In 1997, the Commission on Crime Prevention and Criminal Justice adopted a provisional agenda for the Tenth UN Crime Congress held in 2000. Item four of that agenda was "Offenders and victims: accountability and fairness in the justice process." It was understood that this topic opened the door to discussion of restorative justice.

A year later, the Commission approved a discussion guide for regional preparatory meetings that included a lengthy discussion of restorative justice, and requested comment on whether standards and norms were needed to guide member states in implementation of restorative programs. The reports from all Regional Preparatory meetings expressed support for use of restorative justice, reconciliation, and traditional methods of conflict resolution. Several explicitly requested that the UN develop guidelines or standards and others proposed that the UN provide for exchange of information among nations on models and experiences related to restorative justice.

At its meeting in 1999, the Commission approved a draft declaration for consideration by the Crime Congress. Paragraph 25 of this draft referred to restorative justice and would establish the year 2002 as a date for States to review their practices in support of crime victims, "including mechanisms for mediation and restorative justice".

Subsequent to that Commission meeting, ECOSOC adopted a resolution on mediation and restorative justice in criminal matters that among other things requested the Commission to "consider the desirability of formulating United Nations standards in the field of mediation and restorative justice."

Finally, the International Scientific and Professional Advisory Council (ISPAC) released a study entitled "An Overview of Restorative Justice Programmes and Issues" drafted by Paul Friday of the World Society of Victimology. This study concluded as follows:

"Guidelines and standards are desperately needed. There is a danger that programs that are initially restorative in outlook recreate the courtroom process and, in turn, undermine rather than cultivate restoration. There is also the danger that the legal basis for initiating the process can get lost. And there is a third danger that the etiological factors producing crime - poverty, racism, cultural/social values, individualism will not be addressed as they are uncovered in the process."

The draft Basic Principles were thoroughly reviewed as one example of such guidelines.

Why should the UN adopt Basic Principles? Because restorative justice programmes, badly run, can harm the chances for restoration. Because restorative values need to be carefully incorporated into legal process that respect the rights and responsibilities of individuals and societies. Because countries are requesting them.

8 Jan 2001

"The Need for Basic Principles" was written by Daniel Van Ness and first published on-line on the Restorative Justice web site www.restorativejustice.org, a service of Prison Fellowship International.
Every five years, the United Nations convenes a Congress on Crime Prevention and the Treatment of Offenders for discussion and debate on topics related to crime, criminal justice, treatment of offenders and more recently, treatment of victims. The Congresses offer an opportunity for countries to discuss national experiences with programs and problems in criminal justice. They also are used to discuss joint strategies and mutual cooperation in matters that transcend national boundaries.

Non-governmental organizations in consultative status with the United Nations are actively involved in the Congresses as well. One of the most visible ways in which this happens is through ancillary meetings open to delegates at the Congresses that explore issues of concern to the NGOs. At the Congresses in 1990 and 1995, NGOs sponsored ancillary meetings on the topic of restorative justice. During that period of time, as countries witnessed the growing spread of restorative programs, interest and participation in these sessions expanded.

The Ninth Congress, conducted in Cairo in 1995, included several sessions on the theme of restorative justice. While interest in the topic seemed to be strong, it was apparent that presentations during Ancillary Meetings had little if any effect on debate during the Committee and Plenary Sessions of the Congress itself. As a result, a group of NGOs participating in the Alliance on Crime Prevention and Criminal Justice (NY) decided to form a Working Party on Restorative Justice.

The Working Party on Restorative Justice had a different agenda. Its objective was to stimulate sufficient international awareness of and interest in restorative justice to make it an item of discussion at the Tenth Crime Congress to be held in 2000. Members of the Alliance believed that this topic was of enough import that it deserved discussion in the Committee and Plenary Sessions of the Congress itself, not simply in the ancillary meetings.

The Working Party was made up of representatives of NGOs in consultative status with the UN as well as other NGOs and individuals who had practical, research or academic expertise in the subject. During the early research stages of the Working Party, its members included many who were active in restorative justice work but did not represent NGOs in consultative status. Over time, and as the work of the Working Party focused increasingly on the expected Tenth Congress, participation narrowed to representatives of member organizations of the Alliance.

The working Party's initial efforts focused on collecting and organizing existing research and experience concerning restorative justice. Out of those efforts came several resources:

1. A Restorative Justice Handbook which proposed a working definition and fundamental principles of restorative justice, descriptions of typical restorative programs, a lexicon of terminology commonly used in discussions about restorative justice, and a short bibliography.

This phase of the Working Party's activities came to a close at about the time the UN began planning for the Tenth Crime Congress. In 1997, the Commission on Crime Prevention and Criminal Justice adopted a provisional agenda for that Congress. Item four on the agenda was "Offenders and victims: accountability and fairness in the justice process." It was understood that this topic opened the door to discussion of restorative justice as well as issues related to the rights and roles of victims in criminal justice.

A year later, the Commission approved a discussion guide for the regional preparatory meetings that traditionally precede Congresses. [5] Included in the discussion guide for item four was a lengthy description of restorative justice (concept and program) and a request for comment by the preparatory meetings on whether standards and norms were needed to guide member states in implementation of restorative programs. [6]

At its meeting in 1999, the Commission debated and approved a draft declaration for consideration by the Crime Congress. Paragraph 25 of this draft referred to restorative justice and established the year 2002 as a date for States to review their practices in support of crime victims, "including mechanisms for mediation and restorative justice".

In addition, the government of Italy proposed a resolution on mediation and restorative justice. Among other things, this resolution requested that the Commission "consider the desirability of formulating United Nations standards in the field of mediation and restorative justice." This resolution was approved by the Commission and referred to ECOSOC, which adopted it later that year. [7]

Just before the Tenth Congress convened, the International Scientific and Professional Advisory Council (ISPAC) released a study entitled "An Overview of Restorative Justice Programmes and Issues" drafted by Prof. Paul Friday. This study concluded as follows:

**Guidelines and standards are desperately needed.** There is a danger that programs that are initially restorative in outlook recreate the courtroom process and, in turn, undermine rather than cultivate restoration. There is also the danger that the legal basis for initiating the process can get lost. And there is a third danger that the etiological factors producing crime - poverty, racism, cultural/social values, individualism will not be addressed as they are uncovered in the process. [8]

9 The Working Party Prepares Basic Principles

Meanwhile, the Working Party had begun drafting basic principles on restorative justice. That project had grown naturally out of the initial research phase, during which it had discovered a growing interest in development of guidelines and standards for countries intending to use restorative programs. This concern was reflected in the activities of the Council of Europe and in several independent efforts by researchers and policymakers to create such standards.

**Council of Europe Recommendation R(99)19.** In 1995 the Council of Europe appointed an Expert Committee to evaluate and assess the use of mediation in criminal proceedings within Europe. Between 1996 and 1999 the Committee met to review reports from countries with experience in mediation of criminal matters, and to consider what if any recommendations to make. The reports contained descriptions of the use of mediation, outcome evaluation, legal and policy issues raised by mediation, and so on. Based on the reports and substantial discussion, the Committee prepared a draft recommendation and Explanatory Memorandum and submitted it in June 1999. The Committee of Ministers adopted the recommendation later that year. [9] The Appendix to the recommendation defines "mediation" and offers 34 principles for Member
States of the Council of Europe to consider when using mediation in penal matters.

*Declaration of Leuven.* In 1997, the International Network for Research on Restorative Justice for Juveniles convened the first of what have become annual conferences on "Restorative Justice for Juveniles". At the conclusion of that conference, the Network adopted a declaration "on the advisability of promoting the restorative approach to juvenile crime." This came to be known by the name of the location of that conference: Leuven, Belgium.

The Declaration begins with a preliminary section entitled "The Potential," containing five optimistic observations based on experience with restorative justice for juveniles to that date (its scope is worldwide, initial results are positive, no decisive limits have been observed, offers potential for increased peacemaking, and wider applications appear promising). It follows with ten propositions, many broken into multiple parts, based on current research and experience. [10]

*Standards for Restorative Justice* The Restorative Justice Consortium is a group of individuals and organizations in the UK interested in promoting restorative justice practice in their country. The Consortium's purposes are to educate the public and criminal justice officials about the benefits of restorative justice, to encourage policy makers to use restorative approaches, to share information among themselves, and to recommend standards for restorative justice projects. In 1999, the Consortium issued their Standards for Restorative Justice. [11]

The standards are presented in six sections, organized around the rights, needs, obligations, and responsibilities of different parties. Noting that use of restorative justice programs leads to greater flexibility in the criminal justice system, it cautions that this could undermine existing protections of individual rights. The standards are proposed as a means of preserving human rights and ensuring ethical practice as victims, offenders, community, criminal justice officials and program practitioners participate in restorative justice. [12]

*VOMA Recommended Ethical Guidelines.* The Victim-Offender Mediation Association consists of 350 individual members and 30 agency members in 40 states and 7 countries. It grew out of an informal network of restorative justice practitioners, researchers and advocates in the early 1980s. Its purpose is to promote and provide best practices, ethical guidelines, and peer support for its members and others in the field. It adopted its "Recommended Ethical Guidelines" in ____. [13]

The guidelines are directed to practitioners, and cover the process and procedures to be used in handling cases, impartiality and neutrality of the mediator, confidentiality and the exchange of information, the rights of the parties to self determination and professional advice, the training of mediators, their advertising and fees, and how mediators should relate to their peers and to the media.

*ABA Victim-Offender Mediation/Dialogue Program Requirements.* In 1994, the American Bar Association adopted a resolution urging incorporation of victim-offender mediation/dialogue programs into the criminal justice system provided that these programs are run consistently with 13 "program requirements." These concern the program's goals, monitoring, funding and evaluation; screening of victims and offenders; voluntary participation, with no adverse effects to the offender for refusal to participate; face-to-face meetings; the inadmissibility of statements made in mediation/dialogue; selection and training of mediators; and involvement of prosecutors and defense attorneys. [14]

Each of these documents was informative and useful, but they had several limitations. First, three of the five addressed only one dimension of restorative justice: mediation. Second, four of the five were the product of researchers and experts in the field, not the result of a process that included the political support of governments. Third, for the most part they made no attempt to be global, but instead involved geographical, subject matter or age limitations.
The Working Party began exploring development of standards or guidelines for countries on the use of restorative justice programmes that could be offered for debate and discussion in the political processes of the United Nations. Its initial idea was that this could take place during the Tenth Crime Congress. [15] Beginning with the standards mentioned above, and in particular the Council of Europe Recommendation on the Use of Mediation in Penal Matters, the Working Party sought to draft a document that would reflect the range of restorative justice programs (its subject matter would be broader than simply mediation, for example) as well as the experience of countries around the world, not just those of Europe or North America. The results of various studies by Law Reform Commissions and Justice Ministries in New Zealand, [16] Australia [17] and South Africa [18] were informative in this process. The Working Party was also guided, of course, by existing standards and norms of the UN, such as the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

The Working Party circulated successive drafts to restorative justice writers, practitioners and policy-makers around the world and incorporated their suggestions in subsequent drafts. It also circulated drafts to governments, requesting advice on whether such an instrument might be useful to consider during the course of the Tenth Congress or the following Crime Commission meetings. As a result of this consultation, the governments of Canada and Italy introduced a resolution to the Crime Commission on basic principles on the use of restorative justice programs, with the Working Party's draft annexed as "Preliminary draft elements" of such a declaration.

Commentary on the Proposed UN Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters

The 23 proposed basic principles are grouped into five sections dealing with definitions, use of restorative justice programmes, operation of restorative justice programmes, facilitators, and continuing development of restorative justice programmes. The remainder of this paper will provide background comment on the document as a whole, on each section, and on the proposed basic principles themselves. These are not offered as an official commentary or memorandum of the Working Party, but rather as the observations of one of the members of that group.

Title: Declaration of Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters

The UN has issued standards and norms related to many aspects of criminal justice. Sometimes these take the form of basic principles, sometimes of standard minimum rules, and sometimes of conventions or treaties. Basic principles provide governments with general guidance related to a particular topic, but they do not address in detail how the principles should be implemented. Examples include the Basic Principles of Justice for Victims of Crime and Abuse of Power, the Basic Principles for the Treatment of Prisoners, and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. Standard minimum rules are more comprehensive directives to Member States that provide detailed guidance. They are much longer and more specific than basic principles, and consequently offer less flexibility once promulgated (both to Member States, and to the UN if subsequent practice prompts changes). Examples include the Standard Minimum Rules for the Treatment of Prisoners and the Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules). Treaties or conventions are agreements between Member States concerning how they will co-operate in certain tasks or ways in which they agree to restrain their own internal conduct. Examples include the Model Agreement on the Transfer of Foreign Prisoners and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
There is obviously no need for a treaty or convention, and the Working Party concluded that basic principles rather than standard minimum rules were the appropriate instrument at this time for several reasons. First, what countries had requested during regional preparatory meetings prior to the Tenth Congress was guidance about use of restorative justice programmes in criminal matters, not clear-cut rules. [19] Second, in the opinion of restorative justice experts the movement had not yet developed common and global agreement on the particular rules that should apply to restorative programmes, and that as a result standard minimum rules would be premature. Third, one of the administrative and practical concerns for the UN in adopting standards is that they can lead to requests for UN technical support to implement them. This is another reason why the basic principles were written as principles and not as standard minimum rules. They are designed to give guidance, not to impose rules or standards on countries.

Unlike other topics the UN has addressed, no country is required to use restorative justice programs. Consequently, if it were to adopt basic principles on the use of restorative justice, the UN would not be imposing burdens on countries, since there is no obligation to use restorative justice programs. Every country has prisoners, victims, law enforcement officials, juveniles, courts, and so forth, and the UN standards adopted on those topics apply to every country. But not every country will choose to use restorative processes, so the development of guidelines for those countries that do will not impose a burden on those who don't. What the Basic Principles do is make it possible for countries considering restorative justice programs to draw from the experience of other countries.

Section I.
Definitions

The proposed basic principles do not attempt to define "restorative justice." This was an intentional omission based on several considerations. First, the basic principles themselves do not address restorative justice at the level of vision, public policy or a comprehensive system. Rather they address particular programmatic expressions of restorative justice. Therefore, it was necessary only to define those expressions. Second, there is not general agreement on a definition of restorative justice, [20] and it seemed unwise to embed a particular definition into a United Nations document not likely to change significantly in future years.

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

The limited scope of the basic principles is reflected in the title, which refers to “restorative justice programmes.” This term is given particular meaning by reference to the two following definitions. Together the three definitions indicate that these principles apply to the various forms of victim-offender mediation, conferencing and circles, and to restitution and community service obligations arising out of those restorative processes. They also include any other restorative process that may emerge, and to the agreements that come out of those processes in addition to restitution and community service. In making a distinction between restorative processes and outcomes, the basic principles follow the approach taken by the Restorative Justice Consortium Standards.[21]

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.

Restitution and community service are commonly linked to restorative justice (and to other sentencing philosophies).[22] Because of the ease with which restitution and community service can be used to serve sentencing purposes that are not restorative, there has been controversy over whether these should be considered "restorative", particularly when a court has imposed them. These basic principles do not take a position on that issue. Instead it is the process that led
to the outcome that makes the outcome subject to these rules. This definition is therefore an expansive one: it incorporates all elements of the agreement, including those that are done because the victim or community has requested it as well as those that have a rehabilitative or reintegrative purpose. All aspects of the agreements reached in the course of restorative processes are subject to the basic principles.

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.

This definition adapts an increasingly used definition offered by Tony Marshall: “Restorative Justice is a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future.”[23] It substitutes “the victim, the offender and/or any other individuals or community members affective by a crime” for Marshall’s more general “parties with a stake in a specific offence.” It also notes that this collaborative resolution often requires the assistance of a skilled third party, the facilitator. The Declaration of Leuven applies the term “restorative process” to the approach described by Marshall.[24] The Council of Europe Recommendation[25] and the VOMA Ethical Guidelines[26] offer similar definitions of "mediation."

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.

Throughout the basic principles, the term “parties” is used more broadly than simply the victim and the offender, which is how the term is used in the Council of Europe Recommendation. It also incorporates individuals and community members who are touched by crime.

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

The term “facilitator” was chosen rather than “mediator” because the latter term is not used in conferencing or circles. The term “encounter programme” should instead read “restorative process.” A comment about “impartiality” is found after Principle 18.

Section II. Use of restorative justice programmes

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

This principle was drawn from Guidelines 3 and 4 of the Council of Europe Recommendation.[27] This does not mean that programmes will operate the same at all stages of the criminal justice process or that they will have a similar effect. An agreement reached prior to the sentencing of an offender may shape the sentence. An agreement reached after the sentence may have no effect on the sentence at all. One example of this are the victim-offender dialogue programs that exist in several US states, which provide victims an opportunity to meet with their offender while they are serving their sentences in prison (or in some instances even, awaiting execution). It is understood that the programs will not influence the prisoner’s sentence; the programs serve other purposes related to the victim’s recovery.

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.

This Principle incorporates two provisions appearing in the Council of Europe Recommendation.[28] The first two sentences speak of voluntary participation by the parties in
restorative justice processes. Since those processes are dependent on the full participation of the parties, they must choose to enter the process and be given the option of leaving the process at any time. It follows that referring agencies and restorative justice practitioners should inform the parties of this right at the outset.[29]

The third sentence relates to restorative outcomes. The principle of voluntariness continues here: the agreement reached during a restorative process is not to be imposed in the same way as a judge imposes a sentence.[30]

The final sentence provides that the agreement must be reasonable and proportionate. The Explanation provided with the Council of Europe Recommendation notes that “reasonable” means that the agreement must have some relationship to the offense, and that “proportionality” means that “within rather wide limits, there should be correspondence between the burden on the offender and the seriousness of the offence; for instance, compensation should not be excessive.”[31]

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.

This is a slightly reworded version of the 14th Guideline in the Council of Europe Recommendation.[32] This separates an acknowledgement of what took place from the question of legal guilt. Restorative justice processes typically require a general agreement on the facts, which implicitly includes recognition of some sort of culpability on the part of the offender.[33] Related to this is the “flipside”: that agreeing to participate in a restorative process cannot be treated as an admission of legal guilt. The presumption of innocence in criminal proceedings must continue, even if the accused has at one time agreed to participate in a restorative process.

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.

The first sentence of this Principle is drawn from the 15th Guideline in the Council of Europe Recommendation.[34] Addressed here are several factors to be considered in screening cases and in conducting restorative processes. When there is sufficient disparity between the parties in power, age, maturity or intellectual capacity that the parties cannot discuss the crime as equals, it will be difficult to conduct meaningful conversation during the process. Furthermore, when one party finds their safety threatened because of their participation in the process, the party cannot negotiate meaningfully. The Principle urges great deference to the parties' views on whether a restorative process is suitable, although it does not leave the decision on that with the parties.

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.

There are a number of ways in which a restorative process or outcome can fail. One or more of the parties may be unknown or unwilling to participate. Or parties who do participate may be unable to reach agreement in the course of a restorative process. One of the parties may fail to carry out the terms of the agreement once it has been reached. Perhaps the power imbalances referred to in Principle 9 make a restorative process inadvisable. Under such circumstances the matter will be returned to the referring agency (see Principles 15 and 16). This Principle recognizes that the failure of the restorative process or outcome does not remove the need for
redress for those who were harmed, or of reintegration of the parties into their communities. It urges that criminal justice officials do what they can to encourage such restorative aims even when the restorative process and outcomes cannot be used.[35]

Section 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:

- The conditions for the referral of cases to restorative justice programmes;
- The handling of cases following a restorative process;
- The qualifications, training and assessment of facilitators;
- The administration of restorative justice programmes;
- Standards of competence and ethical rules governing operation of restorative justice programmes.

This principle draws from and expands on Guidelines 6, 7, 19, and 20 of the Council of Europe Recommendation.[36] There is a need for oversight and standards for restorative justice programs. The informality and flexibility that characterize restorative processes and outcomes increase the ability of the parties to tailor a response to the crime that fits the offense, the offender, the victim and others who are affected. This flexibility, however “may make current protections of individual rights and interests less secure”.[37] Furthermore, it may mask incompetent or unethical practices by program administrators or facilitators, and/or by the criminal justice personnel who refer cases to restorative justice programs. While self-regulation and training can do much to address these problems, the protection of certain rights and interests of the parties may require involvement of the legislative and administrative branches of government.

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

- 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;
- 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;
- Neither the victim nor the offender should be induced by unfair means to participate in restorative processes or outcomes.

This Principle is drawn from Guidelines 8, 10 and 11 of the Council of Europe Recommendation.[38] It provides for protection of procedural safeguards of the parties by informing them of their rights, giving them access to legal advice before and after the restorative process, and ensuring that they have the assistance of translators/interpreters when necessary, and of parents in the case of minors. It further provides for disclosure to the parties about the nature of restorative process and the consequences of deciding to participate in such a process. Finally, it acknowledges that inducements may be used to encourage parties to participate in restorative justice programs, but that some of those may be unfair. Examples include pressure by criminal justice officials on a defendant to participate when the defendant claims innocence, or a threat or bribe by the offender to the victim in order to coerce the victim’s involvement. Fair inducements are acceptable; unfair inducements are not.

Some countries have raised the concern that the right to legal advice referred to in subparagraph
(a) would bestow rights that do not exist in their current laws. In particular, this section could be read to require free legal assistance to victims of crime. It may be that this concern can be dealt with by providing for “the right to obtain legal advice.”

13. Discussions in restorative processes should be confidential and should not be disclosed subsequently, except with the agreement of the parties. This Principle is drawn from Guideline 2 of the Council of Europe Recommendation.[39] The reason for confidentiality is to encourage the exchange of information among the parties. A major emphasis and benefit of restorative processes is that they allow the parties an opportunity to ask and answer questions that the other may have. In some instances those are questions that are not legally relevant, but are important to the party. In other instances they might be highly relevant - and incriminating - if revealed in a court setting. In an adversarial setting, there are no incentives for disclosing damaging information, and there are many incentives for hiding it. Restorative processes permit parties to disclose to the other party things they would be unwilling to disclose in court.

But confidentiality is not limited here to use in subsequent legal proceedings. It also concerns disclosure to other individuals or to the community. In that sense, confidentiality is linked to privacy. Criminal justice is conducted in a public setting; restorative processes are conducted in private settings. The expectation is that only parties, facilitators and other interested persons will attend, and that those attending will participate. Even in the case of circles that do not exclude anyone from coming (even those who are completely unrelated to the crime), those who do attend are expected to become a part of the circle and to help seek resolution. People are not given the option of sitting outside the circle and merely observing.

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).

This Principle is Guideline 17 of the Council of Europe Recommendation. It applies to the situation in which a restorative process has led to an agreement and the court has therefore dismissed the case. As long as the agreement is met, criminal justice officials are forbidden from initiating new prosecution based on the facts of that case. Principle 16, below, provides for situations in which the agreement is not kept.

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.

The first sentence is drawn from Guideline 18 of the Council of Europe Recommendation.[40] This Principle refers to the situation where a restorative process has, for some reason, failed to result in an agreement. In those instances, the case should be returned to the referring criminal justice authorities for a decision “without delay” on how to proceed. These determinations would be based on the normal considerations for such cases, but given the time it has taken to attempt to reach an agreement through restorative processes, the Principle recognizes that this decision will need to be made quickly.

The second sentence is a logical extension of the provisions protecting against unfair inducements (12) and involuntary participation (7), as well as of provisions on confidentiality (13) and presumption of innocence (8). If lack of agreement could be used to justify a more severe sentence later, the offender could be unfairly induced to accept an onerous or disproportionate agreement by a victim or community member participating. Furthermore, it would erode the right of the offender to withdraw from a restorative process at any time. An attempt by the offender to explain the failure to agree could breach the provisions on confidentiality and threaten the presumption of innocence.
Furthermore, judicial oversight of restorative justice programs is one thing; judicial review of the specifics of each failure to achieve agreement is another. The kind of scrutiny that would be required if courts were to attempt to reconstruct what took place during the restorative process in order to determine whether the fault for failure lay with the defendant could “legalize” restorative processes and reduce or eliminate their flexibility. The way to avoid these problems is to treat the attempt at a restorative resolution as an interlude in the criminal justice process and simply resume that process when the case is returned.

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.

This Principle follows from the last, and addresses the situation in which an agreement was reached but not implemented. The fault for such a failure could lie with the offender or with individuals, groups or agencies outside the control of the offender. For example, an offender who loses his job may not be able to keep his restitution agreement, or an offender who has agreed to perform community service at an agency selected by the victim may discover that this agency does not need (or want) her services. Furthermore, the offender could refuse to complete the agreement because as he began he experienced aspects of it as degrading or humiliating.

The argument for imposing a more severe sentence is that an offender who contributes to the failure of a restorative process or outcome should be penalised for that contribution. However, to find fault, the court would need to examine what took place, and this would raise the issues mentioned in the comment on Principle 15. Once again, the way to avoid undue interference by courts in the powerful and informal dynamics of restorative processes (including the agreements that come out of them) is to treat the failure of the restorative justice process as simply the occasion to resume criminal justice proceedings.[41]

Section 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.

This Principle is drawn from Guidelines 22 and 23 of the Council of Europe Recommendation.[42] It provides that facilitators will come from ethnic and racial minority groups, not just from the dominant groups within a community or local culture. Both sexes will be represented. The Comment to the Council of Europe Recommendation on Guideline 22 notes that no age limitations are included, although the “sound judgement” called for in the second sentence may suggest a level of maturity on the part of the facilitator.

The other qualities of the facilitator mentioned in this Principle are a “good understanding of local cultures and communities” and “interpersonal skills necessary to conducting restorative processes”. Both are important in facilitating restorative processes, particularly when the participants are from different cultures, races, religions and so on. The abilities of the facilitator to listen, to help the parties communicate with one another, and to maintain impartiality while making sure that no one is unfairly disadvantaged by how the restorative process unfolds are critical to a successful process.

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.

This Principle is drawn from Guideline 26 of the Council of Europe Recommendation.[43] Impartiality in relation to the parties means that they are not to choose sides but instead should make it possible for all parties to find a solution that meets their needs and wishes. The
facilitator is not neutral, however, if that word implies inactivity or an emphasis on procedural
fairness. The work of the facilitator is based on the facts of the case, which means that the
wrongdoer is understood to be in a morally different place than the victim and to have incurred
obligations as a result. Furthermore, the differing needs of the parties may require the facilitator
to take steps to help the parties overcome imbalances in age, power, intelligence, and so forth
(see Principle 9). The touchstones for the facilitator are the dignity and respect due to each
party, the facts of the case, and the needs and wishes of the parties. The discussion and any
resulting agreements will be the result of the parties’ efforts, not the facilitator’s proposals.

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.

This Principle is drawn from Guideline 27 of the Council of Europe Recommendation.[44] Just
as the facilitator is to be impartial between the parties, so the place chosen for the restorative
process should be one that is conducive to an effective exchange between the parties. At a
minimum the environment should be safe, private and comfortable for the parties. The facilitator
needs to consider how to conduct the restorative process in such a way that both parties are able
to participate effectively.

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.

Portions of this Principle are drawn from Guideline 24 of the Council of Europe
Recommendation.[45] While the selection of people with interpersonal skills is important (see
Principle 17), they also need initial and ongoing training. The training needs identified here
relate to both skills and knowledge. “Skills” relate to conflict resolution and to the roles they are
expected to play in the particular restorative justice programme that they are involved in.
“Knowledge” has to do with the needs of victims and offenders, the operation of the criminal
justice system as well as of the restorative justice program in which they will work.

Groups that work closely with victims and with offenders are usually the best sources of
information about the needs of those parties. The purpose of understanding victims and
offenders generally, as well as the criminal justice and restorative justice apparatus, is so that the
facilitator is oriented to the constellation of needs and issues that may be facing the particular
participants.

Section 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.

The first part of this Principle comes from Guideline 33 of the Council of Europe
Recommendation.[46] If restorative justice programs are to become available at every stage of
the criminal justice process (see Principle 6), criminal justice authorities and restorative justice
administrators will need to understand what restorative processes and outcomes can do, how
they can be made available to parties, and the ways in which cases can be effectively handed
back and forth between the criminal justice system and restorative justice programs.

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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.

This is an expanded version of Guideline 34 of the Council of Europe Recommendation.[47] Restorative justice programs have demonstrated that they can play an important role for many victims and offenders. Research and evaluation into why this happens and what the implications of that may be on criminal justice is critically important. This research should be directed toward the outcomes of those processes, toward the effect that these programs are having on criminal justice caseloads, and toward documenting the ways in which they are positively (and by implication, negatively) affecting the participants.

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.

The definitions of restorative processes and restorative outcomes are expansive. Examples of specific programs are provided in each, but implied is the expectation that new forms will emerge over time. This principle acknowledges that restorative justice programs will continue to develop, and provides that new programs claiming to be restorative be subjected to evaluation and modification as needed in order to increase the likelihood that the purposes of restorative processes and outcomes will be accomplished.[48]

This need for evaluation will be particularly important as criminal justice officials become involved in restorative justice programs, and as those programs are incorporated into criminal justice systems.[49] Without regular and rigorous evaluation those programs may lose their restorative distinctiveness and become just one more fad in the history of criminal justice reform.

Conclusion

These basic principles were annexed to a resolution submitted by the governments of Canada and Italy during the Ninth Session of the Commission on Crime Prevention and Criminal Justice in April 2000. That resolution noted a previous years’ resolution calling for consideration of the creation of standards or guidelines on the use of restorative justice and mediation, as well as the discussions that had taken place during the Tenth UN Crime Congress just days before. It proposed that the Secretary-General circulate the annex to Member States for comment. (The annexed basic principles were referred to as “preliminary draft elements of a declaration of basic principles” to underscore the desirability for substantive comments).

The resolution further requested that a meeting of experts be convened to review the comments from Member States, to consider proposals for further UN action concerning restorative justice, including the advisability of adopting a declaration of basic principles such as the one attached to the resolution. (Under UN rules, such an expert meeting would be convened only after thirty countries had submitted comments.) Thirty-eight other countries joined as cosponsors during the three-day meeting of the Commission, which unanimously approved it and forwarded it to the Economic and Social Council (ECOSOC). ECOSOC adopted it in July 2000.

In early December 2000, the Secretary-General sent a note verbale to Member States enclosing a copy of the resolution and requesting “their views and observations with respect to the desirability and utility of developing such a new international instrument on restorative justice, the means of establishing common principles thereon and the provisions to be embodied
therein.” It specifically directed attention to the resolution’s annex and requested comment on its provisions.

By early April over 30 countries had responded with comments and the government of Canada had offered to host the expert meeting in October 2001. Within the next few months, the UN will identify experts in law and criminal justice (not necessarily persons with expertise in restorative justice) from each region. These individuals will meet to review the country comments and to formulate recommendations concerning further UN action on restorative justice, including any action on a declaration of basic principles. The expert meeting’s recommendations will be offered at the Eleventh Session of the Commission, which will meet during the first part of 2002.

Bibliography


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"Proposed UN Basic Principles on Restorative Justice" was written by Daniel W. Van Ness in response to the first draft of the basic principles. After the introduction of the draft principles, an Experts Meeting was convened in Ottawa to further develop the principles. A second draft has been subsequently circulated and will be presented for adoption by the UN at the Eleventh Session of the UN Commission on Crime Prevention and Criminal Justice in Vienna, April 16-26, 2002. Among the changes to the second draft are the addition of a preamble and 24th clause and the removal of sections 19, 20 and 23. The second draft of the principles is available for viewing from this web site. Van Ness's commentary was first published on-line on the Restorative Justice web site www.restorativejustice.org, a service of Prison Fellowship International.