodies in national legislation, and the limited number of legal professionals, social workers, community educators and supervising officers working in this field;
b) the extended period of time before detainees' families are informed of the detention; the long period of detention before having to be brought before a judge (72 hours) and the duration of pre-trial detention (18 months);
c) the placement in isolation of children aged 11 to 18 years in juvenile reception/distribution centres under the authority of the Special Ministry and the poor conditions in these centres and in all institutions where children are deprived of their liberty;
d) The insufficient education and guidance provided in corrective and other institutions and the lack of social and psychological rehabilitation services.

The Committee recommended that the Ukrainian State should:

a) Ensure full implementation of juvenile justice standards and in particular articles 37, 40 and 39 of the Convention, as well the United Nations Standard Minimum Rules for the Administration of Juvenile Justice

[4] See the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")- G.A. Res. 40/33of 29 November 1985.

(the Beijing Rules) and the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines[5]).

b) Use detention, including pre-trial detention, only as a measure of last resort, for as short a time as possible and for no longer than the period prescribed by law.
c) Take, in light of article 39, appropriate measures to promote the recovery and social reintegration of the children involved in the juvenile justice system, including adequate education and certification to facilitate their reintegration.
d) Seek assistance from, inter alia, the Office of the High Commissioner for Human Rights, the United Nations Centre for Crime Prevention, the International Network on Juvenile Justice and UNICEF.

IV. 3. The Aims of Juvenile Justice

The stated aim of the juvenile justice system as promulgated in all relevant international human rights instruments is ***the child's rehabilitation and social reintegration.*** This is in particular clear from article 40(1) of the Convention on the Rights of the Child, which reads:

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

In connection with its consideration of the reports submitted by States parties, the Committee on the Rights of the Child has expressed concern at the insufficient number of facilities and programmes for the physical and psychological recovery and social reintegration of juveniles,[1] "the lack of rehabilitation measures and educational facilities for juvenile offenders"[6], as well as "the placement of 'potential delinquents' in detention centres instead of care institutions for their rehabilitation"[7].

According to Rule 5.1 of the Beijing Rules, "[t]he juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence."[8] The Commentary to this document stipulates two basic and "most important objectives of juvenile justice"[9]. The ***first objective*** is "the promotion of the well-being of the juvenile", and moreover, it is *the main focus* of those legal systems in which juvenile offenders are dealt with by family courts or administrative authorities, but also "in those legal systems that follow the criminal court model" in order that they contribute "to the avoidance of merely punitive sanctions".[10]

The ***second objective*** is the "principle of proportionality", considered here as an "instrument for curbing gravity of the offence", and which in this particular context means that "the response to young offenders should be based on the consideration not only of the gravity of the offence but also of personal circumstances", such as "social status, family situation, the harm caused by the offence or other factors affecting personal circumstances".[11] Such circumstances "should influence the proportionality of the reactions (for example, by having regard to the offender's endeavour to indemnify the victim or to her or his willingness

[5] See United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines) – G.A. Res. 45/112 of 14 December 1990

[6] See UN doc. CRC/C/84, *Report on the twentieth session, 1 1-29 January 1999,* para. 126.

[7] See UN doc. CRC/C/84, *Report on the twentieth session, January 1999,* para. 184.

[8] See Beijing Rules, *ibid.*

[9] See UN doc. ST/HR/1/Rev.4 (vol. I/Part 1) *Human Rights – A Compilation of International Instruments,* vol. I (First Part), Universal Instruments, p. 360.

[10] *Ibid.*

[11] *Ibid.*

to turn to wholesome and useful life)".[12] To sum up the Commentary, Rule 5 "calls for no less and no more than a fair reaction in any given cases of juvenile delinquency and crime. The issues combined in the rule may help to stimulate development in both regards: new and innovative types of reactions are as desirable as precautions against any undue widening of the net of formal social control over juveniles."[13]

Article 10(3) of the International Covenant on Civil and Political Rights – admittedly, the most widely-used international human rights instrument at a global level - also provides that "the penitentiary system shall comprise treatment of prisoners *the essential aim of which shall be their reformation and social rehabilitation"* (emphasis added)[14]. As stated by the UN Human Rights Committee, "no penitentiary system should be only *retributory*; it should essentially seek the *reformation* and *social rehabilitation of the prisoner*" (*emphsasis added*).[15]

Thus, according to the international human rights law, the overall aim of the juvenile justice system is *to promote the child's rehabilitation and social reintegration*, including the child's *sense of the dignity and worth* of its own person as well as *his or her respect for the fundamental rights of others*.

V. Measures to be Taken to Foster the Juvenile Justice Reform along the Restorative Lines

It is abundantly clear from the above argumentation that international human rights law and recent developments in general point to the so-called *diversionary* measures as an alternative to custody and incarceration. In a purely legal sense, *diversionary* measures exist with regard to offences of a criminal nature set out under special legislation and not with regards to the crimes and/or contraventions stipulated in the Criminal Code. An example could be breach of an Environment Protection Act, whereby a *compromise penalty* would be instituted, as agreed between the State authority and the Offender, in the result of which person's criminal liability with respect to that offence would also be extinguished[16].

The evidence, at both international and national levels, point to the fact that the majority of offences committed by juvenile offenders are less serious *offences* and that resorting to formal means of dealing with them cold be both unnecessary and even counter-productive. Only a relatively small portion of the more serious offences merit formal means and in some countries there have been wide-scale experimentation in this area, like introduction of administrative tribunals and "children's hearings"; formal meetings between the juvenile offender's family and the court; involvement of the ordinary members of public in off-court hearings without any punitive options available; mediation programmes involving the victim as well as the offender trying to resolve the consequences of the offence without taking the young offender through the formal court proceedings; imposition of a social work, where involvement of the social services with a young offender who admits his involvement in an offence, can be sufficient for the waiving of prosecution- usually on some condition agreed with the offender.

Another argument in favour of a restorative principle comes from the so-called *evidence-based approach*, the essence of which is a 'reality check' on the extent to which particular programmes or measures are successful in terms of effectiveness for social rehabilitation, and also – their cost-effectiveness, in terms of outlay of time and resources of the community. All the evidence – culled from social workers, policy makers and offenders and their families – is that punitive sanctions are less effective, less cost effective; may in part be more harmful to the young offender; will perpetuate the social exclusion of the young offender and will inhibit his/her re-integration into society as required by the international standards.

As hinted in the above examples, there is one vital distinction to be made when confronted with the punitive vs. restorative dilemma: if the offence is of a relatively minor gravity, the juvenile offender is accorded less

[12] *Ibid.*
[13] *Ibid.*
[14] *See* G.A. Res. 2200 A (XXI) of 16 December 1966.
[15] General Comment No.21 in *United Nations Compilation of General Comments,* p. 143, para. 10.
[16] See Fishery Conservation and Management Act of 1976 -- Public Law 94-265, approved April 13, 1976; 16 U.S.C. 1801-1882; 90 Stat. 331; as amended by numerous subsequent public laws listed and identified in the U.S. Code, sect. 34(7) of Chapter 425.

formal, non-custodial measures, while for those who commit the more serious offences, more formal, and sometimes custodial ones would be more appropriate. This *twin track* approach is a litmus test for determining which type of approach should be used when confronted with a juvenile offence.

In order to re-direct the lives of juvenile offenders, new paths should be found that combine strict accountability with research-based, integrated treatment, which recognizes the significance of the victim's and offenders' families and the interests of the communities they live. Victim/offender mediation-, community service-, high intensive probation/social work programmes[17], programmes supporting families, parenting, community development, communities-that-care, safe-neighbourhood/community safety schemes should be given priority attention and adequate funding.

Concerning pre-trial detention, such measures as remand at home on supervision, reduction of the time spent in custody, and the above-mentioned diversionary measures should be carefully considered and incorporated into Ukrainian juvenile justice system.

Overall, what seems the most important ***is the development of an overall strategy, which would clearly state the strategic vision for the future of the juvenile justice reform in Ukraine***. UNICEF, as a UN agency specifically dedicated to the promotion of the rights and well-being of children, *could play such a coordinating role and establish for that purpose a body (e.g. Inter-Agency Coordination Committee on Juvenile Justice) composed of key governmental and non-governmental actors and produce a strategic statement on the future of juvenile justice based on restorative principles*.

The elements of such a statement could include the following action and programmatic components:

1. **Accurate, objective and comprehensive assessment of the current situation in the area of Juvenile Justice.** This would allow taking stock of the stakeholders' information needs, and identifying potential sources of information and constraints in the data gathering procedures.

   Activities, supporting this CSF, could include:
   - securing agreement from Ukrainian autorities on main disaggregated indicators on juvenile justice in order to introduce them into a national statistics system;
   - qualitative survey allowing to identify major potential intervention areas among key target groups, including children; and
   - comparative quantitative research allowing for measurement of the project benchmarks and results.

2. **Building partnerships, initiating and engaging in inter-sectoral cooperation**, including the initiation of a permanent *Inter-Agency Coordination Council (IACC)* working on juvenile justice issues. Activities would include:
   - organization of public events, including round-table discussions, public hearings/debates, seminars and conferences, on national and community levels;
   - establishment of an *International Advisory Committee (IAC)* to the project with the participation of, *inter alia,* Swedish/international juvenile justice experts, and
   - identifying and disseminating 'success story' models.

   To ensure transparency and complementariness of efforts, UNICEF, as a coordinating body, would engage in this process Ukrainian and international experts on juvenile justice, international organizations, CSOs and media.

3. **Development of a comprehensive long-term national strategy on the ways to create a workable and sustainable Juvenile Justice System in Ukraine and its formal endorsement by the Government of Ukraine.**

Activities supporting this strategy would include:
- technical support and advice to the *Inter-Agency Coordination Council (IACC)*;

[17] The Concluding Observations of the Committee on the Rights of the Child: Ukraine made specific comment on the need for more "….social workers, community educators and supervision officers working in this field." – *ibid.*

- provision of the JJS-specific legal, advisory, prosecution and litigation services to the Government along the restorative lines;
- elaborating and sharing international experience on long-term strategies for building the JJS along the restorative and re-integrative lines.

To ensure operational viability of the *Inter-Agency Coordination Council (IACC),* a number of multi-sectoral working groups could be formed to develop issue-specific, long-term JJS reform strategies with representation from different branches of the Government (including the legislative, executive, and judicial branches). The activities in this CSF envisage active participation of youth, CSO and media representatives.

4. **Alignment of the JJS-specific public policy and regulatory framework with the UN standards and best international practices.** This would be achieved through development of a resource-based public policy and long-term strategy.

Activities supporting this CSF would be aiming at:
- determining gaps in national legislation on JJS;
- amending national legislation in accordance with accepted international norms and standards;
- establishment of a proper basis for development and promotion of a draft law on juvenile justice;

5. **Capacity building of the judiciary (especially Juvenile Judges), law enforcement officials and social workers** at the central and local levels in order to enhance their knowledge and competence in the area of Juvenile Justice.

Activities supporting this strategy would include:
- organization of Juvenile Justice-specific trainings for juvenile judges, law-enforcement officials and social workers in line with Article 44 of the UN *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*; and
- establishment of the "*code of practice for proper management of the cases involving child victims*" as stipulated in the same document.

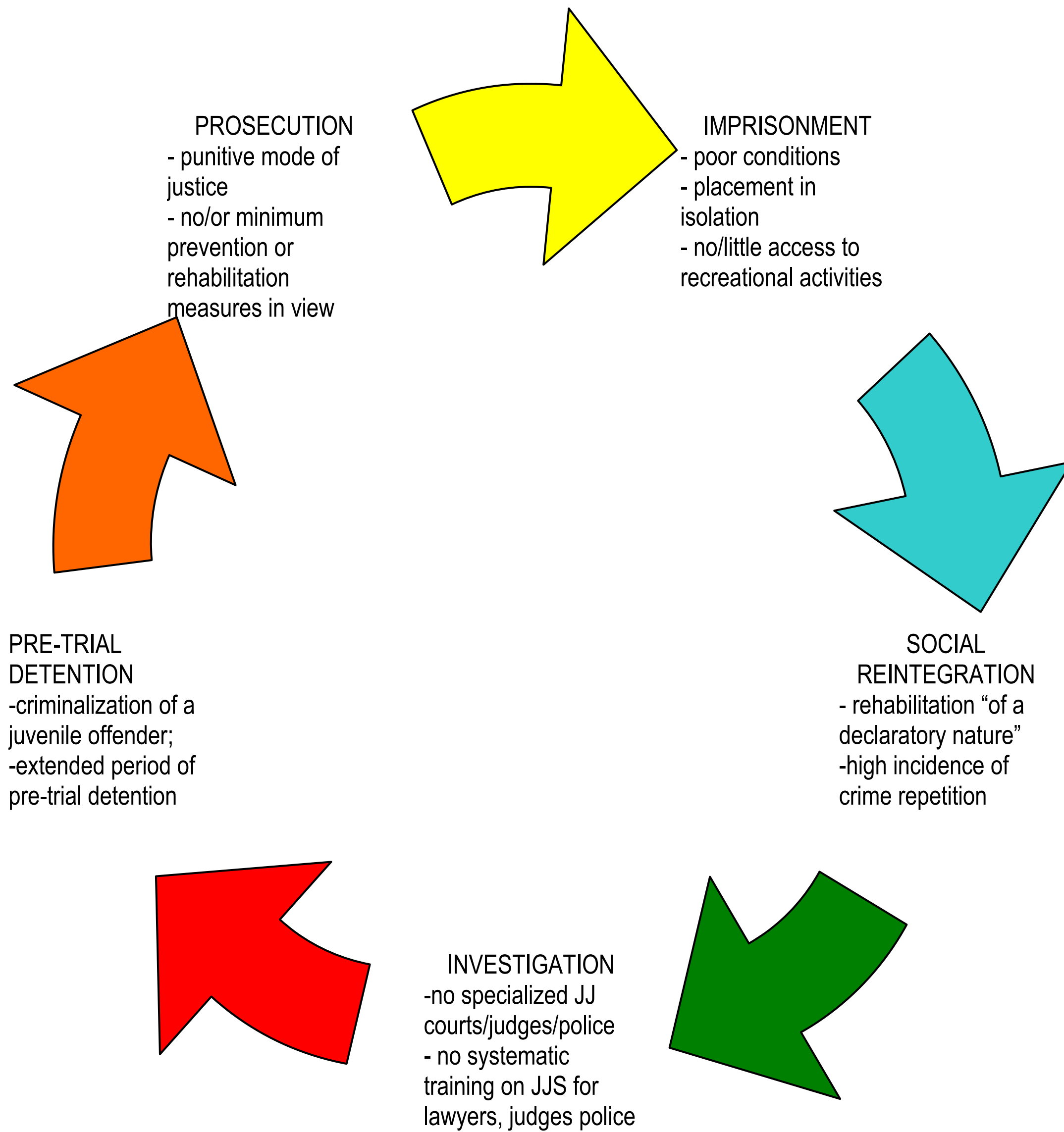
The present article has provided a survey of some of the important international human rights principles relevant to the rights of the child in the administration of justice and juvenile justice system reform. This legal justice system takes as its point of departure the fact that children are persons in their own right and possess rights and obligations which have to be considered and respected by both administrative and judicial authorities. Furthermore, children have special rights, needs and interests which must be considered. Thus, the juvenile justice reform must at all times be guided by the overriding principles of non-discrimination, the best interests of the child, the child's right to life and development and its right to be heard – all of which, if properly applied to juvenile offenders, would result in the response based on restorative and not on punitive principles.

However, in order to make the restorative principles a reality for the children of Ukraine, government must incorporate all relevant international rules into its domestic legal system, as well as provide proper training and financial means to the legal professions, police and social authorities, enabling them to acquire the necessary knowledge and skills to carry out their duties in conformity with States' legal undertakings.

Of all the recommendations made, the main priority is the establishment of a coordinating body to develop and implement a juvenile justice strategy for Ukraine, based on restorative and human rights principles. The initiative to create such a body and coordinate its activities could come – according to the argumentation of the author – from UNICEF, as the only UN body dealing with special rights and needs of a Child. UNICEF could provide a strategic baseline for introduction – in a coordinated and synergistic manner – of a comprehensive juvenile justice reform and most effective deployment of the available – alas scarce! – resources. And, as a prerequisite for achieving any lasting results, the capacity- building and development of training programmes to increase the knowledge and skills of the implementing actors, remains an absolute MUST.

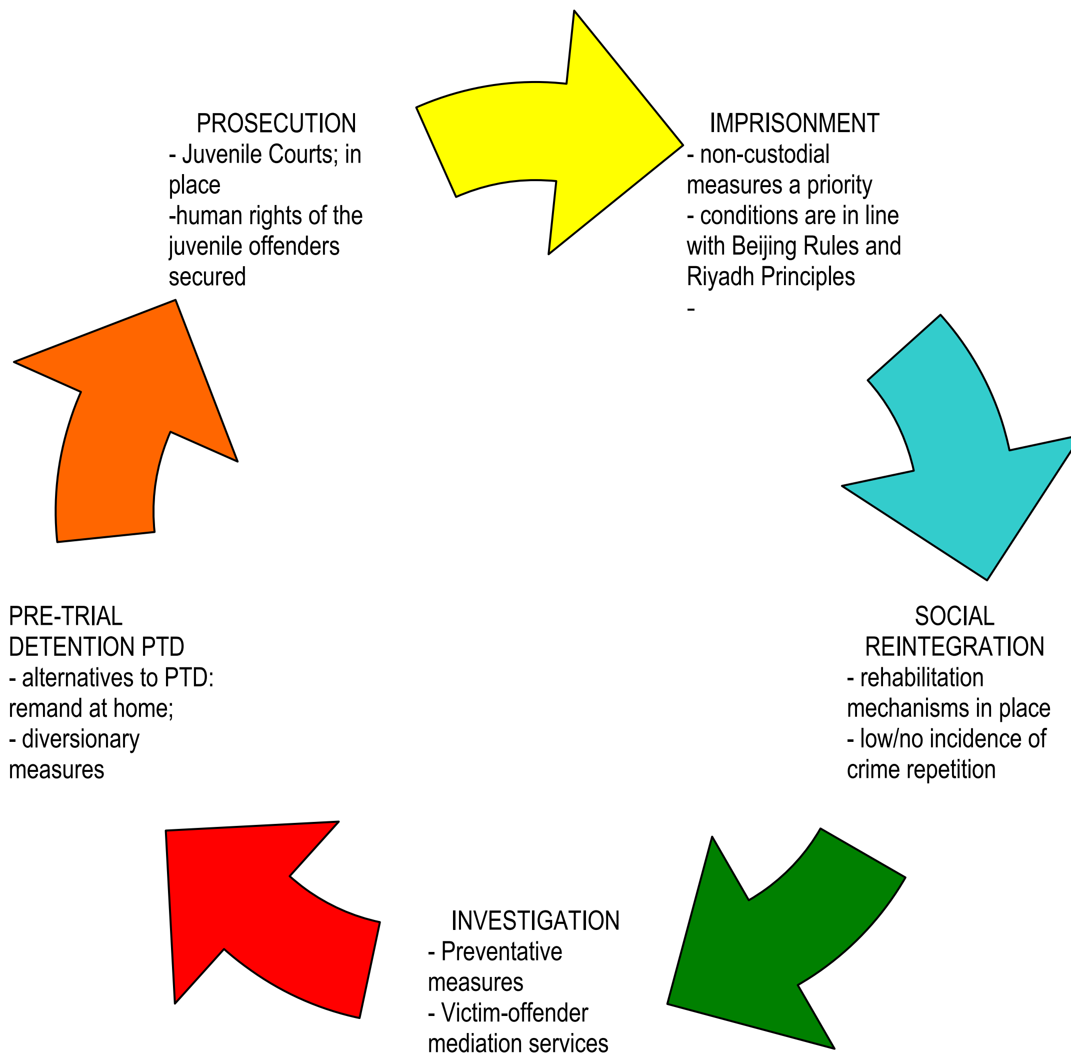
Appendix 1

Vicious Circle of a Retributive Juvenile Justice System



Appendix 2

Virtuous Circle of a Restorative Juvenile Justice System



Programme Evaluation

SUMMARY REPORT

INTRODUCTION OF RESTORATIVE JUSTICE IN THE UKRAINIAN LEGAL SYSTEM

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Ukrainian Centre for Common Ground

Key Findings from 2006 External Evaluation

INTRODUCTION

Since 1994 the Ukrainian Centre for Common Ground (UCCG) has built and strengthened individual and institutional capacity in Ukraine to deal with conflicts constructively and cooperatively. Informing all of UCCG's work is the vision of transforming Ukraine by cultivating a sense of possibility and personal stake in the future of Ukrainians and by promoting the attitude and skills necessary for them to identify and solve their problems and conflicts in a peaceful and non-adversarial way.

The UCCG is a sister organisation of Search for Common Ground, registered as a Ukrainian Philanthropic Organisation. Search for Common Ground is an international non-governmental organisation that seeks to transform the way the world deals with conflict away from adversarial approaches and toward cooperative solutions. Within this broader vision, UCCG launched the restorative justice initiative to develop and

institutionalize the movement to reform the judicial sector in Ukraine. Specifically, UCCG developed pilot programmes in Victim Offender Mediation (VOM), the oldest, most widely used, and most research-based expression of restorative justice. VOM is a process that provides interested crime victims the opportunity to meet the offender with a trained mediator in a safe and structured setting, with the goal of holding offenders directly accountable for their behaviour while providing important assistance and compensation to the victim.

This project was supported by the Institute for Sustainable Communities with co-funding from the British Embassy in Kyiv in 2003-2004. The European Commission supported development and implementation of the restorative justice model in Kyiv and 5 regions of Ukraine during 2004-2005.

SCOPE OF THE EVALUATION

Independent evaluators Betty Vos, Ph.D., Mark Umbreit, Ph.D., and Toran Hansen, M.S.W. from the Center for Restorative Justice & Peacemaking (CRJ&P), University of Minnesota, USA, conducted the evaluation between April, 2004 and February, 2006. In collaboration with the UCCG staff, the research team designed several data collection instruments that were filled out by UCCG programme staff and VOM participants. This data collection was coordinated by the UCCG Project Design, Monitoring and Evaluation Coordinator. In February, 2006, Betty Vos conducted a ten day site visit to Kyiv and three regions of Ukraine to complete the data collection.

The primary objectives of the evaluation were:

- To study and evaluate the functioning opportunities of victim-offender mediation (VOM) in Ukraine
- To study and evaluate the developed mechanisms of cooperation between mediation organizations and legal system offices
- To study and evaluate the consequences of VOM for its participants

Additional objectives, if possible, included the following:

- To study and evaluate the short term impact of VOM on the legal system in Ukraine
- To study attitudes of legal system representatives to Restorative Justice ideas
- To study and evaluate societal needs in restorative justice programmes

Not all objectives could be adequately investigated within the time constraints and resources available for the evaluation. The following list of primary research questions was developed by the evaluation team in consultation with the UCCG Programme Director and other UCCG staff:

1. Who participates in the VOM process and why?
2. How does the VOM process work in each region? (Similarities and differences)
3. How do the participants in the mediation process evaluate it?
4. What do legal system representatives think about VOM?
5. What were the immediate outcomes of the VOM?
6. Does the VOM model effectively implement restorative justice principles?
7. What are the primary factors that facilitate or impede the expansion of restorative justice VOM in Ukraine?

KEY FINDINGS

1. Who participates and why? In five regions, a total of 29 victim-offender mediations had been completed by the end of the evaluation period. Offences included leaving in danger (Article 135), stealing (Article 185), house breaking (Article 185 clause 3) robbery/ pillage (Article 186 clause 1, clause 2), banditry (Article 187), and fraud (Article 190). Reasons that victims participated included to help the offenders, to receive restitution, to learn what happened, and because solving problems peacefully is part of democracy. Reasons offenders

participated included to work out restitution, to apologize, to repair relationships, and to impact court proceedings.

- *Recommendation: Because many participants were already motivated to work out their differences together outside the courtroom, VOM can offer a safer and more balanced option for facilitating this process.*

2. How does VOM work in the regions? In all five regions, the VOM programmes operate through written and verbal agreements with local justice officials, typically judges and/or Ministry of Interior Inspection officials. There is currently no statutory provision for VOM in Ukrainian law, so each region has developed its own referral procedures in coordination with the cooperating officials. All regions provide in-person preparation of offenders who are interested, followed by in-person preparation for victims. All regions conduct respectful and well organized mediation sessions. When agreements result, they are usually entered into the court records and judges consider them in the sentencing process. The entire mediation process is typically completed within two to three weeks of the initial referral.

- *Recommendation: Some measure of regional flexibility to meet differing regional situations has proven valuable and should be preserved.*

3. How do the VOM participants evaluate it? Feedback from participants is very positive and meets or exceeds the results found in similar programmes in other nations. Satisfaction is high and participants would recommend VOM to others in similar situations. Participants reported feeling that the process is balanced, that mediators are impartial, and that the mediators do a wonderful job. Both victims and offenders were extremely grateful that the programme is free of charge. They also appreciated that the mediation procedure results in an official agreement which can become part of the court record.

- *Recommendation: The strong positive evaluations of VOM participants increase the likelihood that VOM can expand in Ukraine as citizens become more aware of it.*

4. What do legal system representatives think about VOM? The legal system representatives who were interviewed were very favourable towards VOM concepts. In addition, those who had direct contact with functioning VOM programmes were highly positive about those programmes. Respondents think VOM can reduce caseloads for judges and inspectors, can better meet the needs of crime victims, can resolve conflict among persons who live in the same community, can better reintegrate the offender into the community, and can help protect juvenile offenders from inappropriately harsh punishments and incarceration. Respondents felt there might be some negative reactions from Police officers and Ministry of Interior Inspectors, whose job performance currently tends to be measured by the numbers of "successfully prosecuted cases." Respondents also indicated that some lawyers might be opposed to VOM.

- *Recommendation: UCCG should utilize the positive reactions of justice system officials in their public relations campaign. It should also work to develop ways to help other justice system officials develop stake in VOM.*

5. What were the immediate outcomes of VOM? Fifty eight percent of the cases referred were evaluated as suitable for mediation. Seventeen percent of these mediable cases were convened in a mediation meeting. Ninety percent of the meetings resulted in an agreement between the victim and the offender. Fifty eight percent of the agreements resulted in payment of material damages to the victims. Major reasons that referred cases did not meet in mediation included insufficient contact information, advice of lawyers not to participate, refusal of the offender to admit guilt, and lack of interest in meeting. For completed mediations, mediators rated the relative achievement of the goals of positive changes in emotional state, acceptance of responsibility and apologies (offenders), and understanding of the situation and forgiveness (victims). Across all meetings and all participants, mediators assessed that such goals were fully met between roughly sixty and seventy percent of the time. These immediate outcomes are very impressive for a new programme initiative operating in an amorphous legal environment.

- *Recommendation: A major factor impeding successful mediation of referred cases is lack of sufficient information to contact the parties. Legislation will need to clarify and improve referral procedures. Until that time, UCCG programme staff will need to continue creative solutions to referral procedure problems.*

6. Does the VOM model effectively implement restorative justice principles? Data on restitution agreements and feedback from participants provides evidence that VOM is largely successful in repairing harm. Participation is clearly voluntary for both offenders and victims. The VOM process successfully addresses the needs that participants have identified, to the extent possible. While active involvement of the participants is most often the case, sometimes juvenile offenders are less involved and it is their parents who have primary involvement. Explicit community representation in the VOM process is present in some regions but not in all, although the mediators themselves are functionally volunteers and serve in part as representatives of their communities.

- *Recommendation: UCCG mediators should continue to develop creative ways to hold juveniles accountable within the constraints of current Ukrainian juvenile law. Potential National legislation to regulate VOM in Ukraine should provide for such accountability.*

7. What are the primary factors that facilitate or impede the expansion of restorative justice VOM in Ukraine? The two major barriers that currently impede the expansion of VOM in Ukraine are the lack of national legislation to sanction and regulate VOM, and a general lack of public awareness about the VOM process. Currently the VOM programmes that are part of the UCCG Initiative are functioning outside the law and are largely dependent on the good will of the justice system professionals who have agreed to cooperate with the regional programmes. Other barriers include the possible resistance of some key players in the justice system identified above. Major factors that can facilitate the further development of victim offender mediation in Ukraine, in addition to an appropriate law and increased public information, are that many citizens and justice system officials are very supportive of the idea once it is explained to them.

- *Recommendation: UCCG should continue its efforts to draft appropriate VOM legislation and to expand public awareness of restorative justice and victim offender mediation.*

SUSTAINABILITY OF VOM IN UKRAINE

Can restorative justice and victim offender mediation be sustained in the Ukrainian justice system? To the extent that political events in Ukraine are moving in the direction of increased democracy, both restorative justice and VOM will continue to have strong appeal. The history of communist control and the legacy of cumbersome bureaucratic structures and widespread corruption have already led ordinary citizens in many situations to seek to work out differences outside formal channels. Interviews with participants, programme staff and justice system officials made clear that the presence of a process that is viewed as trustworthy and at the same time that is sanctioned to have an impact on formal justice procedures offers an appealing middle ground for such persons.

As identified above, there is currently no legal mandate for victim offender mediation in Ukrainian law. In the long run, this is not a sustainable arrangement. In many situations VOM could be challenged legally. Further, if role incumbents change, the working agreements under which it operates would need to be re-negotiated. Long run sustainability will depend on having appropriate legislation in place.

UCCG has been part of a working group for the last several months that is attempting to draft legislation to provide for the practice of VOM within the Ukrainian Justice System. Such work is crucial and should be continued. More detailed recommendations for specific components of such legislation are provided in the full evaluation report.

Even so, we recommend caution and deliberation in moving towards establishing VOM through national legislation. Great care must be exercised to assure that any proposed legislation both provides for the uniquely

restorative components of VOM and permits variations that can be sensitive to regional differences, and we feel it is more advisable to delay legislation than to enact faulty legislation. If possible, legislation of a "permissive" nature that allows VOM to function and permits communication of appropriate case information to VOM programme staff could be a useful starting place. Such a move would increase the legitimacy of VOM and make possible more wide scale use while postponing decisions about narrow regulations that might prove difficult to undo later.

The second major barrier, public awareness, is also already being addressed by UCCG, and these efforts should continue. Data from the present report on high participant satisfaction and favourable opinions of justice system personnel can be useful as these efforts are expanded. The fact that regional programme coordinators have been approached to mediate cases not specifically referred through court channels further underscores the potential for VOM to have wide appeal in Ukraine. The demand for VOM services can only be expected to increase as more persons learn about it.

CONCLUSION

The UCCG initiative in restorative justice victim offender mediation has produced positive results in a very short period of time. The high satisfaction of VOM participants, the favourable responses of justice system officials, and the successful implementation of restorative principles in the mediation programmes bode well for the future of restorative justice in the Ukrainian legal system. These findings provide a strong foundation for Ukraine and UCCG to work towards increased public awareness of VOM and towards implementation of appropriate national legislation to sanction and institutionalize its practice.

Draft

CONCEPT FOR LEGISLATIVE REGULATION OF THE RESTORATIVE JUSTICE (MEDIATION) PROGRAMMES IN CRIMINAL PROCEEDINGS IN UKRAINE

1. General Provisions

For over 25 years, many countries of the world have developed a new approach to reaction to crime – restorative justice. That approach is based upon the principles of elimination of emotional, material and physical damages inflicted to the injured person, and acceptance of the responsibility for the committed crime by the offender, which is especially important is case of juvenile offenders. The effectiveness of the restorative justice was recognised by such countries as New Zealand, Norway, Germany, France and Poland, which, through their legislations, included restorative justice programmes to their criminal justice as an alternative or supplement to their justice systems.

In Ukraine, implementation of the restorative justice practices as a comprehensive complex of measures on part of different authorities and services – with due account to the fact that certain components existed even earlier – began to develop in 2003, starting from experimental models; at present, it encompasses 8 regions, accumulating experience. Implementation of that institute is necessitated primarily by crime rate growth.

Over the last years of the previous century, the degree of offenders' responsibility played the decisive role in delivering judgement, even as regards minors. That new punitive tendency conforms to the individualistic culture reigning in the market-economy countries. In practice, that approach to criminal sentencing caused considerable increase in the numbers of convicts in institutions of confinement and overcrowding of the latter, and to the increase of costs the state has to spend on the penitentiary system. As is known, the natural reaction to cruelty (although justified by the societal interests) is also cruelty and aggression, which, however, does not result in reduction of crime rates but, on the contrary, triggers their growth.

In the modern criminal law science and practices, proposals concerning the need for a more clearly defined status of crime victims and protection of their interests begin to be are voiced ever more actively. The world-wide and the European principles of human rights protection found their reflection in our legislation through the improved protection of the rights of suspects and defendants, but had practically no impact on the status of the injured person who fell victim of a crime. By their nature, proceedings in a case are not very helpful in restoration of the victim's rights, do not create conditions for realisation by offenders of the consequences their actions had and, finally, fail to fulfil their principal task – to protect rights and legitimate interests of citizens. Under those circumstances, it is necessary to change the way the society and the state react to law infringement, which directly affects formation of our future.

Justice, being a means to correct damages inflicted by a crime, must be aimed at creation of conditions where the process of repentance and restoration of justice may begin with the ensuring of possibilities for material consideration and reconciliation, and achievement of balance and accord between victim and the offender. One of the best known restorative justice tools is the programme for reconciliation of victims and offenders, specifically, use of mediation.

Some other forms of restorative justice, widely spread in the world (for instance, in Canada, Norway, New Zealand, the USA) are family counselling and civil justice circles, where the main advantage is a more active public participation in the process of social rehabilitation of the delinquent (as well as the victim) and in crime prevention.

In criminal proceedings, mediation between the injured person and the offender is the procedure that enables the victim and the accused (the defendant), by their mutual consent and with the help of the third party, the mediator – to reach agreement concerning compensation for the inflicted damages and reconciliation.

In other words, mediation in criminal proceedings is the intermediary services aimed at reconciliation between the victim and the offender.

The need for mediation services expansion in criminal proceedings was emphasized in Article 10 of the European Council Framework Decision on the standing of victims in criminal proceedings (dated 15th of March,

2001), which, in part, requires that all countries of the European Union develop intermediary services in criminal proceedings and ensure cognizance of of any agreements between the victim and the offender reached in the intermediation process. Even the Ukraine-NATO Programme envisages, as Ukraine's internal measure, the necessity to develop alternative methods for conflict resolution and, in part, mediation.

With regard to considerable shortcomings appearing in the course of traditional criminal justice, a number of international documents have been adopted that, to a smaller or larger extent, underline the need for application of «unofficial mechanisms for conflict resolution, including intermediary services, arbitration and customary law or local practices» (para. 7, Section A, Annex to the Declaration of Main Principles of Justice for Victims of Crime and Abuse of Powers, November 29, 1985).

The Tenth UN Congress on the Prevention of Crime and Treatment of Offenders, held in Vienna on April 10 through 17, 2000, emphasized that unofficial and semi-official forms of dispute settlement between the victim and the offender reflect the modern trends in reduction of functions of the state in that process.

Among the documents of the Council of Europe that in some way are related to application of mediation in criminal justice, the following may be noted:

- European Convention on the Exercise of Children's Rights (September 08, 1995), which, in its Article 13 - «Mediation or Other Processes to Resolve Disputes» - calls for encouraging the provision of mediation or other processes to resolve disputes;
- Recommendation №R (85) 11 about the status of the victim within the criminal justice system suggests that all European Council member countries examine all possible advantages of mediation and reconciliation;
- Recommendation №R (87) 18 about the simplified structure of the criminal justice system suggests that all European Council member countries review their legislations in order to legitimise methods of extra-judicial conflict resolution;
- Recommendation №R (87) 20 about the public reaction to juvenile delinquency calls on all states to review their legislations and to make appropriate amendments necessary for mediation development;
- Recommendation №R (87) 21 about reduction of the degree of victimisation and providing assistance to injured persons suggests that all European Council member countries conduct experiments in the sphere of mediation, involving victims and offenders to participation in those;
- Recommendation №R (92) 16 about the European standards in application of civil sanctions and measures that specifies measures that are alternative to confinement and that facilitate re-integration of offenders into society (that is the result that the mediation system envisages);
- Recommendation №R (92) 17 about delivering judgement underlines that conviction of a person must be accompanied by modern, more humane processes, aimed at reduction of the number of instances of imprisonment;
- Recommendation №R (95) 12 about the criminal justice system management structure makes note of the fact that application of methods to prevent recidivism, to review the contents of the term «punishment», and to apply mediation and the simplified consideration of cases, remove certain difficulties in the criminal justice processes, specifically, load relief and financing of judicial bodies are meant.
- Recommendation №R (99) 19 concerning the principles of organisation of mediation in criminal matters.

At the 26th Conference of European Ministers of Justice, held in Helsinki on April 7 and 8, 2005, the Report on the social mission of the criminal justice system emphasized that, although *«...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. Restorative justice processes often draw upon traditional and indigenous forms of justice which view crime as fundamentally harmful to people. This approach enables those affected by crime to share openly their feelings and experiences, and aims at addressing their needs. 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.*

Consequently, in contrast to the traditional objectives of the criminal justice system, one central objective of restorative justice is to meet the needs of the crime victim better than before. In part, such needs are material and may be satisfied by restitution. The needs of the victim also comprise emotional needs such as restoring

dignity, and social needs such as restoring or improving the feeling of security. In the restorative justice approach, also the needs of the offender are considered: he or she is given the opportunity to take genuine responsibility for his or her acts and their consequences and to improve his or her behaviour. Restorative justice makes sense also in the fiscal realm: since court proceedings are expensive and slow both for the litigants and for the state, restorative justice can lead to an equitable result at less cost.

There is some, very strong, evidence that restorative justice is successful in reducing re-offending. However, the reduction of recidivism is not the central objective of the restorative justice. Victims often feel that it is most important to receive information and to be able to influence the offender's behaviour. The typical outcome of mediation in practice is an agreement that is also usually implemented successfully. In most cases, the litigants, and victims in particular, have also been satisfied with the outcome.

One of the central insights of restorative justice is that the process itself may be more important than its direct outcome. It is important for the litigants that they have been treated in a fair manner, with attention paid to their particular needs. If the process is experienced as being fair and just, it is also easier to commit oneself to the outcome. Commitment and learning may also be facilitated by the feature that all those involved are able to participate in the decision-making and to share in the responsibility for the success of the endeavour.

Consequently, we can see that the restorative justice programmes (specifically, mediation) are a rational and, probably, the best method to resolve the dilemmas in problems of struggle against crime. The mediation processes do not only accelerate criminal justice procedures, they also make it possible to give due consideration to people's rights, which is the best and the most flexible option for resolution of the existing conflict. It often realises what is not possible under the usual, typical judicial procedures.

2. Goal and Purpose of the Concept

The goal of the Concept is definition of ways for introduction of mediation processes in criminal justice in Ukraine. The purpose of the Concept is to outline the key legal issues that hinder introduction of mediation into the national practices and require legislative regulation.

3. Key Issues of legislative regulation

Analysis of the Criminal Code of Ukraine demonstrates that there are practically no obstacles in the Ukrainian material law that could prevent restorative justice from being introduced. The law on criminal proceedings of Ukraine, however, does not envisage that institute, which is an obstacle for application of that procedure in criminal cases, because judges explain their non-application in courts by absence of the respective law.

The Criminal Code of Ukraine envisages relief of liability in connection with actual repentance, or in connection with the reconciliation between the offender and the victim, on the reasons stipulated in Article 46 of the Criminal Code of Ukraine.

Article 46 of the Criminal Code of Ukraine envisages relief from criminal responsibility in connection with the reconciliation between the offender and the victim. That Article regulates reconciliation only as an element of mediation, which in foreign legislations is an alternative method for regulation of criminal law conflicts, based upon intermediary services in reconciliation of the litigants. Besides, the offender must be a person who committed a crime for the first time, and the crime itself should not be grave. Besides, the offender must come to terms with the victims and compensate the damages inflicted or eliminate the harm done. Reconciliation means reaching of an agreement that fixes reconciliation between the victim and the defendant (the accused person) and the fact that the victim does not object against relieving of the accused person from criminal responsibility. Obviously, the fact of reconciliation between the victim and the defendant requires corresponding procedural record in the material of file of case.

Provisions contained in part one of Article 66 of the Criminal Code stipulate that sincere repentance or active cooperation in clearance of the crime, voluntary restitution for the damages inflicted or elimination of the harm done are circumstances that mitigate responsibility. Apart from that, part two of Article 66 of the Criminal Code stipulate that, in the course of imposition of penalty, the court may accept other circumstances, not envisaged in the said Article, as mitigating (for example, reconciliation between the victim and the accused (defendant) in consideration of cases of crimes that are more serious than moderate). Sincere repentance implies the person's

realisation of his or her unlawful behaviour and readiness to bear criminal responsibility.

Consequently, skilful application of restorative justice procedures, that is, in case they emerged as a consequences of the above-mentioned circumstances, in any event may be beneficial for the accused person (defendant), including in cases of crimes that are moderate, serious and severe, or when the convicted person is unable to restitute the damages inflicted or eliminate the harm done. It is also important that, in presence of a number of mitigating circumstances (those may be, for instance, a combination of such possible outcomes of mediation as sincere repentance and voluntary restitution of damages), the court may impose a milder punishment for severe, serious or moderate crimes than the law stipulates (Article 69 of the Criminal Code).

In accordance with paragraph 6 in part one of Article 6 of the Code on Criminal Proceedings of Ukraine, a criminal case may not be initiated, and the initiated criminal case is to be closed by reconciliation between the accused person (defendant) and the victim in cases that are initiated solely upon complaint of the victim. Exceptions from that rule are regulated in parts 2, 4 and 5 in Article 27 of the Code on Criminal Proceedings. The said reasons may not be used for closing of cases on charges of rape, cases of priority social importance, or if the prosecutor is involved in the case in connection with protection of state or public interests or citizens' rights.

Article 7 of the Code on Criminal Proceedings of Ukraine envisages the right of the court to acquit the defendant if it is recognised that, at the moment of the court consideration of the case, due to changed situation, it lost its social danger or the person is no longer socially dangerous.

Provisions in Article 7^1 of the Code on Criminal Proceedings of Ukraine (in presence of reasons specified in Articles 25 and 6 of the Criminal Code) envisage closing of proceedings in a criminal case by a court in the even of reconciliation between the victim and the defendant and in connection with actual repentance.

It should be noted that the Code on Criminal Proceedings of Ukraine does not impose any limitations on that right of the court, and decision of the accused person's destiny remains completely at the discretion of the court. Provisions Articles 7^2 and 8 of the Code on Criminal Proceedings of Ukraine define the procedures for relieving from criminal responsibility in presence of circumstances, specified in Articles 45 and 46, respectively. In either of the said cases, the court, deciding the accused person's or the defendant's destiny, is obligated to learn the victim's opinion and notify him or her about the decision passed (Article 12 of the Code on Criminal Proceedings of Ukraine).

In other words, the effective legislation of Ukraine contains numerous prerequisites for application of the restorative justice. The above-mentioned provisions create the legislative field for reconciliation, in case it is being applied, had concrete legal outcomes.

At the same time, despite the fact that the Code on Criminal Proceedings of Ukraine contains a number of norms aimed at the procedural implementation of the above-listed possibilities for application of reconciliation (paragraph 11 in part one of Article 227 - Competences of the Prosecutor; paragraph 3 in part one of Article 229 - Actions by the Prosecutor in the course of examination of the case with the judgement of conviction; Article 232^1 - Actions of the Prosecutor after receiving a case that may envisage relieving the accused person (the defendant) from criminal responsibility or termination of proceedings; paragraph 2 in part one of Article 237 – issues to be considered by the judge during the preliminary hearing of the case; paragraph 5 of Article 244 – decision by the judge based upon the preliminary hearing of the case; Article 248 – closing of the case, etc.); it lacks, however, regulations on mediation of intermediary services. Actually, that is one of the factors hindering development of that institute in Ukraine.

The main idea of mediation is the concept of restorative justice, which, primarily, is based upon the principle of restitution for the damages inflicted. The concept is based on the ever growing conviction that the interests of crime victims must be the focus of attention of the process.

Application of mediation in criminal justice proceedings has numerous advantages both for the litigants and for the court. For the litigants, mediation is an advantage because the offenders assume responsibility for their actions; its directly influences the issue of restitution in the material or moral form; it enables the litigants to influence the decision that is passed in the case, and also helps to relieve the emotional tension of the litigants.

For the court, mediation is an advantage because it partially relieves judges from burden of petty offences and enables them to concentrate on more serious cases; it relieves judges from the necessity to deal with the

litigants' emotions and enables them to concentrate on consideration of the case; it accelerates the process of hearing of cases in court and saves judges' time. If the litigants in the course of mediation concluded a reconciliation agreement between the victim and the offender, that document, as well as direct questioning of the litigants, gives the judge a possibility to better assess the offender's personality, sincerity of his or her repentance and possibilities for relieving of the accused person from criminal responsibility on the basis of paragraphs 1, 2, 3 and 4 in Article 7^1 of the Code on Criminal Proceedings of Ukraine. The court may also use the results of reconciliation to close the case on the basis of paragraph 1 in Article 27 of the Code on Criminal Proceedings of Ukraine, in the event of a request of the aggrieved party.

The judge may also take into consideration the fact of the litigants' reconciliation as a circumstance for mitigation of punishment in the course of delivering judgement (paragraph 2, part 1, and part 2 of Article 66 of the Criminal Code), or to impose milder punishment than the one envisaged by law for commitment of a severe, serious or moderate crime (Article 69 of the Criminal Code). The results of mediation may be taken into account by the court in imposition of penalties and making decisions concerning relieving the accused person from punishment with probation, depending on the sentence, the offender's personality and seriousness of the crime (Article 75 of the Criminal Code).

On the other hand, investigation officers, public prosecutors and judges do not have powers to initiate mediation processes and, in accordance with part two in Article 6 of the Constitution of Ukraine, bodies of legislative, executive and judicial powers exercise their competences within the limits set by the Constitution and in compliance with the laws of Ukraine. That is, at present, mediation may only result from the desire of both litigants, mediators' initiative, and actions by law-enforcement bodies and courts in that direction can only be arbitrary and transgressing the limits of their competences.

Besides, in accordance with the norms contained in part two of Article 44 of the Criminal Code, relieving from criminal responsibility can be effected exclusively by courts. This practically eliminates possible interest of investigation officers and public prosecutors, who are obligated to send the case to court in any event, in facilitating simplified justice by initiating mediation and affirmation of the discretionary justice principle. At the same time, due consideration of those recommendations could assist bringing the national norms to conformity with the European standards. It should be noted that legitimacy of decisions by public prosecutor on closing the case can be examined by the court even today, which guarantees observance of the litigants' rights.

There also exists the problem of status, competences of mediators, supervision over their activities and responsibility.

4. Ways to Resolve the Problem

The problem of pre-trial investigation bodies and court not having direct competences concerning initiation of mediation, which hinders implementation of mediation in the national practices, can only be solved by amending the Code on Criminal Proceedings of Ukraine by a regulation stipulating that, in the course of pre-trial investigation, preliminary inquiry and investigation bodies, as well as courts, may address the case to a mediator or an organisation in charge of implementation of a restorative justice programme.

Implementation of mediation requires thorough procedural elaboration of relevant processes. Specifically, the following issues require procedural regulation:

- Principle of voluntary participation in mediation processes (restorative justice process);

(mediation in penal matters should only take place if the parties freely consent. The parties should be able to withdraw such consent at any time during the mediation. (paragraph 1, Council of Europe Recommendation No. R (99) 19);

- Confidentiality of all negotiations between the mediator and the parties;

(any discussions in mediation are confidential and may not be used subsequently, except with the agreement of the parties (paragraph 2, Council of Europe Recommendation No. R (99) 19); or, possibly, when such information testifies to a serious threat of a socially dangerous action. Mediators may not be interrogated with the aim of disclosure of information that they receive in the course of mediation).

- Determining the range of cases where mediation can be prescribed;

(possibilities for prescribing mediation in cases where there are victims and where the offenders admit their guilt in committing a crime. The July 24, 2002 ECOSOC Resolution, in paragraph 6, as well as paragraphs 4 and 5 of the Council of Europe Recommendations say that the restorative justice programmes must be accessible at all stages of criminal justice. Also, Recommendations of the European Forum for Restorative Justice note inexpedience of tying of the rights to participate in mediation to categories of cases, stipulated in codes, because there exist numerous examples of effectiveness of the restorative justice programmes in very serious cases, regardless of the impact that the mediation results produced on the sentence by the court. In may instances, those processes are applied at the stage of the penalty execution. Special attention should be attached to issues of possible addressing of serious and very serious crimes to mediation).

- Expedience of inclusion of time period allotted for mediation into the procedural term, defining the maximum time period for carrying it out;

(the time period for mediation is not included into the procedural term, and mediation maximum term may not exceed 1 month (in some countries it can last 3 months). At the same time, limitation of the term to complete mediation will make it possible to prevent unjustified delays in case consideration).

- Defining the format of reports on mediation completion and the format of agreement between victims and the accused persons/ defendants;

(reports on mediation and the agreement concluded between victims and the accused persons/ defendants must be of procedural nature, be officially attached to the criminal case materials, and for that reason, must have clearly defined formats);

- Determining the terms and volumes of information on the case that is to be accessible to mediators, and other important procedural matters;

(according to paragraph 25 of the above-mentioned Council of Europe Recommendation, prior to the meeting (mediation), the competent criminal justice bodies inform the mediator about all circumstances that are relevant for the case, and provide the mediator with all necessary documents. Also, the form of decision by court, investigation officer or public prosecutor about prescription of mediation may require regulation).

- Inadmissibility of regarding participation in mediation as evidence to prove guilt in the consequent court consideration;

(results of negotiations between the accused person/ defendant and the mediator, as well as the fact of participation in mediation, may not be used in the court process as evidence to prove the offenders' guilt, in accordance with paragraph 14 of the above-mentioned Recommendation).

- Accessibility of mediation for the litigants;

(it is necessary to determine the method of payment for mediator's services or their gratuitous providing. Participants in the restorative justice programmes do not pay for mediators' services in any of the European countries – that is either the responsibility of the state or the local authorities, or directly of the community who, with the help of non-governmental organisations, raise charity funds).

- Independence and autonomy of mediation within the framework of criminal justice;

(Mediation must remain independent and autonomous within the framework of criminal justice. It is important that restorative justice programmes by their nature are informal procedures that do not require legislative regulation by themselves, but do require that the legislation envisages the possibility to carry them out and that their results are taken into account within the framework of the criminal proceedings(p. 5 of the Council of Europe Recommendation No. R (99) 19)). Paragraph 7 in the «Legal Basis» Section of the said European Council Recommendation says: «There must be certain directives determining application of mediation in criminal cases. Those directives must characterise the conditions for addressing cases to mediation (meeting), and to highlight approaches to resolution of issues that may emerge after termination of the mediation process».)

It is advisable to review the norms contained in the Criminal Code and the Code on Criminal Proceedings in the perspective of empowering public prosecutors, by the principle of discretionary prosecution, to independently take decisions on application of mediation and closing vases and relieving the accused persons from criminal responsibility on grounds of reconciliation with the victim.

Special attention must be attached to regulation in the law of the issue of mediation procedures with participation of minors, specifically, stricter demands to mediators who work with minors, mandatory involvement of parents or tutors of a minor. Legislation must also clearly specify details for conclusion of reconciliation agreements with participation of a minor (from 15 to 18 years – upon consent of parents (adoptive parents or tutors); younger than 15 years – conclusion of agreements by parents, adoptive parents or tutors).

For that reason, apart from making appropriate amendments in the procedural law, there exists a necessity to develop a separate law about application of restorative justice programmes (mediation) in criminal cases. The said law must define the notions of restorative justice programmes (mediation), mediators' status, requirements to them and to their selection (age criteria, professional skills etc.), guarantees for their activities, their rights and obligations, causes for responsibility, methods of compensation and social benefits, authority or professional union to issue permits to be practice mediation in criminal cases and to exercise control over mediators' activities.

5. Expected Results

Introduction of restorative justice programmes (mediation for victims and offenders) in the criminal justice system will help partially change the way the judicial system reacts to crime from punitive to restorative, will produce a positive impact on the participants in criminal process and on the state of public order and civic peace, will be a concrete tool to ensure the right to reconciliation stipulated in the effective legislation, and will promote the positive image of the country in the international community.

Restorative justice could reduce the burden borne by the criminal justice system through introduction of damage restitution concept, withdrawing certain cases from the criminal justice system, and increasing of the degree of participation of victims in proceedings. Encouraging people to respecting each other and to conflict resolution, in case they emerge, on restorative basis – those are the two most important ways to build a just and humane society.

APPENDIX

COUNCIL OF EUROPE
COMMITTEE OF MINISTERS

RECOMMENDATION N° R (99) 19 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES CONCERNING MEDIATION IN PENAL MATTERS

(Adopted by the Committee of Ministers on 15 September 1999 at the 679th meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 15.*b* of the Statute of the Council of Europe,

Noting the developments in member States in the use of mediation in penal matters as a flexible, comprehensive, problem-solving, participatory option complementary or alternative to traditional criminal proceedings;

Considering the need to enhance active personal participation in criminal proceedings of the victim and the offender and others who may be affected as parties as well as the involvement of the community;

Recognising the legitimate interest of victims to have a stronger voice in dealing with the consequences of their victimisation, to communicate with the offender and to obtain apology and reparation;

Considering the importance of encouraging the offenders' sense of responsibility and offering them practical opportunities to make amends, which may further their reintegration and rehabilitation;

Recognising that mediation may increase awareness of the important role of the individual and the community in preventing and handling crime and resolving its associated conflicts, thus encouraging more constructive and less repressive criminal justice outcomes;

Recognising that mediation requires specific skills and calls for codes of practice and accredited training;

Considering the potentially substantial contribution to be made by non-governmental organisations and local communities in the field of mediation in penal matters and the need to combine and to co-ordinate the efforts of public and private initiatives;

Having regard to the requirements of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Bearing in mind the European Convention on the Exercise of Children's Rights as well as Recommendations No. R (85) 11 on the position of the victim in the framework of criminal law and procedure. No. R (87) 18 concerning the simplification of criminal justice. No. R (87) 21 on assistance to victims and the prevention of victimisation. No. R (87) 20 on social reactions to juvenile delinquency. No. R (88) 6 on social reactions to juvenile delinquency among young people coming from migrant families. No. R (92) 16 on the European Rules on community sanctions and measures. No. R (95) 12 on the management of criminal justice and No. R (98) 1 on family mediation;

Recommends that the governments of member States consider the principles set out in the appendix to this Recommendation when developing mediation in penal matters, and give the widest possible circulation to this text.

Appendix to Recommendation N° R (99) 19

I. Definition

These guidelines apply to any process whereby the victim and the offender are enabled, if they freely consent, to participate actively in the resolution of matters arising from the crime through the help of an impartial third party (mediator).

II. General principles

1. Mediation in penal matters should only take place if the parties freely consent. The parties should be able to withdraw such consent at any time during the mediation.
2. Discussions in mediation are confidential and may not be used subsequently, except with the agreement of the parties.
3. Mediation in penal matters should be a generally available service.
4. Mediation in penal matters should be available at all stages of the criminal justice process.
5. Mediation services should be given sufficient autonomy within the criminal justice system.

III. Legal basis

6. Legislation should facilitate mediation in penal matters.
7. There should be guidelines defining the use of mediation in penal matters. Such guidelines should in particular address the conditions for the referral of cases to the mediation service and the handling of cases following mediation.
8. Fundamental procedural safeguards should be applied to mediation; in particular, the parties should have the right to legal assistance and, where necessary, to translation/interpretation. Minors should, in addition, have the right to parental assistance.

IV. The operation of criminal justice in relation to mediation

9. A decision to refer a criminal case to mediation, as well as the assessment of the outcome of a mediation procedure, should be reserved to the criminal justice authorities.
10. Before agreeing to mediation, the parties should be fully informed of their rights, the nature of the mediation process and the possible consequences of their decision.
11. Neither the victim nor the offender should be induced by unfair means to accept mediation.
12. Special regulations and legal safeguards governing minors' participation in legal proceedings should also be applied to their participation in mediation in penal matters.
13. Mediation should not proceed if any of the main parties involved is not capable of understanding the meaning of the process.
14. The basic facts of a case should normally be acknowledged by both parties as a basis for mediation. Participation in mediation should not be used as evidence of admission of guilt in subsequent legal proceedings.
15. Obvious disparities with respect to factors such as the parties' age, maturity or intellectual capacity should be taken into consideration before a case is referred to mediation.
16. A decision to refer a criminal case to mediation should be accompanied by a reasonable time-limit within which the competent criminal justice authorities should be informed of the state of the mediation procedure.
17. Discharges based on mediated agreements should have the same status as judicial decisions or judgements and should preclude prosecution in respect of the same facts *(ne bis in idem).*
18. When a case is referred back to the criminal justice authorities without an agreement between the parties or after failure to implement such an agreement, the decision as to how to proceed should be taken without delay.

V. The operation of mediation services

V.I. *Standards*

19. Mediation services should be governed by recognised standards.
20. Mediation services should have sufficient autonomy in performing their duties. Standards of competence and ethical rules, as well as procedures for the selection, training and assessment of mediators should be developed.
21. Mediation services should be monitored by a competent body.

V.2. *Qualifications and training of mediators*

22. Mediators should be recruited from all sections of society and should generally possess good understanding of local cultures and communities.
23. Mediators should be able to demonstrate sound judgement and interpersonal skills necessary to mediation.
24. Mediators should receive initial training before taking up mediation duties as well as in-service training. Their training should aim at providing for a high level of competence, taking into account conflict resolution skills, the specific requirements of working with victims and offenders and basic knowledge of the criminal justice system.

V.3. *Handling of individual cases*

25. Before mediation starts, the mediator should be informed of all relevant facts of the case and be provided with the necessary documents by the competent criminal justice authorities.
26. Mediation should be performed in an impartial manner, based on the facts of the case and on the needs and wishes of the parties. The mediator should always respect the dignity of the parties and ensure that the parties act with respect towards each other.
27. The mediator should be responsible for providing a safe and comfortable environment for the mediation. The mediator should be sensitive to the vulnerability of the parties.
28. Mediation should be carried out efficiently, but at a pace that is manageable for the parties.
29. Mediation should be performed in camera.
30. Notwithstanding the principle of confidentiality, the mediator should convey any information about imminent serious crimes, which may come to light in the course of mediation, to the appropriate authorities or to the persons concerned.

V.4. *Outcome of mediation*

31. Agreements should be arrived at voluntarily by the parties. They should contain only reasonable and proportionate obligations.
32. The mediator should report to the criminal justice authorities on the steps taken and on the outcome of the mediation. The mediator's report should not reveal the contents of mediation sessions, nor express any judgement on the parties' behaviour during mediation.

VI. Continuing development of mediation

33. There should be regular consultation between criminal justice authorities and mediation services to develop common understanding.
34. Member States should promote research on, and evaluation of, mediation in penal matters.

BASIC PRINCIPLES ON THE USE OF RESTORATIVE JUSTICE PROGRAMMES IN CRIMINAL MATTERS (UN), 2000

The Economic and Social Council,

Recalling its resolution 1999/26 of 28 July 1999, entitled "Development and implementation of mediation and restorative justice measures in criminal justice", in which the Council requested the Commission on Crime Prevention and Criminal Justice to consider the desirability of formulating United Nations standards in the field of mediation and restorative justice,

Noting the discussions on restorative justice during the Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Vienna from 10 to 17 April 2000, in relation to the agenda item entitled "Offenders and victims: accountability and fairness in the justice process",

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

1. Takes note of the submission of the preliminary draft elements of a declaration of basic principles on the use of restorative justice programmes in criminal matters, annexed to the present resolution;

2. Requests the Secretary-General to seek comments from Member States and relevant intergovernmental and non-governmental organizations, as well as the institutes of the United Nations Crime Prevention and Criminal Justice Programme network, on the desirability and the means of establishing common principles on the use of restorative justice programmes in criminal matters, including the advisability of developing an instrument, such as the preliminary draft declaration annexed to the present resolution, and on the contents of this draft;

3. Also requests the Secretary-General to convene, subject to the availability of voluntary contributions, a meeting of experts selected on the basis of equitable geographical representation to review the comments received and to examine proposals for further action in relation to restorative justice, including mediation, as well as the possibility of developing an instrument such as a declaration of basic principles on the use of restorative justice programmes, taking into account the preliminary draft declaration annexed to the present resolution;

4. Further requests the Secretary-General to report to the Commission on Crime Prevention and Criminal Justice at its eleventh session on the comments received and the results of the meeting of experts;

5. Invites the Commission to take action at its eleventh session, on the basis of the report of the Secretary-General;

6. Calls upon Member States, building on the results of the Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Vienna from 10-17 April 2000, to continue to exchange information on experiences in the implementation and evaluation of programmes for restorative justice, including mediation.

Annex

Preliminary draft elements of a declaration of basic principles on the use of restorative justice programmes in criminal matters

I. Definitions

1. "Restorative justice programme" means any programme that uses restorative processes or aims to achieve restorative outcomes.

2. "Restorative outcome" means an agreement reached as the result of a restorative process. Examples of restorative outcomes include restitution, community service and any other programme or response designed to accomplish reparation of the victim and community, and reintegration of the victim and/or the offender.

3. "Restorative process" means any process in which the victim, the offender and/or any other individuals or community members affected by a crime actively participate together in the resolution of matters arising from the crime, often with the help of a fair and impartial third party. Examples of restorative process include mediation, conferencing and sentencing circles.

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 justice programme.

5. "Facilitator" means a fair and impartial third party whose role is to facilitate the participation of victims and offenders in an encounter programme.

II. Use of restorative justice programmes

6. Restorative justice programmes should be generally available at all stages of the criminal justice process.

7. Restorative processes should be used only with the free and voluntary consent of the parties. The parties should be able to withdraw such consent at any time during the process. Agreements should be arrived at voluntarily by the parties and contain only reasonable and proportionate obligations.

8. All parties should normally acknowledge the basic facts of a case as a basis for participation in a restorative process. Participation should not be used as evidence of admission of guilt in subsequent legal proceedings.

9. Obvious disparities with respect to factors such as power imbalances and the parties' age, maturity or intellectual capacity should be taken into consideration in referring a case to and in conducting a restorative process. Similarly, obvious threats to any of the parties' safety should also be considered in referring any case to and in conducting a restorative process. The views of the parties themselves about the suitability of restorative processes or outcomes should be given great deference in this consideration.

10. Where restorative processes and/or outcomes are not possible, criminal justice officials should do all they can to encourage the offender to take responsibility vis-à-vis the victim and affected communities, and reintegration of the victim and/or offender into the community.

III. Operation of restorative justice programmes

11. Guidelines and standards should be established, with legislative authority when necessary, that govern the use of restorative justice programmes. Such guidelines and standards should address:

(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 ethical rules governing operation of restorative justice programmes.

12. Fundamental procedural safeguards should be applied to restorative justice programmes and in particular to restorative processes:

(a) The parties should have the right to legal advice before and after the restorative process and, where necessary, to translation and/or interpretation. Minors should, in addition, have the right to parental assistance;

(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 induced by unfair means to participate in restorative processes or outcomes.

13. Discussions in restorative processes should be confidential and should not be disclosed subsequently, except with the agreement of the parties.

14. Judicial discharges based on agreements arising out of restorative justice programmes should have the same status as judicial decisions or judgements and should preclude prosecution in respect of the same facts (non bis in idem).

15. Where no agreement can be made between the parties, the case should be referred back to the criminal justice authorities and a decision as to how to proceed should be taken without delay. Lack of agreement may not be used as justification for a more severe sentence in subsequent criminal justice proceedings.

16. Failure to implement an agreement made in the course of a restorative process should be referred back to the restorative programme or to the criminal justice authorities and a decision as to how to proceed should be taken without delay. Failure to implement the agreement may not be used as justification for a more severe sentence in subsequent criminal justice proceedings.

IV. Facilitators

17. Facilitators should be recruited from all sections of society and should generally possess good understanding of local cultures and communities. They should be able to demonstrate sound judgement and interpersonal skills necessary to conducting restorative processes.

18. Facilitators should perform their duties in an impartial manner, based on the facts of the case and on the needs and wishes of the parties. They should always respect the dignity of the parties and ensure that the parties act with respect towards each other.

19. Facilitators should be responsible for providing a safe and appropriate environment for the restorative process. They should be sensitive to any vulnerability of the parties.

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

V. Continuing development of restorative justice programmes

21. There should be regular consultation between criminal justice authorities and administrators of restorative justice programmes to develop a common understanding 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 should promote research on and evaluation of restorative justice programmes to assess the extent to which they result in restorative outcomes, serve as an alternative to the criminal justice process and provide positive outcomes for all parties.

23. Restorative justice processes may need to undergo change in concrete form over time. Member States should therefore encourage regular, rigorous evaluation and modification of such programmes in the light of the above definitions.